
ARTICLES

PARAFAMILY

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ABSTRACT

The nuclear family ideal is failing to deliver on its promises. Not only are Americans choosing to delay and avoid marriage, but those who do marry and have children increasingly find the nuclear family structure isolating, fragile, and insufficient for caring for children and other dependents. One reason the marriage and nuclear family ideal may have hung on so long is the failure to develop a workable, modern alternative—not a second best to settle for, but a compelling, robust, alternative vision of how people relate that can accomplish what the nuclear family is failing to. This Article articulates such a vision and illustrates how the American legal system can support it.

A new paradigm is necessary, one that does not focus so exclusively on one's nuclear family but recognizes the web of connections every person has, which exist on a gradient of closeness and commitment. We call these connections a person's parafamily and argue that both American culture and the American legal system should recognize, affirm, and support parafamilial connections that individuals choose to build their lives around. In particular, American law should shift away from assuming a person's most important relationships are within one's nuclear family and instead adopt a parafamilial framework, where the core questions are how close one person is to another and in what way, rather than whether one person is related to another by blood, marriage, or adoption.

Inspired by extended and blended families, committed platonic friends, and polyamorous people who already live a life defined by parafamilial connections, this Article aims to rewrite the fundamental assumptions about family that underlie American law, replacing the focus on the nuclear family with a more

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flexible framework—a framework that is broader, more realistic, and more adaptable than the nuclear family ideal. Coupled with this big picture goal, however, is an intense and intentional commitment to practical law reform and a deep respect and appreciation for the value that nuclear families provide. Thus, the Article's reform suggestions are all targeted toward developing realistic innovations in the law we already have, rather than toward reimagining all legal relationships from the ground up.

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INTRODUCTION

The nuclear family ideal is failing to deliver on its promises. Not only are Americans choosing to delay and avoid marriage, but those who do marry and have children increasingly find the nuclear family structure isolating, fragile, and insufficient for caring for children and other dependents.¹ Yet despite the sense that marriage and the nuclear family are failing to achieve their ends, the narrative that the best way to live one's life is married and focused on one's nuclear family appears to be as strong as ever.² One reason marriage and the nuclear family ideal may have hung on so long is the failure to develop and articulate a workable, modern alternative—not a second best to settle for, but a compelling, robust, alternative vision of how people relate that can accomplish what the nuclear family is struggling to.³ This Article proposes such an alternative framework and illustrates how the American legal system can support it.

This Article arrives at a time when the legal definitions of marriage and the nuclear family have been evolving. Same-sex marriage is now not only legal but constitutionally protected in the United States, and numerous states have

¹ See, e.g., David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC (Mar. 2020), <https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/> (describing the detrimental effects of the nuclear family's isolation and inherent fragility); ELI J. FINKEL, *THE ALL-OR-NOTHING MARRIAGE* 25 (2017) (arguing “the average marriage is getting worse” while supporting couples working toward having an excellent marriage); The Ezra Klein Show, *Dan Savage on Polyamory, Chosen Family and Better Sex*, N.Y. TIMES, at 1:10:15 (Jan. 10, 2023), <https://www.nytimes.com/2023/01/10/opinion/ezra-klein-podcast-dan-savage.html?showTranscript=1> (Klein remarking “something just has seemed off to me as a parent for some time — it’s just we have so little community, and we seem trapped in this view that this kind of atomization is OK”).

² See, e.g., ANDREW J. CHERLIN, *THE MARRIAGE GO-ROUND* 9 (2010); FINKEL, *supra* note 1, at xi (“[A]lthough the average marriage is shaky, many floundering or passable marriages can flourish by adopting strategies pioneered by the best marriages.”); Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 946-47 (2001) (“Nevertheless, despite the nuclear family’s real disappearance and theoretical flaws, the nuclear family remains an ideal, held in high legal and social regard. . . . In the legal setting, this stigma of nonconformity translates into punitive and coercive measures.” (footnote omitted)).

³ Cf. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2702 (2008) (arguing that criticizing the marriage ideal has failed to displace it and that articulating a “different central case around which all forms of human connection orbit” is necessary). For popular discussions struggling to figure out how to think about the nuclear family’s failures, see, for example, Joe Pinsker, *If the Nuclear Family Has Failed, What Comes Next?*, ATLANTIC (Feb. 13, 2020), <https://www.theatlantic.com/family/archive/2020/02/nuclear-family-multigenerational-cohousing-depaulo/606511/> (interviewing social psychologist Bella DePaulo about Americans living in “nonnuclear” ways); and Nicole Sussner Rodgers, *What Comes After the Nuclear Family?*, NATION (Feb. 24, 2020), <https://www.thenation.com/article/society/nuclear-family-progressive-critique/> [<https://perma.cc/YAY2-YXJP>].

adopted laws allowing for children to have more than two legal parents.⁴ But simply expanding our legal and cultural conceptions of marriage and the nuclear family does not alone solve the problem of dependent care or promote human and societal flourishing. Indeed, by focusing so exclusively on expanding access to the nuclear family ideal, the American legal system blinds itself to the possibility that the answers may be found outside it.⁵

⁴ See *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (recognizing a due process right to same-sex marriage). The Uniform Parentage Act includes an alternative provision allowing courts to recognize a child's having more than two legal parents. See UNIF. PARENTAGE ACT § 613 Alt. B (UNIF. L. COMM'N 2017) (explaining process of adjudicating parentage when there are two or more individuals). Several states permit a child to have more than two legal parents. See, e.g., CAL. FAM. CODE § 7612(c) (West 2024) (“[A] court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child.”); DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6), (c) (2024) (allowing additional de facto parents if child's legal parent or parents consent); D.C. CODE § 16-909(e) (2024); ME. REV. STAT. ANN. tit. 19-a, § 1853(2) (2024) (“Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents.”); *Warren v. Richard*, 296 So. 2d 813, 817 (La. 1974) (recognizing a child can have more than two parents as a matter of Louisiana common law and explaining a child could recover for her biological father's death despite law presuming her to be another man's child); see also Angela Chen, *The Rise of the Three-Parent Family*, ATLANTIC (Sept. 22, 2020), <https://www.theatlantic.com/family/archive/2020/09/how-build-three-parent-family-david-jay/616421/> (describing a legally-recognized three-parent family in California in which the three co-parents of a child are a married couple and an asexual man who has a platonic relationship with the couple). See generally Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 FORDHAM L. REV. 2561, 2584-88 (2022) (discussing West Virginia case law involving multi-parent families).

⁵ See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 6 (1995) (“We have created, then valorized, new patterns of family formation, holding them out as the equivalent (moral and/or functional) of traditional marriage. But the tenacity and vitality of our inherited beliefs or ideologies about the family has meant that the changes are in some ways superficial—merely altering form, while leaving aspiration and expectation undisturbed.”); see also *id.* at 143 (arguing that recognizing informal heterosexual unions or same-sex relationships “merely reinforce the idea of the sexual family. By duplicating the privileged form, alternative relationships merely affirm the centrality of sexuality to the fundamental ordering of society and the nature of intimacy”). Illustrating Fineman's points, literature concerning unmarried couples describes how the marital norm penalizes couples who do not marry, while reenforcing the marriage ideal. See, e.g., Courtney G. Joslin, *Nonmarriage: The Double Bind*, 90 GEO. WASH. L. REV. 571, 631 (2022) (“Nonmarital partners are denied protection under the law of the family because they are not family. Simultaneously, they are denied protection under market law when their underlying transactions are too family like.”). While this Article is principally concerned with those whose closest relationships have even more varied structures, the legal system's undermining of nonmarital relationships reflects a similar phenomenon to that experienced by those who arrange their lives in even more eclectic ways.

A new paradigm is necessary, one that does not focus so exclusively on one's nuclear family but recognizes the web of connections every person has, which exist on a gradient of closeness and commitment. We call close and committed connections a person's *parafamily* and argue that both American culture and the American legal system should recognize, affirm, and support parafamilial connections that individuals choose to build their lives around.⁶ In particular, American law should shift away from assuming a person's most important relationships are within one's nuclear family, and instead adopt a parafamilial framework, where the core questions are *how close* one person is to another, and *in what way*, rather than whether one person is related to another by blood, marriage, or adoption.

Adopting a parafamilial framework is not about expanding the definition of family, changing who is "in" and who is "out" according to a functional definition or some other criteria besides blood, marriage, and adoption.⁷ Rather, the idea of parafamily is that, in different circumstances, faced with different life challenges and problems, individuals may want and need different people to act as "family," to be the close partners who support each other and work through the challenges of life together. Both our culture and the legal system should be able to accommodate that complex reality. A single mother might want her neighbor—the parent of her child's best friend—to act as a near stepparent and to be guardian of her child if she is incapacitated. That same mother might also choose to co-own her home with a sibling and designate her sibling as her medical decision-making proxy. Both her sibling and neighbor make up part of this woman's parafamily, although she would want neither to play all of the roles a spouse is often expected to. And notably, both this woman's sibling and neighbor might be part of her parafamily, even though they may have little connection with each other.

Importantly, a parafamilial approach continues to recognize the importance of spouses and nuclear families. Indeed, a married person's spouse and a parent's child will often be the closest and most committed relationships they have. Yet

⁶ The prefix *para-* emphasizes that one's parafamily may broadly include individuals outside one's legal or biological family. Although there are similar terms used in ethnography and anthropology, such as 'fictive kin,' 'chosen kin,' 'voluntary kin,' and 'chosen family,' we say 'parafamily' because these other terms don't perfectly capture the flavor—and implied legal ramifications—of our concept. As others have noted, 'fictive kin' carries the connotation that fictive kinship is "less real" than a kinship relationship between blood relatives or a married pair. Prefacing 'kin' or 'family' with the adjectives 'chosen' or 'voluntary' emphasizes complete freedom of choice, while some important relationships may be strongly motivated by circumstance rather than choice. See, e.g., Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1275-76 (2010) ("Familial associations (like religious ones) are not always strictly voluntary, and the law should not pretend otherwise. . . . To treat familial obligations as voluntarist is to misrepresent the character of those obligations in important ways.").

⁷ For an article focused on the functional family, see Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 COLO. L. REV. 269 (1991).

the idea of parafamily is *bigger* than the nuclear family ideal and capable of recognizing the importance of one's other relationships, whether they are with extended family, neighbors, platonic friends, or nonmarital romantic partners. At first glance this idea may sound banal—many people will espouse the importance of their adult siblings and cousins, or their best friends. But very often these important relationships are denigrated by cultural expectations and undermined by law, and so people hesitate to make major life choices with these individuals. It's *weird* to say a relationship with a platonic friend or extended family member is more important than a longstanding romantic and sexual relationship. It's *weird* to want to live in a house with multiple adults late in life, and zoning laws often make it difficult to do so. But many people's lives are, or would be, enriched and improved by making these kinds of choices, by centering their lives around members of their parafamily as well as their nuclear family, and American law and culture shouldn't get in the way.

We're not going to hide the ball. This Article aims to rewrite the fundamental assumptions about family that underlie American law, replacing the focus on marriage-like relationships and the nuclear family with a more flexible framework—a framework that is broader, more realistic, and more adaptable than the nuclear family ideal.⁸ Coupled with this big picture goal, however, is an intense and intentional commitment to practical law reform, and a deep respect and appreciation for the value that nuclear families provide to many. The Article's reform suggestions are all targeted toward developing realistic innovations within the law we already have, rather than toward reimagining all legal relationships from the ground up. They also all preserve the legal recognition of nuclear family relationships that exist under current law. Nuclear family relationships are critically important—but often, they are not enough on their own.

Our inspiration for making this parafamilial turn comes from a variety of sources: extended families, blended families, chosen families, platonic friends who have built their lives around each other,⁹ monogamous couples who bought

⁸ See Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 208 (2007) (noting one of the goals of family law is to “reflect and support the ways people actually live their lives”); Kris Franklin, Note, “*A Family Like Any Other Family: Alternative Methods of Defining Family in Law*,” 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1062 (1991); cf. Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 631 (2007) ([T]he law needs to do a better job of recognizing, protecting, respecting, and promoting friendships.”).

⁹ See Christina Ianzito, *They Met in a 1960s Group House. Nearly 50 Years Later, They're Still Roommates.*, WASH. POST (Jan. 29, 2016), https://www.washingtonpost.com/local/they-met-in-a-1960s-group-house-nearly-50-years-later-theyre-still-roommates/2016/01/29/3ef27e30-a5de-11e5-b53d-972e2751f433_story.html (describing three women who lived together for fifty years, across multiple homes); Hilary Howard, *A Confederacy of Bachelors*, N.Y. TIMES (Aug. 3, 2012), <https://www.nytimes.com/2012/08/05/nyregion/four-men-sharing-rent-and-friendship-for-18-years.html> (describing four men who have lived together for eighteen years); Virginia Linn, *Mt. Lebanon Women Find a Cooperative Household a Good Fit*, PITT. POST-GAZETTE (July 14, 2012), <https://www.post-gazette.com/life/lifestyle/2012/>

and share a home together,¹⁰ and critically, polyamorous individuals who already live a life defined by parafamilial connections and who currently navigate those relationships within a somewhat hostile legal system.¹¹ Indeed, the growing prevalence of nonmonogamy in America is a major reason why a parafamilial framework is increasingly needed.¹² Polyamory isn't plural marriage; in other words, it's not a "hub and spoke" arrangement where multiple people are married to one person, but rather one where multiple people can have important relationships with multiple people, often in complex social networks.¹³ Given the richness and complexity of these dynamics, a simple

07/14/Mt-Lebanon-women-find-a-cooperative-household-a-good-fit/stories/201207140156 (describing three women who decided to live together in their fifties to preserve their independence and who have been together for eight years).

¹⁰ See Ari Weisbard, *Two Couples, One Mortgage*, ATLANTIC (July 11, 2014), <https://www.theatlantic.com/business/archive/2014/07/two-couples-one-mortgage/374102/> (describing two monogamous couples who bought a house together).

¹¹ See, e.g., Andrew Solomon, *How Polyamorists and Polygamists Are Challenging Family Norms*, NEW YORKER (Mar. 15, 2021), <https://www.newyorker.com/magazine/2021/03/22/how-polyamorists-and-polygamists-are-challenging-family-norms> (describing, among other arrangements, four queer polyamorous people who live on a property in New York with room for nine and have various romantic relationships within the group and with outsiders); see also Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 304 (2015) (citing Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261, 269-70 (2008)) (describing how Aviram's research interviews revealed polyamorous groups "used various contractual mechanisms, such as wills, trusts, power-of-attorney documents, and the like, to mimic some of the economic and logistical aspects of marriage and facilitate management of the household"); *Polyamory is Getting Slivers of Legal Recognition in America*, ECONOMIST (Jan. 12, 2023), <https://www.economist.com/united-states/2023/01/12/polyamory-is-getting-slivers-of-legal-recognition-in-america> (describing a triad that "signed a 'no-nup': a contract outlining alimony and child-care responsibilities in the event of a break-up or death among partners who were never legally married").

¹² See Jennifer D. Rubin, Amy C. Moors, Jes L. Matsick, Ali Ziegler & Terri D. Conley, *On the Margins: Considering Diversity Among Consensually Non-Monogamous Relationships*, J. FÜR PSYCHOLOGIE 3 (Aug. 26, 2014), <https://journal-fuer-psychologie.de/article/view/324/346> [<https://perma.cc/392K-B5V7>] ("Our recent studies with United States samples have demonstrated that approximately 4% to 5% of people are currently involved in [consensually nonmonogamous] relationships." (citation omitted)); M.L. Hauptert, Amanda N. Gesselman, Amy C. Moors, Helen E. Fisher & Justin R. Garcia, *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY 424, 438 (2017) (explaining one in five single Americans surveyed reported having been in a consensually nonmonogamous relationship of some kind).

¹³ ELISABETH SHEFF, *THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES* 1 (2014) ("Polyamory is consensual, openly conducted, multiple-partner relationships in which both men and women have negotiated access to

notion of “more marriage” is neither going to meet the needs of polyamorous people nor of anyone whose life hasn’t developed according to the nuclear family ideal.

This Article and its arguments proceed in several parts. Part I discusses the idealization of marriage and the nuclear family, and how that idealization contributes to these institutions’ failure to deliver on their promise; it then introduces the alternative of parafamily, how some people are already conducting their lives according to a parafamilial framework, and the benefits of doing so. Part II addresses some concerns with taking a parafamilial approach to law. Part III then turns to how the law can be reformed to facilitate and support parafamilial connections. Part IV concludes.

I. FROM NUCLEAR FAMILY TO PARAFAMILY

A. *Where Marriage and the Nuclear Family Struggle*

This Section expands on the idea that marriage and the nuclear family are insufficient to meet their own ends, and that family law and policy are in need of serious reform and re-envisioning. By illustrating how current expectations surrounding marriage and family lay the groundwork for marital hesitation and failure, it sets the stage for understanding how a parafamilial system can better succeed.

We start with the question of what marriage and the nuclear family are for. Despite the apparent reality that “Americans have never exhibited less agreement about what marriage is all about,” casting a wide net over the literature on marriage reveals a handful of recurring themes.¹⁴ Marriage is supposed to facilitate (1) the self-actualization and flourishing of its participants,¹⁵ (2) participants’ functioning as a unit, from which larger community and a healthy, flourishing society is built,¹⁶ (3) providing an

additional partners outside of the traditional committed couple. It is not *polygamy* . . . [which] is almost always practiced as *polygyny*, or one man married to multiple women.”).

¹⁴ FINKEL, *supra* note 1, at 261.

¹⁵ See KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 136 (2011) (“[T]he meaning of marriage has changed. It is no longer primarily about childbearing and childrearing. Now, marriage is primarily about adult fulfillment . . .”); FINKEL, *supra* note 1, at 9-10 (describing a trend beginning in the 1960s of seeking self-expression and personal growth through one’s marriage); see also Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One*, 2001 U. ILL. L. REV. 1, 31 (arguing companionship is the core good of marriage, rather than procreation or sex).

¹⁶ See FINEMAN, *supra* note 5, at 146 (“[M]arriage is constructed as essential, not only the foundational relationship of the nuclear family but the very basis of society itself.”); *id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 165 (1879) (“Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.”)).

environment to effectively raise healthy, well-adjusted, and happy children,¹⁷ (4) providing care to others in need, such as aging or ill relatives,¹⁸ and (5) providing economic and other kinds of stability to the married couple.¹⁹ Looking at these themes, we can further summarize the goals of marriage, and the nuclear family by extension, as fitting under two broad umbrellas: Marriage and the nuclear family are supposed to facilitate individual and societal flourishing and provide a private structure that can internalize and meet humans' need for care. These goals will serve as this Article's guiding star in exploring family law and policy reforms. Crucially, these goals also serve as a reminder that marriage and living in a nuclear family are not ends in themselves. As Barbara Bennett Woodhouse observed, "Defenders of the traditional family elevate form over function—the marriage certificate becomes an end in itself rather than a means to the end of encouraging committed, mutually interdependent, and self-sustaining family systems."²⁰ This Article's aim is to keep the goal of facilitating committed and supportive relationships front and center, and to be unafraid of revising means that aren't sufficient to achieve them.

This list of goals is not exhaustive, but we believe it roughly captures what most people—including individuals in or contemplating marriage, thought leaders, and policy makers—want marriage and family to deliver on. We also recognize that these values have been shifting over time,²¹ and that people with different values will emphasize different goals. For example, some individuals more focused on the effect of family dynamics on children will care much more about marriage's effects on child-rearing than on the personal development of

¹⁷ As one scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 41 (2002), cited in *Obergefell v. Hodges*, 576 U.S. 644, 690 (2015) (Roberts, C.J., dissenting). Similarly, Melissa Murray observes, "[T]he most important function that the family serves is the privatization of care for dependent members, usually children." Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 394-95 (2008).

¹⁸ FINEMAN, *supra* note 5, at 161 (describing the nuclear family as "the social institution we depend on to raise the children and care for the ill, the needy, the dependent in our culture").

¹⁹ See FINKEL, *supra* note 1, at 31-45 (describing the historical role of marriage in providing economic stability to its participants).

²⁰ Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 UTAH L. REV. 569, 579; see also Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 368 (2004) ("Rather than emphasizing the importance of marriage, government should instead enact more carefully targeted policies to support caretaking and the economic well-being of its citizenry.").

²¹ See FINKEL, *supra* note 1, at 31-107 (tracing the evolution of marriage's focus on economic stability, love, and self-expression).

individuals within the marriage. Alternatively, someone more focused on how marriage affects their personal life may not think much about how marriage affects the larger community outside of their particular dyad.

Even though these goals would seem to be generally appealing, it's increasingly apparent from Americans' behavior that adults are avoiding marriage, either because they don't share these goals, don't believe marriage can deliver on them, or have some other countervailing reasons to avoid marriage. As of 2017, only about half of Americans over age eighteen were married, down from 72% in 1960.²² Sociologist Andrew J. Cherlin characterized the government's response to marriage hesitancy and decline as a "social and political battlefield" unique to the United States.²³ Writing in 2010, he remarked, "Nowhere else is the government spending money to promote marriage. In no other Western country would a person walking down the street see the advertisement I have seen on the sides of buses in Baltimore: a smiling couple proclaiming, 'Marriage works.'"²⁴

Of course, the advertisement Cherlin noticed was placed not because "marriage works," but because marriage does *not* seem to be working as well as many are committed to believing it should and thus needs some public relations help. Indeed, ambivalence about getting married is evidence that despite the strength of the marriage ideal, Americans—consciously or unconsciously—aren't completely sold.²⁵ Deviations from the nuclear family model are already much more socially acceptable today than they were decades ago.²⁶ Divorce and blended families are common and not particularly shameful.²⁷ Voluntary unwed

²² Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RSCH. CTR. (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/> [<https://perma.cc/YE47-K8WV>].

²³ CHERLIN, *supra* note 2, at 3.

²⁴ *Id.*; see also *Government to Spend More on Marriage*, CBS NEWS (July 21, 2006, 1:52 PM), <https://www.cbsnews.com/news/government-to-spend-more-on-marriage/> [<https://perma.cc/TT84-UHAP>] ("The grant money represents the latest shift in welfare reform in the United States. For the next five years, Congress is setting aside up to \$100 million a year to promote marriage and \$50 million a year to produce committed fathers."). Cherlin contrasts how the "British policy priority is that parents remain together while caring for children" while "the American priority is that they marry." CHERLIN, *supra* note 2, at 128.

²⁵ See *Key Statistics from the National Survey of Family Growth – A Listing*, CDC, https://www.cdc.gov/nchs/nsfg/key_statistics/a.htm#marriage [<https://perma.cc/3FZ7-QK5Q>] (last updated June 6, 2017) (concluding 36.2% of female people and 31.5% of male people aged fifteen to forty-four surveyed between 2011 and 2015 agreed or strongly agreed with the statement "[m]arriage has not worked out for most people I know").

²⁶ See, e.g., *id.* (concluding 80.2% of female people and 71% of male people aged fifteen to forty-four surveyed between 2011 and 2015 agreed or strongly agreed with the statement "[i]t is okay for an unmarried female to have a child").

²⁷ See ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, *LIVING ARRANGEMENTS OF CHILDREN: 2009*, P70-126, at 1, 16 tbl.6 (2011), <https://www2.census.gov/library/>

motherhood also appears to be becoming more common.²⁸ In 2012, a little less than 20% of households were made up of married couples and children, down from about 40% in 1970.²⁹ In 2014, 46% of children lived with two parents in their first marriage, compared with 73% of children in 1960.³⁰

But on the other hand, the *ideal* of marriage and the nuclear family is stronger than ever, even as deviations from that ideal have become more acceptable. As Cherlin put it, “[y]ou can choose not to marry and still live a socially acceptable life,” but marriage “remains the most highly valued form of family life in American culture, the most prestigious way to live your life.”³¹

The cultural narrative that the best family is the married, nuclear family reinforces, and is reinforced by, a legal system that assumes the nuclear family as the best family arrangement.³² Justice Kennedy’s majority decision in

publications/2011/demo/p70-126.pdf [https://perma.cc/CQN6-4Z47] (noting 15.8% of all children lived in blended families in 2009); *Key Statistics from the National Survey of Family Growth – D Listing*, CDC, https://www.cdc.gov/nchs/nsfg/key_statistics/d.htm#divorce [https://perma.cc/U2Z7-BUD] (last updated July 7, 2017) (concluding women aged fifteen to forty-four years in 2011-2015 had a 36% chance their first marriage would be disrupted by separation, divorce, or death within ten years of the marriage, compared to 32% in 2006-2010, with death being “rare for this age group”); cf. CDC, *supra* note 25 (concluding 37.2% of female people and 39% of male people aged fifteen to forty-four surveyed between 2011 and 2015 agreed or strongly agreed with the statement “[d]ivorce is usually the best solution when a couple can’t seem to work out their marriage problems”).

²⁸ As Finkel noted:

Between 2002 and 2012 . . . the birth rate for unmarried women between fifteen and twenty-four years of age dropped, whereas the birth rate for unmarried women between twenty-five and forty-four years of age rose. Given that pregnancies are much more likely to be intentional rather than accidental among older women, this trend suggests that the twenty-first century, with its advances in fertility science and its reduced disapproval of nontraditional lifestyles, is witnessing a surge in voluntary unwed-motherhood.

FINKEL, *supra* note 1, at 92.

²⁹ JONATHAN VESPA, JAMIE M. LEWIS & ROSE M. KREIDER, U.S. CENSUS BUREAU, *AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2012*, at 1, 5 fig.1 (2013), <https://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-570.pdf> [https://perma.cc/T7B9-PZQ].

³⁰ PEW RSCH. CTR., *PARENTING IN AMERICA 15* (2015), https://www.pewresearch.org/wp-content/uploads/sites/20/2015/12/2015-12-17_parenting-in-america_FINAL.pdf [https://perma.cc/8M7H-GEMM].

³¹ CHERLIN, *supra* note 2, at 9, 25; see also Andrew Cherlin, *Marriage Has Become a Trophy*, ATLANTIC (Mar. 20, 2018), <https://www.theatlantic.com/family/archive/2018/03/incredible-everlasting-institution-marriage/555320/> (describing marriage as a capstone of a person’s adulthood rather than its beginning).

³² See Kelly, *supra* note 2, at 946-47 (explaining idealization of the nuclear family often leads to stigmatizing individuals in alternative family structures as deviant, thereby reinforcing the belief that the nuclear family is superior while casting other family forms as inferior substitutes); Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the*

*Obergefell v. Hodges*³³ exemplifies this assumption, opining that “[m]arriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”³⁴ Implicit in Justice Kennedy’s exaltation of marriage is the belief that an unmarried life is more precarious, lonelier, and lacking in understanding, companionship, and the assurance that someone will care for you if you are in need.³⁵ Indeed, all across the legal system, assumptions and rules reinforce the primacy of the nuclear family, making living life more difficult for those who arrange their family life in an alternative way.³⁶ By “creat[ing] marriage to be like no other relationship,” the state “leads some people existing outside of marriage to feel stigmatized and alone” and “encourages some people to prioritize dating that could lead to marriage over other forms of relationship.”³⁷ And yet, Americans today are still

Family in American Law and Society, 1993 UTAH L. REV. 387, 389 (“[T]he grip of the traditional family metanarrative remains firm, in part because it resonates so strongly in certain extralegal institutions.”); cf. Franklin, *supra* note 8, at 1032 (“Our cultural ideology assumes that everyone should live in some form of nuclear family, and that the nuclear family is ideally suited to modern American society.”).

³³ 576 U.S. 644 (2015).

³⁴ *Id.* at 667. Perhaps ironically, it’s Chief Justice Roberts in his dissent who pronounces, “No one is ‘condemned to live in loneliness’ by the laws challenged in these cases—no one.” *Id.* at 701 (Roberts, C.J., dissenting).

³⁵ See Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of Obergefell v. Hodges*, 70 HASTINGS L.J. 1263, 1265 (2019) (“[N]ot only is the *Obergefell* opinion unabashed in its veneration and prioritization of marriage, it is equally unabashed in its dismissiveness of life outside of marriage, which, on Kennedy’s telling, is less dignified, less profound, and less valuable.”).

³⁶ See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN’S L.J. 19, 21-24 (1995) (discussing the law’s reverence for the nuclear family and the disparate treatment of single parents); Fineman, *supra* note 32, at 388-89 (“The veneration of the nuclear family is coercive, with the state through its regulatory mechanisms . . . defining and securing for the nuclear family a privileged if not exclusive position in regard to the sanctified ordering of intimacy.”); Kelly, *supra* note 2, at 946-47 (“Nevertheless, despite the nuclear family’s real disappearance and theoretical flaws, the nuclear family remains an ideal, held in high legal and social regard. . . . In the legal setting, this stigma of nonconformity translates into punitive and coercive measures.”); Murray, *supra* note 17, at 414 (explaining that “in minority communities, departures from the nuclear family ideal frequently are characterized as deviant and pathological, even though they are part of a larger cultural tradition of collaborative care” and that departing from the “nuclear family ideal often serves as grounds for state intrusion and regulation”); cf. Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187, 211-27 (2015) (arguing post-New-Deal housing design prioritizing the single-family home “was the result of deliberate government action envisioning a particular societal ordering, which further elevated the white nuclear family and distanced the minority family and other kinds of households from the American Dream”).

³⁷ Rosenbury, *supra* note 8, at 218-19. See generally BELLA DEPAULO, SINGLED OUT: HOW SINGLES ARE STEREOTYPED, STIGMATIZED, AND IGNORED, AND STILL LIVE HAPPILY EVER

delaying and avoiding marriage to a much greater degree than they did in the recent past. Why do Americans both avoid and idealize marriage, and by extension, the nuclear family arrangement?

Reflecting on the apparent goals of marriage points us toward the answer. Marriage is supposed to facilitate flourishing and dependent care, but evidence indicates it is failing to do either sufficiently. For one, the care-internalizing functions of marriage are incomplete. A two-parent household alone doesn't always make the burden of child and elder care bearable,³⁸ especially as more women have entered the workforce. Spouses who both have careers often struggle to provide the care and attention they want their children to have and buckle further when having to care for aging parents along with young children.³⁹

The story of nuclear family as the building block of our larger society also seems increasingly untrue. Despite the Supreme Court's declarations that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress"⁴⁰ and "a great public institution, giving character to our whole civil polity,"⁴¹ recent studies indicate that marriage is associated with its participants withdrawing from community and civil society, rather than participating in it more fully.⁴² Indeed, unmarried people, on

AFTER (2006) (exploring societal pressures placed on single people to get married and the privileging of married status).

³⁸ See Murray, *supra* note 17, at 410-12 (explaining that at times all parents must "seek help in order to continue providing care in the long term," which causes many parents to experience "incredible guilt and anxiety about their use of nonparental caregiving").

³⁹ See PAUL TAYLOR, KIM PARKER, EILEEN PATTEN & SETH MOTEL, PEW RSCH. CTR., THE SANDWICH GENERATION: RISING FINANCIAL BURDENS FOR MIDDLE-AGED AMERICANS 1 (2013), https://www.pewresearch.org/wp-content/uploads/sites/20/2013/01/Sandwich_Generation_Report_FINAL_1-29.pdf [<https://perma.cc/H2J4-NQNZ>] ("Nearly half (47%) of adults in their 40s and 50s have a parent age 65 or older and are either raising a young child or financially supporting a grown child[,] with about 15% "providing financial support to both an aging parent and a child."); Elizabeth Chang, *The Sandwich Generation Is Changing. The Stress Remains.*, WASH. POST (Mar. 22, 2023), <https://www.washingtonpost.com/parenting/2023/03/22/caregivers-sandwich-generation/> (describing stress of supporting both children and aging adults and quoting Nicole Jorwic, chief of campaigns and advocacy for Caring Across Generations, saying "[t]here is an overwhelming feeling with family caregivers of being in it alone"); *Sandwich Generation Moms Feeling the Squeeze*, AM. PSYCH. ASS'N (2008), <https://www.apa.org/topics/families/sandwich-generation> ("Mothers in the 'sandwich generation,' ages 35-54, feel more stress than any other age group as they balance the demanding, delicate acts of caring for growing children and their aging parents, according to the American Psychological Association's 2007 Stress in America survey.").

⁴⁰ Maynard v. Hill, 125 U.S. 190, 211 (1888).

⁴¹ *Id.* at 213.

⁴² See Naomi Gerstel, *Rethinking Families and Community: The Color, Class, and Centrality of Extended Kin Ties*, 26 SOCIO. F. 1, 1, 10 (2011); Naomi Gerstel & Natalia Sarkisian, *Marriage: The Good, the Bad, and the Greedy*, CONTEXTS, Fall 2006, at 16, 18 (2006) [hereinafter Gerstel & Sarkisian, *Marriage: The Good, the Bad, and the Greedy*];

average, “have more friends and do more to maintain the ties that they have with their friends, their neighbors, their siblings, their parents, and their co-workers.”⁴³ Married people’s withdrawal from other relationships and the public sphere seems to be increasing over time. In 1975, married Americans with and without children averaged nearly two hours per weekend day with friends and extended family; by 2003, married individuals without children spent only around 1.2 hours per weekend day with friends and extended family.⁴⁴

Finally, the notion of marriage facilitating self-actualization—a goal which marriage scholars often cite as emerging in the second half of the twentieth century—rests on shaky ground.⁴⁵ It’s here that marriage’s failure to achieve its own ends is most dramatic. The very narrative that drives individuals to seek fulfillment and purpose from their spouses and children often sets them up for failure because their expectations are too large a burden for so few relationships to bear. Indeed, the desire for marriage to facilitate self-actualization and the phenomenon of marriage avoidance and delay may be related: As marriage becomes more laden with expectations, people become more hesitant to commit to a partner who might not offer all of the many qualities modern marriage is supposed to provide.⁴⁶

As relationship psychotherapist Esther Perel summarized in her famous TED Talk, *The Secret to Desire in a Long-Term Relationship*:

[W]e come to one person, and we basically are asking them to give us what once an entire village used to provide. Give me belonging, give me identity, give me continuity, but give me transcendence and mystery and awe all in one. Give me comfort, give me edge. Give me novelty, give me familiarity. Give me predictability, give me surprise.⁴⁷

Natalia Sarkisian & Naomi Gerstel, *Does Singlehood Isolate or Integrate? Examining the Link Between Marital Status and Ties to Kin, Friends, and Neighbors*, 33 J. SOC. & PERS. RELATIONSHIPS 361, 364-65 (2015) [hereinafter Sarkisian & Gerstel, *Does Singlehood Isolate or Integrate?*]; Natalia Sarkisian & Naomi Gerstel, *Till Marriage Do Us Part: Adult Children’s Relationships with Their Parents*, 70 J. MARRIAGE & FAM. 360, 360 (2008) [hereinafter Sarkisian & Gerstel, *Till Marriage Do Us Part*].

⁴³ Pinsker, *supra* note 3. For a more detailed account of DePaulo’s work that was the subject of Pinsker’s interview, see BELLA DEPAULO, *HOW WE LIVE NOW* (2015).

⁴⁴ FINKEL, *supra* note 1, at 19.

⁴⁵ See CHERLIN, *supra* note 2, at 31 (“Beginning in the 1960s people began to judge the success of their marriages not by their material standard of living or how well they raised their children but rather by whether they felt their personal needs and desires were being fulfilled.”); FINKEL, *supra* note 1, at 74-94 (describing the emergence of the “self-expressive marriage” in the second half of the twentieth century and the view of “marriage as capstone”).

⁴⁶ See FINKEL, *supra* note 1, at 92 (“Even as Americans retreat from marriage, they maintain high levels of respect for the institution, especially by comparison to western Europeans. Indeed, some of the retreat actually reflects great respect for the institution—people don’t want to marry unless they can build a relationship worthy of the label.”).

⁴⁷ Esther Perel, *The Secret to Desire in a Long-Term Relationship*, TED, at 3:24 (Feb. 2013), https://www.ted.com/talks/esther_perel_the_secret_to_desire_in_a_long_term_rel

Eli Finkel's generally pro-marriage book *The All-or-Nothing Marriage* similarly describes how an insular marriage can lead to dissatisfaction.⁴⁸ He tells an illustrative story early in his book about the fictional Jasmine, a woman who, in her late twenties, had five good friends. One gave her career advice, another played open mic night gigs with her, a third joined Jasmine in yoga class, a fourth met her to discuss meditation and eastern philosophy, and a fifth was a "party animal" with whom Jasmine went camping. Each of these relationships helped Jasmine cultivate different aspects of herself. Twelve years later, when Jasmine is married with kids, her husband James is great at supporting Jasmine in her career and at doing intense workouts together. However, he doesn't like music or camping and doesn't see the value in thinking about philosophy. Because of Jasmine's focus on her marriage and children, she doesn't see much of her friends anymore. And so unsurprisingly, Jasmine struggles because she's looking to one person, her husband James, to play the role in her life five people once did.⁴⁹

Generalizing from his story, Finkel observes that "[a]s we've increasingly sidelined our other friends and relatives, we've expanded our spouse's responsibility for helping us fulfill our deepest emotional and psychological needs" and acknowledges that this means "the proportion of spouses whose marriages fall short of expectations has grown."⁵⁰

Finkel walks a tough line as his book turns to marital advice. He urges that in stressful times, couples be open to "recalibration" and "temporarily asking less of our marriage[s]."⁵¹ But he has little hope that, after one gets married, nonspouses can facilitate the self-development that his character Jasmine experienced in her single years: "[w]e can readily imagine societies in which our spouse isn't our primary sculptor—societies in which friends or other relatives hammer and chisel each other more than spouses do. But, for the most part, contemporary America is not one of those societies."⁵²

ionship/ transcript?language=en; see also DEPAULO, *supra* note 37, at 4 (describing how some couples "look to each other for companionship, intimacy, caring, friendship, advice, the sharing of the tasks and finances of household and family, and just about everything else. They are the repositories for each other's hopes and dreams. They are each other's soulmates and sole mates").

⁴⁸ See FINKEL, *supra* note 1, at 17-21 (noting prioritization of marriage over other relationships can lead to social isolation, making individuals overly reliant on their spouse to meet a wide range of needs).

⁴⁹ *Id.* at 19-21.

⁵⁰ *Id.* at 22.

⁵¹ *Id.* at 231-32.

⁵² *Id.* at 17 (engaging with a critique from Bella DePaulo where DePaulo suggests that Americans adhere to a marriage-centered ideology, prioritizing the marital bond to such an extent that it obscures the significance of other types of relationships).

B. *The Parafamilial Alternative*

Finkel's belief that friends and relatives can't or won't play central roles in married Americans' lives is, frankly, depressing. The picture he paints of Jasmine searching for interlocutors in her life, and only being able to turn to her husband, is a lonely one. Indeed, Americans *in general* are suffering from high levels of loneliness, as rates of participation in community events and organizations have been declining for decades.⁵³

But the emerging awareness of individuals' loneliness and social isolation is a cause for hope. Even though "more and more, Americans turn to their spouses for needs they once expected an entire community to fulfill,"⁵⁴ it is possible to reverse course, and to recognize that just as "it takes a village to raise a child,"⁵⁵ it takes a village (and not just a single companion) to lead a rich and fulfilling life. Indeed, contrary to Finkel, psychologist Bella DePaulo has argued that this is a preferred and more accurate way to frame modern life.⁵⁶ She argues that in reality, "each person is at the center of his or her own unique social network" and "[t]his networked individualism is the new social operating system in societies around the world."⁵⁷ Despite DePaulo's individualistic tone, the vision of an individual at the center of their own social network does not need to be understood as an inherently self-interested one. Rather, DePaulo's vision of human relations, where individuals are the nodes, provides a more realistic map

⁵³ See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 2, 8 (rev. & updated ed. 2020) (explaining in the preface to the revised and updated edition that "both *civic engagement* and *organizational involvement* experienced marked declines in the second half of the twentieth century" and that "[a]ccording to the best available evidence, these declines have continued uninterrupted"); Vivek H. Murthy, *Surgeon General: We Have Become a Lonely Nation. It's Time to Fix That.*, N.Y. TIMES (Apr. 30, 2023), <https://www.nytimes.com/2023/04/30/opinion/loneliness-epidemic-america.html> (announcing the Surgeon General's initiative to address "the epidemic of loneliness and isolation [that] has fueled other problems that are killing us and threaten to rip our country apart"); U.S. PUB. HEALTH SERV., *OUR EPIDEMIC OF LONELINESS AND ISOLATION: THE U.S. SURGEON GENERAL'S ADVISORY ON THE HEALING EFFECTS OF SOCIAL CONNECTION AND COMMUNITY* 4 (2023), <https://www.hhs.gov/sites/default/files/surgeon-general-social-connection-advisory.pdf> (explaining roughly half of Americans reported experiencing loneliness in recent years, and that loneliness "harms both individual and societal health. It is associated with a greater risk of cardiovascular disease, dementia, stroke, depression, anxiety, and premature death. The mortality impact of being socially disconnected is similar to that caused by smoking up to 15 cigarettes a day").

⁵⁴ Mandy Len Catron, *What You Lose When You Gain a Spouse*, ATLANTIC (July 2, 2019), <https://www.theatlantic.com/family/archive/2019/07/case-against-marriage/591973/>.

⁵⁵ For the origins of the proverb, see Joel Goldberg, *It Takes a Village to Determine the Origins of an African Proverb*, NPR (July 30, 2016, 7:00 AM), <https://www.npr.org/sections/goatsandsoda/2016/07/30/487925796/it-takes-a-village-to-determine-the-origins-of-an-african-proverb>.

⁵⁶ See generally DEPAULO, *supra* note 43.

⁵⁷ *Id.* at 242.

of commitments and loyalties than a vision where the core unit is a nuclear family, a married couple, or a parent-child relationship. Even in the most traditional nuclear family arrangements, individual relationships matter. For example, a heterosexual, married woman may be incredibly close to, and deeply invested in, the well-being of her sister, while her husband might go weeks at a time without even thinking of his sister-in-law. Only by looking at each individual's social network can we accurately understand the bonds of commitment and support that exist, because relationships are often formed between individuals rather than between nuclear families. And only by looking at each individual's network can we see all the potential ways in which we can facilitate each other's flourishing and address humans' need for care.

Indeed, decentering the nuclear family has the potential to create more stability for children (as well as adults), rather than less. Consider, by contrast, how in the 1800s, most free Americans lived in what historian Steven Ruggles calls "corporate families"—extended families organized around a family business (usually a farm).⁵⁸ Although individuals who were part of these extended, usually patriarchal, families lacked the degree of self-determination over their lives that would be expected today, the large social unit provided significant support and stability for its members.⁵⁹ Accordingly, in an essay critiquing the nuclear family ideal, writer David Brooks observed that extended, corporate families could be more resilient, because "[i]f one relationship breaks," there are "shock absorbers," whereas "[i]n a nuclear family, the end of the marriage means the end of the family as it was previously understood."⁶⁰

American society likely can't return to a culture dominated by the corporate, extended family—nor would we want to, given concurrent commitments to gender equality and individual self-determination. But the resiliency of extended families and other alternative kinship structures can teach us how to conceptualize, build and reinforce new systems of support and attachment.

Once we start thinking about the extended family as well as the nuclear family, we can stop seeing family as a single unit, or an island, and start seeing family (and community generally) as DePaulo does—as a web of connections, each of a different kind and degree of importance.⁶¹ In an idealized society of nuclear families—each with two parents and children who are descended from

⁵⁸ Steven Ruggles, *Patriarchy, Power, and Pay: The Transformation of American Families: 1800-2015*, 52 *DEMOGRAPHY* 1797, 1799-800 (2015).

⁵⁹ *See id.*

⁶⁰ Brooks, *supra* note 1; cf. Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 *YALE J.L. & FEMINISM* 83, 84 (2004) ("Our family changed during my childhood—homes moved, stepparents and children were added and subtracted, and new adults came into our lives. . . . What remained stable, however, was the abundance of care provided to children by different adults—through interwoven, supportive connections.").

⁶¹ *See generally* DEPAULO, *supra* note 43.

both parents—each nuclear family functions as a distinct and separate unit.⁶² When centering the nuclear family, a person is either in the family or not: There is no grey area. But considering extended families and blended families makes it easier to see how familial connection, loyalty, and support exist along a gradient. A person may be closely connected to one cousin, but not another. One may be deeply loyal to one aunt on one parent's side, and to an uncle on the other, even though these two figures have little knowledge of one another. Similarly, two longstanding neighbors might coordinate their childrearing efforts quite closely, but in other respects have very different loyalties and family attachments. From this vantage, the important question is not whether someone is *in* or *out* of a particular family. The important questions instead become: *How closely connected are particular individuals? In what ways are they committed to each other?* Answering these questions allows us to recognize our *parafamily*, whether its members have a legal or blood relationship to us or not.

Some people are already living their lives with a focus on their parafamily instead of, or in addition to, their nuclear family. When we look at such people's stories, we can begin to identify the value a parafamilial approach brings to their lives. Notably, there's significant diversity among those who shy away from a primary focus on their nuclear family. There are monogamous couples or unpartnered individuals who make major commitments to platonic friends, such as by sharing or buying a home together.⁶³ There are polyamorous individuals who have multiple, long-term, "open" relationships, which can look like a sprawling network of connected nodes when relationships are drawn out on

⁶² See Sean Illing, *The Case for Reimagining the Nuclear Family*, VOX (Aug. 22, 2023, 7:30 AM), <https://www.vox.com/the-gray-area/2023/8/22/23840152/kristen-ghodsee-everyday-utopia-the-gray-area> (quoting Kristen Ghodsee on how, in the traditional nuclear family model, each household—comprised of two parents and their direct descendants—functions as an independent, self-contained unit). See generally KRISTEN R. GHODSEE, *EVERYDAY UTOPIA: WHAT 2,000 YEARS OF WILD EXPERIMENTS CAN TEACH US ABOUT THE GOOD LIFE* (2023).

⁶³ See Mackenzie Born, *Roommates for Boomers: Why Roommates Over 50 Is Trending*, AVAIL (Feb. 7, 2022), <https://www.avail.co/education/articles/why-roommates-over-50-is-trending> [<https://perma.cc/WSW3-T5AU>]; *supra* note 9 and sources cited; Sridhar Pappu, *Age 31 and Up, with Roommates. You Got a Problem with That?*, N.Y. TIMES (May 5, 2016), <https://www.nytimes.com/2016/05/06/fashion/mens-style/adult-men-roommates-new-york.html> (describing two men who shared home for several years, maintaining a committed but platonic living arrangement); Allie Volpe, *The Strange, Unique Intimacy of the Roommate Relationship*, ATLANTIC (Aug. 13, 2018), <https://www.theatlantic.com/family/archive/2018/08/the-strange-unique-intimacy-of-the-roommate-relationship/567296/> (explaining rising student debt, delayed marriages, and high housing costs have led to more young adults cohabitating, with nearly 32% of adults living in shared households by 2017); Weisbard, *supra* note 10.

paper.⁶⁴ There are polyamorous people with closed relationships that include more than two people, an arrangement known as “polyfidelity.”⁶⁵ These individuals’ experiences begin to paint a picture of what is possible when one’s life is structured around parafamily rather than a nuclear family and how parafamilial living can facilitate flourishing and caregiving.

For instance, those who center their lives among parafamily rather than a nuclear family often describe an increased sense of community and family, and a lack of loneliness in their lives. Consider, for example, the experience of one member of a monogamous couple, Ari Weisbard, who bought a house with another monogamous couple.⁶⁶ In an essay, he described why living in a larger unit was appealing.

When [my wife and I] started talking about getting married, we realized our biggest fear was that we’d leave . . . important kinds of friendships behind and end up living in what she jokingly called a “love/torture cave of nuclear family loneliness.” Neither of us wanted that. . . . By forming a household with friends who share our values, we realized we could build an even stronger system of support than we would have in separate homes. The model is not even new; it’s an echo of raising children with the support of an extended family, but with less drama, I expect.⁶⁷

Similarly, three women profiled in the *Washington Post* who lived together for over fifty years were described as planning to face aging and future challenges together. “We are a family,” explained one.⁶⁸ Cal T., one of a group of polyamorists who live in upstate New York, explained to *The New Yorker*, “The thing that I wanted was a family. And I didn’t want to get married or have

⁶⁴ See, e.g., Solomon, *supra* note 11; Kimchi Cuddles, *Updated Polycule*, TUMBLR (May 29, 2016), <https://kimchicuddles.tumblr.com/post/145121785030/updated-polycule-for-full-character> (depicting graph of fictional relationships among polyamorous characters in webcomic about polyamory, included here as an example of the kind of relationship connections that can exist in a polyamorous network).

⁶⁵ See, e.g., Deni Kirkova, *Here Comes the Bride. And Another One. And Another One! Meet World’s First Married Lesbian THREESOME . . . and They’re Expecting a Baby Due in July*, DAILY MAIL, <https://www.dailymail.co.uk/femail/article-2611020/Meet-worlds-married-lesbian-threesome-baby-make-four-July.html> [<https://perma.cc/LG68-KZGT>] (last updated Apr. 23, 2014; 9:21 AM) (describing a lesbian triad which characterizes their relationships as polyfidelitous); David K. Li, *Married Lesbian “Throuple” Expecting First Child*, N.Y. POST (Apr. 23, 2014, 1:55 PM), <https://nypost.com/2014/04/23/married-lesbian-threesome-expecting-first-child/> [<https://perma.cc/AH3U-8H83>] (discussing the same triad) *cited in* Obergefell v. Hodges, 576 U.S. 644, 704-05 (2015) (Roberts, C.J., dissenting)); see also SHEFF, *supra* note 13, at 3-4 (defining “polyfidelity” as “most closely resembl[ing] a closed group marriage”).

⁶⁶ Weisbard, *supra* note 10.

⁶⁷ *Id.*

⁶⁸ Ianzito, *supra* note 9.

children. And it turns out you can still have a family, even if you're not getting married and having children."⁶⁹

This common theme of looking outside the nuclear family to find community and support is consistent with the work of sociologists Natalia Sarkisian and Naomi Gerstel. These two scholars have concluded in a series of papers that marriage, at least as currently practiced in America, on balance isolates its participants from their communities, rather than acting as a building block for larger, meaningful community relationships.⁷⁰ The turn some have already made toward parafamily also functions as a response to the observation of Perel, Finkel, and others, that too much is being expected of spouses—that spouses are now expected to fill a role that a whole community once filled.⁷¹ Humans crave meaningful relationships—whether platonic, romantic, or sexual—and a culture that dismisses the value of relationships outside the nuclear family sets its participants up to experience systemic loneliness and isolation.⁷²

A parafamilial approach not only makes its participants less lonely; it also creates further opportunities to address humans' need for care than the nuclear family does alone. As other scholars have noted, a married couple is envisioned to be self-sufficient, and a nuclear family unit able to internalize the cost of caregiving needed by its members.⁷³ But critics of this model, such as Martha Fineman, emphasize that we all find ourselves dependent on others in some ways, at some times, and it's neither realistic nor desirable to internalize dependent care entirely within the nuclear family.⁷⁴ The nuclear family structure tends to assume a breadwinning husband supporting a caregiving wife, who provides the active care for children and potentially other elderly or disabled individuals for which the family is caring.⁷⁵ But as anyone who has been in a

⁶⁹ Solomon, *supra* note 11.

⁷⁰ See Gerstel, *supra* note 42, at 10-11; Gerstel & Sarkisian, *Marriage: The Good, the Bad, and the Greedy*, *supra* note 42; Sarkisian & Gerstel, *Does Singlehood Isolate or Integrate?*, *supra* note 42, at 377 ("Compared to those married, the single are more likely to contact and receive help from their parents or siblings."); Sarkisian & Gerstel, *Till Marriage Do Us Part*, *supra* note 42, at 369.

⁷¹ See, e.g., Perel, *supra* note 47, at 3:21; FINKEL, *supra* note 1, at 84-85.

⁷² See Gerstel, *supra* note 42, at 13.

⁷³ See FINEMAN, *supra* note 5, at 161 ("The natural family is the social institution we depend on to raise the children and care for the ill, the needy, the dependent in our culture. In its idealized form, the family will be a self-contained and self-sufficient unit in accomplishing those tasks . . ."); Murray, *supra* note 17, at 410-11 ("The law's understanding of caregiving as private and parental presumes that parents will be able to perform their tasks for the long term."); Rosenbury, *supra* note 8, at 193 ("The state initially recognized . . . spousal and parent-child relationships as a means to privatize the dependency of both women and children.").

⁷⁴ See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY*, at xiii-xv, 34-35 (2004).

⁷⁵ See FINEMAN, *supra* note 5, at 162-63. ("Women . . . are typically the socially and culturally assigned caretakers. . . . The very process of assuming caretaking responsibilities

caregiving position knows, this arrangement can be particularly burdensome on whoever occupies the caregiving position. Diversification of caregiving thus becomes an attractive proposition, and a more realistic one, when the universe of potential caregivers consists of friends, romantic partners, and extended family who choose to participate in the caregiving.⁷⁶

Skeptics of diversification often express concern that departing from the two-parent model of child-rearing will harm children by bringing instability into their lives.⁷⁷ But it's important to distinguish between the two-parent household specifically and childhood well-being and stability, generally. The two-parent household is a means to childhood well-being and stability, not an end in itself, and research suggests having a greater number of consistent adult figures in a child's life can be beneficial. For instance, Elisabeth Sheff's sociological research on polyamorous families concludes over and over again that "children in [polyamorous] families appeared to be thriving with the plentiful resources and adult attention their families provided."⁷⁸ This occurs in part because polyamorous relationships do not tend to be any more unstable than monogamous relationships, so children in polyamorous families are not inherently more likely to have unstable parental figures, even if they have more of them.⁷⁹

creates dependency in the caretaker In a traditional family, the caretaker herself, as wife and mother, is dependent on the wage-earning husband to provide for her so she can fulfill her tasks.").

⁷⁶ See Murray, *supra* note 17, at 410-12.

⁷⁷ See Stanley Kurtz, *Heather Has 3 Parents*, NAT'L REV. (Mar. 12, 2003, 2:00 PM), <https://www.nationalreview.com/2003/03/heather-has-3-parents-stanley-kurtz/>.

⁷⁸ SHEFF, *supra* note 13, at 135; see also Terri D. Conley, Jes L. Matsick, Amy C. Moors & Ali Ziegler, *Investigation of Consensually Nonmonogamous Relationships: Theories, Methods, and New Directions*, 12 PERSPS. ON PSYCH. SCI. 205, 224 (2017); Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J.L. & SOC. DEVIANCE 150, 214 (2013) ("Adults and children alike identified the increase in resources that resulted from adults pooling their time, money, and energy as advantageous to the entire family."); *id.* at 239-40 (explaining that children in polyamorous families encountered "no real sense of social stigma"); Elisabeth Sheff, *Strategies in Polyamorous Parenting*, in UNDERSTANDING NON-MONOGAMIES 169, 171 (Meg Barker & Darren Langdridge eds., 2010).

⁷⁹ See Alicia N. Rubel & Anthony F. Bogaert, *Consensual Nonmonogamy: Psychological Well-Being and Relationship Quality Correlates*, 52 J. SEX RSCH. 961, 978-79 (2015) (reviewing studies showing that both monogamous and consensually nonmonogamous relationships report similar levels of relationship quality, and that there is "little evidence that consensual nonmonogamy leads to higher rates of separation or divorce than monogamy"); see also Thomas R. Brooks, Jennifer Shaw, Stephen Reysen & Tracy B. Henley, *The Vices and Virtues of Consensual Non-Monogamy: A Relational Dimension Investigation*, 13 PSYCH. & SEXUALITY 595, 604-05 (2022) (finding those in consensually nonmonogamous relationships may even score higher on measures of satisfaction, commitment, intimacy, passion, and love and are more likely to engage in positive problem-solving than withdrawal tactics with partners as compared to those in monogamous relationships).

Indeed, situations where children have more than two stable adult figures in their lives might be preferable, as David Brooks suggested in his discussion of extended families serving as “shock absorbers.”⁸⁰ In a situation where multiple monogamous individuals closely coordinate, or in a polyamorous context that includes several parental figures, severing one dyadic relationship would be less likely to radically destabilize the rest of the parafamilial structure, on an emotional or logistical level. Multipartner or multiparenting arrangements thus have the potential to create a more resilient environment for child-rearing and caregiving, rather than one that is more fragile.

II. CONCERNS ABOUT PARAFAMILY

A. *The “Traditional Marriage” Narrative*

When the role or nature of marriage is questioned, it’s common for individuals to react with some skeptical conservatism: if marriage has functioned as the backbone of society for generations, might decentering it have a profoundly harmful and destabilizing effect? Indeed, the argument that marriage is essentially the same in all places and throughout history has been made repeatedly, perhaps most clearly in the context of contesting the recognition of same-sex marriage.⁸¹ But in fact, there has been considerable diversity in the ways that individuals and communities have organized their relationships, as well as considerable diversity in the legal and societal recognition of those relationships across different societies.⁸² Some of these systems worked well for their participants; some were particularly patriarchal or reinforced existing power imbalances among different members of society.⁸³ But regardless of their merits and flaws, the variety of family arrangements that have existed indicates that there is no single enduring, natural way to structure family and social relationships and that there is freedom to innovate on our conception of the family.

In early America and through the nineteenth century, for instance, alternative family formations were particularly common in Black, Indigenous, and religious

⁸⁰ Brooks, *supra* note 1.

⁸¹ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 689-90 (Roberts, C.J., dissenting) (“Th[e] universal definition of marriage as the union of a man and a woman is no historical coincidence. . . . It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. . . . Society has recognized that bond as marriage. . . . This singular understanding of marriage has prevailed in the United States throughout our history.”).

⁸² See, e.g., STEPHANIE COONTZ, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* 10-11 (2005); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1964-69 (2010). See generally SARAH M.S. PEARSALL, *POLYGAMY: AN EARLY AMERICAN HISTORY* (2019) (tracing historical global practice of polygamy).

⁸³ See, e.g., Davis, *supra* note 82, at 1967-68 (“[I]ntensely debated is women’s status in polygyny, and whether it empowers women, subordinates them, or both.”).

minoritarian communities, as well as on frontiers with less developed institutions.⁸⁴ According to Nancy Cott, most Indigenous groups “married within complex kinship systems that accepted premarital sex, expected wives to be economic actors, often embraced matrilineal residence and matrilineal descent, and easily allowed both polygamy and divorce with remarriage.”⁸⁵ Among European immigrants and their descendants, institutions that enforce cultural norms, including religious institutions, the state, and civil society, were less robustly established, and thus there was more opportunity—and more need—for individuals to deviate from rigid norms of marriage and the family.⁸⁶ Frequently, “[w]hite and nominally Christian Americans engaged in informal marriages, self-divorces, premarital unchastities, and bigamy, without suffering much for their sins.”⁸⁷ As immigrants moved south and west, marriage “frequently followed upon a sexual relationship between [a] man and a woman proving fruitful, rather than preceding it: pregnancy or childbirth was the signal for a couple to consider themselves married.”⁸⁸ Nineteenth-century Mormons explicitly and infamously practiced polygynous “plural marriage.”⁸⁹

During and after slavery, Black families’ formations and creation of kinship ties also diverged significantly from legally sanctioned marriages, and families of enslaved people were significantly more structurally complex than a nuclear family model.⁹⁰ Coercive pressures in the antebellum era, including the ban on recognizing slave marriages present in many states’ slave codes, and the breakup of families that occurred when one family member was sold to other slave

⁸⁴ Other communities as well have lived in and been adversely affected by the American state’s commitment to suppressing diverse family structures. Non-Anglo-Saxon immigrants, Jewish people, Asian people, and of course LGBTQ+ people are other examples of those whose family structures have at various times run afoul of America’s legal and cultural family norms. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 4, 135-39 (2002) (Asian people); *id.* at 126, 140-42 (Catholic, Jewish, and Eastern European immigrants); Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ 437, 445 (1997) (LGBTQ+ people).

⁸⁵ COTT, *supra* note 84, at 25.

⁸⁶ See, e.g., LILLIAN FADERMAN, *TO BELIEVE IN WOMEN: WHAT LESBIANS HAVE DONE FOR AMERICA—A HISTORY* 6-7 (1999) (discussing “Boston marriages,” the phenomenon of upper-class nineteenth century New England women cohabiting with each other in life partnerships); Ruggles, *supra* note 58, at 1799-1800 (discussing corporate families, “married couple households with self-employed heads”).

⁸⁷ COTT, *supra* note 84, at 30.

⁸⁸ *Id.* at 31 (omitting a misprint in the text).

⁸⁹ See *Reynolds v. United States*, 98 U.S. 145, 161, 167 (1879); COTT, *supra* note 84, at 73 (describing political opposition to and criticism of Mormon polygyny).

⁹⁰ See TERA W. HUNTER, *BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY* 13-21 (2017).

owners, resulted in a wide range of domestic arrangements which existed both before and after abolition.⁹¹

All of these variations and practices were put under pressure by a government that believed “Christian marriage should underpin the society” and that “legal monogamy benefited social order.”⁹² In the case of Indigenous Americans, “[b]oth political and religious officials assumed that native Americans’ assimilation had to be founded on monogamous marriage, from which would follow the conventional sexual division of labor, property, and inheritance.”⁹³ Native communities’ deviation from nuclear, patriarchal family ideals eventually became the rationale used by white reformers to break up Indigenous families and remove Indigenous children from close-knit extended families and clans.⁹⁴

For Black Americans, marriage rights introduced additional means of racial subjugation following the Civil War.⁹⁵ While Black Americans had not been allowed to get married under slavery, they were “disproportionately punished if they did not marry while cohabitating” as free people.⁹⁶ Additionally, the “multiple partners that many men and women had as a result of forced separations and the unknown whereabouts of spouses w[ere] defined as illegal bigamy.”⁹⁷ New state laws that automatically recognized the marriages of

⁹¹ See *id.* at 20 (describing the varied domestic arrangements as “matrifocal, monogamous, bigamous, single parent, abroad spouses, multigenerational, single- and mixed-gender sibling groups, single-sex groups, and orphaned children”); see also Cohen, *supra* note 84, at 453.

⁹² COTT, *supra* note 84, at 10.

⁹³ *Id.* at 26.

⁹⁴ See MARGARET D. JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940*, at 46-47 (2009). White reformers depicted Native communities’ deviation from nuclear patriarchal family ideals as creating unfit environments for children. See *id.* (describing practice of missionaries assuming Indigenous children without two married parents were neglected and using this assumption to justify taking those children to orphanages); see also Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 61 (1997). Berger notes:

At the level of cultural assimilation, the autonomy of the Indian woman had to be subordinated to that of the male head of the nuclear family. From being she who worked, who controlled lines of descent, who may even have ruled politically, she was to become she who inspired others to work and who depended on others for her support.

Id. Between 1880 and the 1930s, “white women reformers and many male authorities deemed it necessary to invade the most intimate spaces of indigenous homes and families,” forcing children to replace their intimate bonds to their peoples with loyalty and affiliation to institutional authorities and the state. See JACOBS, *supra*, at xxxi. White reformers believed that these actions would help native American women, who they viewed as being treated as “beasts of burden, items of exchange, sex objects, or slaves” by living within nonmonogamous family structures. See COTT, *supra* note 84, at 120.

⁹⁵ See Hunter, *supra* note 90, at 15.

⁹⁶ *Id.*

⁹⁷ *Id.*

formerly enslaved couples did not consider that many individuals wanted to pursue other relationships not arranged by their enslavers.⁹⁸ The result was that many were prosecuted, “singled out disproportionately[,] and punished for failure to meet the requirements of legal, monogamous marriage.”⁹⁹ Republicans advocating for civil rights for freedmen faced opposition from Democrats who invoked complex Black family structures and their proximity to “polygamy” to undermine equal rights.¹⁰⁰

Mormon polygyny also gradually succumbed to governmental pressures. The 1879 Supreme Court decision *Reynolds v. United States*¹⁰¹ upheld the Territory of Utah’s ban on polygamy, criticizing the Mormon practice in racialized terms: “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”¹⁰² As Martha Ertman has explained, Mormons were framed as “race traitors” for being predominantly white Americans who engaged in a relationship form that, in the words of one nineteenth-century territorial official, “belongs now to the indolent and opium-eating Turks and Asiatic, the miserable Africans, the North American savages, and the latter-day saints.”¹⁰³ In 1890, facing increasingly hostile actions by Congress, LDS church president Wilford Woodruff issued a statement advising against any church members from entering into marriages prohibited

⁹⁸ *Id.* at 16.

⁹⁹ *Id.*

¹⁰⁰ See COTT, *supra* note 84, at 88. This narrative of Black family structures as deviant has had continuing salience in American social policy. In 1965, Daniel Patrick Moynihan’s notorious and influential report *The Negro Family: The Case for National Action* argued that the “fundamental problem” holding Black people back from achieving civil and economic equality in America was “pathologies” in “family structure” which had resulted in “the Negro community [being] forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole.” See Cohen, *supra* note 84, at 455-56. In the 1980s, the Reagan Administration echoed these themes in its war on “welfare queens,” which were typically portrayed as Black single mothers. See *id.* at 457 (discussing the racialized, “conservative dichotomy between the deserving working poor and the lazy, Cadillac-driving, steak-eating welfare queens of Ronald Reagan’s imagination”).

¹⁰¹ 98 U.S. 145 (1879).

¹⁰² *Id.* at 164.

¹⁰³ See, e.g., Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 290, 313 (2010).

by law.¹⁰⁴ Woodruff's "manifesto" made it politically possible for the territory of Utah to become a state.¹⁰⁵

In each of these cases, government actors forcibly imposed on other groups a particular model of marriage, involving "lifelong, faithful monogamy, formed by the mutual consent of a man and a woman, bearing the impress of the Christian religion and the English common law in its expectations for the husband to be the family head and economic provider, his wife the dependent partner."¹⁰⁶ But rather than being a story of how so-called "traditional marriage" outcompeted its alternatives through demonstrated superiority, these historical examples paint a more complicated picture of a dominant group imposing its cultural values on less powerful populations, with little regard for the contexts that led to variation.

And critically, despite its hostility to patriarchal polygyny, the monogamous marriage model was far from a model of justice and gender equality. At the time *Reynolds* was decided, marriage led to the suspension of a woman's legal personhood, and women lacked basic civil rights, such as the right to vote.¹⁰⁷ As Judge Berzon described in a 2014 concurring opinion, "[h]istorically, [monogamous] marriage was a profoundly unequal institution, one that imposed distinctly different rights and obligations on men and women."¹⁰⁸ Under the law of coverture, "the husband and wife" were deemed to be "one person," such that "the very being or legal existence of the woman [was] suspended . . . or at least [was] incorporated and consolidated into that of the husband" during the marriage.¹⁰⁹ Husbands had a possessory right to intimacy with their wives, such

¹⁰⁴ See *Official Declaration 1*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/scriptures/dc-testament/od/1?lang=eng> [<https://perma.cc/9GZ7-T9CU>] (last visited Mar. 9, 2025) ("Inasmuch as laws have been enacted by Congress forbidding plural marriages, . . . I hereby declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise."); see also *The Manifesto and the End of Plural Marriage*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/gospel-topics-essays/the-manifesto-and-the-end-of-plural-marriage?lang=eng> [<https://perma.cc/H7V3-3SQJ>] (last visited Mar. 9, 2025) (essay published by the Mormon Church about the end of plural marriage within the church).

¹⁰⁵ See Maren Peterson, *Utah's Road to Statehood: 125 Years*, UTAH DIV. OF ARCHIVES & RECS. SERV. (Jan. 4, 2021), <https://archivesnews.utah.gov/2021/01/04/utahs-road-to-statehood-125-years/>.

¹⁰⁶ COTT, *supra* note 84, at 3.

¹⁰⁷ See E.H. Deering, Note, *Coverture and Lasting Effects of Gender Inequality: An Analysis Through Equal Protection Jurisprudence*, 16 WASH. U. JURIS. REV. 296, 303-04 (2024) (discussing history and dismantling of coverture through the nineteenth and twentieth century).

¹⁰⁸ *Latta v. Otter*, 771 F.3d 456, 487 (9th Cir. 2014) (Berzon, J., concurring).

¹⁰⁹ *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *442 (3d rev. ed. 1884)).

that it was deemed legally impossible for a husband to rape his wife.¹¹⁰ The “profoundly unequal status” of men and women within marriage was often cited by courts as a justification for denying women equal rights in other areas, including the workplace.¹¹¹ Women were excluded from various professions on the rationale that, as Justice Bradley put it, “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life,” and “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.”¹¹²

There are a number of observations we can make by looking back on these aspects of American family history. First, the model of marriage that first prevailed in America, saddled with coverture and other doctrines that subsumed female autonomy and personhood, can hardly function as an illustration of moral superiority by present-day standards. The suppression of alternative family structures was not rationally or empirically related to any particular type of evidence about the outcomes for families or children. At the same time, beliefs in the cultural superiority of monogamous marriage and the nuclear family perpetuated long-standing pernicious policies and stigmatic attitudes toward minority groups that lived in alternative ways.¹¹³

Second, few to none of the varieties of marriages from this period exist in the same form today. While white, largely Christian Americans used their political and cultural power to suppress the eclectic relationship structures seen among Indigenous Americans, Black Americans, and religious minorities, the marriage they imposed bears little resemblance to twenty-first century marriage. Coverture is now gone; married women routinely work outside the home, and even when they don’t, they are substantially more involved in public life than was seemly for early American women.¹¹⁴ Early American marriage may bear a superficial resemblance to the kind of monogamous marriage and nuclear family ideals that predominate in America today, but they can hardly be said to be the same institutions. Given how much marriage has changed, it simply cannot be said that there is a single model for marriage and family that is compelling on the basis of its longevity and success. And so, rather than appeal to tradition, critics and champions of different models of marriage and family must argue for

¹¹⁰ *Id.* at 488.

¹¹¹ *Id.*

¹¹² *Id.* at 489 (quoting *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring)).

¹¹³ See *supra* text accompanying notes 88-94.

¹¹⁴ For a description of women’s role in early America, see NANCY F. COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780 – 1835*, at 8 (1977) (noting that in the early 1800s, “an emphatic sentence of domesticity was pronounced for women. . . . [They were] to be wives and mothers, to nurture and maintain their families, to provide religious example and inspiration, and to affect the world around by exercising private moral influence”).

their preferred vision on the merits—in other words, one must argue for relationships that work, rather than simply appeal to history.

B. *The Specter of Polygamy*

This Article calls for law and society to embrace many kinds of relationships beyond the nuclear family, including committed and caring nonmonogamous relationships, as important, real, and laudable. Nonetheless, some object to the cultural and legal acceptance of nonmonogamy of any kind because they worry that accepting any kind of nonmonogamy will *in fact* lead to widespread polygamy, and specifically polygyny.¹¹⁵ This worry emerges from several well-worn stereotypes about heterosexual men and women: that men want sex, and women want men who can provide them with resources.¹¹⁶ Per this argument, if any kind of nonmonogamy is culturally acceptable, wealthy men will simply collect multiple wives (presumably disallowing them from seeking relationships with others), leaving women as part of commodified harems and less successful men without any sexual or romantic partners.

It's worth saying straightforwardly that this argument rests on a false, dismal, and reductive depiction of human nature. In addition to taking a particularly heteronormative perspective, this viewpoint ignores the reality that humans of all genders want sex, material security, status, social acceptance, community, love, and the feeling like their work is meaningful. While there may be small differences in strategy to achieve these goals based on one's culture and circumstance, there's little reason to think that in America today, but for the social pressure to be monogamous, successful men would jealously dole out assets in exchange for multiple women's sexual fidelity, and women would willingly make this deal *en masse* rather than insist on a more equitable arrangement. This scenario is particularly implausible because of the powerful social values about equality and women's role in American society, which are largely unrelated to monogamy or nonmonogamy—social values generally not present in historically polygynous cultures.¹¹⁷

This *equality* value supports a norm that men and women in heterosexual relationships have equal power and authority in the relationship. We see the development of this value over time, with the passage of the Married Women's Property Acts and the end of coverture preserving married women's economic

¹¹⁵ See, e.g., Scott Alexander, *Polyamory Is Not Polygyny*, SLATE STAR CODEX (May 17, 2017), <https://slatestarcodex.com/2017/05/17/polyamory-is-not-polygyny/> [<https://perma.cc/GG5T-63QJ>] (describing concerns about polyamory leading to polygamy articulated in *National Review* and a now-deleted blog written by a pick-up artist and white nationalist).

¹¹⁶ *Id.* (“[W]hat happens to women in a world where we scrap the ‘binary axis’ of monogamy? Women suffer, that’s what. Nobody is asking for a show called ‘Brother Husbands.’” (quoting Ashley E. McGuire, ‘Polyamory’ Is a Modern Name for a Backwards Practice, NAT’L REV. (May 13, 2017, 8:00 AM), <https://www.nationalreview.com/2017/05/polyamory-polygamy-same-practice-now-presented-edgy-fresh/>)).

¹¹⁷ See *supra* text accompanying notes 86-94.

freedom and legal identity.¹¹⁸ Similarly, for the past several decades, it has become more common for women to work and be financially independent of male partners, even as a gap remains between women's and men's earnings.¹¹⁹ Accordingly, women are substantially less dependent on male financial support.

Given the strength of these values and trends, there's every reason to believe that heterosexual polyamorous relationships would continue to reflect the same parallel structure that heterosexual monogamous relationships currently do, with all parties having the same freedom (whatever it is) to pursue relationships or socialize outside the marriage or relationship.

And this indeed is what we see in practice. Examples abound of complex and egalitarian polyamorous arrangements and of polyfidelitous groups consisting of members of varied genders; two recent articles describe a lesbian triad and a multigender group including a nonbinary person, their two partners, and one of their partners' partners.¹²⁰ Rather than finding polygyny, sociologist Elisabeth Sheff observed in her study of polyamorous families with children that she "found far more triads composed of a woman with two men, rather than a man with two women or including a transgender person."¹²¹ And while quantitative evidence is difficult to come by, one small nonscientific survey indicated that, as currently practiced, polyamory does not resemble polygyny, with men and

¹¹⁸ See, e.g., JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 108-09 (2014); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2132-40 (1994) (detailing history of marital status reform); Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 212-14 (2014) (providing history of Married Women's Property Acts in the United States and the United Kingdom through lens of creation of separate estate).

¹¹⁹ See Janet L. Yellen, *The History of Women's Work and Wages and How It Has Created Success for Us All*, BROOKINGS (May 2020), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all/> [<https://perma.cc/LE45-MY8T>].

¹²⁰ See, e.g., Alice Hines, *Polyamory Works for Them*, N.Y. TIMES, <https://www.nytimes.com/2019/08/03/style/polyamory-nonmonogamy-relationships.html> (last updated Aug. 5, 2019) (describing a variety of polyamorous arrangements involving people of multiple genders); Kirkova, *supra* note 65 (describing a lesbian triad); Li, *supra* note 65 (same); Valeriya Safronova, *Interested in Polyamory? Check Out These Places*, N.Y. TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/style/polyamory-somerville.html> (describing how multi-gender group including a nonbinary person, their two partners, and one of their partners' partners moved to Somerville, MA, because of its laws favorable to polyamory); Solomon, *supra* note 11 (describing, among other arrangements, four queer, polyamorous people). See generally SHEFF, *supra* note 13 (describing many arrangements in polyamorous families whom Sheff interviewed).

¹²¹ Elisabeth A. Sheff, *The One Penis Policy*, PSYCH. TODAY (Jan. 21, 2016), <https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201601/the-one-penis-policy>.

women instead tending to have similar numbers of romantic partners.¹²² This result is hardly surprising, given the norms and values of self-declared polyamorists. In her work, Elizabeth Emens observed that many polyamorous writers say that the appeal of polyamory “builds in part on a feminist understanding of monogamy as a historical mechanism for the control of women’s reproductive and other labor.”¹²³ Hadar Aviram and Gwendolyn Leachman similarly note, “Several polyamorous commentators cite such feminist understandings of monogamy and women’s sexual control as a driving force in their decisions to pursue polyamory, creating a visible sex-positive feminist presence in the polyamorous community.”¹²⁴

It’s worth recognizing that the fear of polygamy arising from polyamory is not entirely baseless. As Ashley McGuire described in a *National Review* essay criticizing polyamory as harmful to women, media depictions of polyamory often do choose to show a man with two female partners as the exemplar of the practice.¹²⁵ Heterosexual married couples “opening up” for the first time can stereotypically succumb to a male partner’s anxieties and limit their extramarital sexual activities to women.¹²⁶ But longstanding polyamorous relationships, both as captured in sociological research like Elisabeth Sheff’s and in other media descriptions, on balance are varied and egalitarian.¹²⁷ Moreover, polyamorists tend to gently mock and criticize nonegalitarian arrangements as a tool to reinforce values of equality. For instance, heterosexual couples looking for a third, bisexual female partner are derogatorily referred to as “unicorn hunters,” and the men in such relationships are reproved for imposing a “one penis policy” on their female partner when they have no reciprocal limitations.¹²⁸

¹²² Alexander, *supra* note 115 (noting percentage of poly individuals who are single or dating and how many partners they have); cf. William Baude, *Is Polygamy Next?*, N.Y. TIMES (July 21, 2015), <https://www.nytimes.com/2015/07/21/opinion/is-polygamy-next.html> (“[Arguments that] high-status men [will] hoard wives . . . rest on the assumption that plural marriage will involve only one man and multiple women. That assumption is weak. Plural relationships could well be . . . between multiple people of both sexes, not all of whom are strictly heterosexual.”).

¹²³ Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 325 (2004).

¹²⁴ Aviram & Leachman, *supra* note 11, at 301 (footnote omitted).

¹²⁵ See McGuire, *supra* note 116.

¹²⁶ See SHEFF, *supra* note 13, at 83-87 (describing examples of heterosexual couples seeking a third bisexual woman in their relationship); Sheff, *supra* note 120 (“In practice, it can be incredibly difficult for some heterosexual men to allow the women in their polycule – ‘their’ women – to partner with other men.”).

¹²⁷ See sources cited *supra* notes 120-21.

¹²⁸ See, e.g., Abby Moss, *Unicorn Hunters on Dating Apps Are Finally Being Called Out as Toxic*, 1-D (Feb. 7, 2022), <https://i-d.co/article/unicorn-hunting-sex/> [<https://perma.cc/QQT8-6MZH>] (discussing several commentators’ criticism of “unicorn hunting”); Polyamfam, *The Infamous One Penis Policy*, YOUTUBE (Nov. 4, 2021), <https://www.youtube.com/watch?v=NfKwKkXE36A> [<https://perma.cc/Q9VC-Z7RG>]

The social values of polyamorists and existing evidence indicate that acceptance of nonmonogamy and polyamory will not lead to widespread polygamy. However, it would be foolish to argue that no nonmonogamous arrangements would be unequal or harmful. But that should not be the standard for whether polyamory is acceptable, any more than the complete eradication of sexist or harmful monogamous marriages should be necessary for society to regard monogamy as acceptable. Many monogamous marriages in America are consciously “complementarian,” reflecting a belief that men and women *should* have different roles in a marriage, with a wife’s decision-making subordinated to her husband’s.¹²⁹ Many other heterosexual, monogamous marriages are theoretically egalitarian, although female partners find themselves doing a substantially greater share of household work, unconsciously reflecting gendered expectations of who should do housework.¹³⁰ But these phenomena exist because the role of women in society remains evolving and contested, not because monogamy itself is inherently sexist or patriarchal. Because polyamory and monogamy exist within our society, they will both be influenced by gendered expectations, which will undoubtedly continue to change over time. But acceptance of polyamory will not be worse for women (or for anyone) than monogamy. Indeed, there is reason to believe that polyamory holds great promise for equality, because it is not weighed down by a history of coverture, of the man being “head of the household,” and of a couple agreeing to be “man and wife.”

(criticizing “One Penis Policies” as sexist, controlling of female partners, transphobic, homophobic, and rooted in insecurity, and arguing it is preferable for couples to work through male partner’s insecurities rather than to restrict a female partner from having multiple partners with penises).

¹²⁹ See Ginger Kolbaba, *Healthy Gender Roles in Marriage*, FOCUS ON THE FAM. (May 3, 2021), <https://www.focusonthefamily.com/marriage/healthy-gender-roles-in-marriage/> [https://perma.cc/8D4R-KZT9] (describing wife’s role in complementarian marriage as “work[ing] alongside her husband to make their marriage succeed while allowing him to take the lead, especially when the two are in clear conflict,” and explaining “[c]omplementarians view their marriage as a team in which the husband is the ‘team captain’”).

¹³⁰ A recent Pew Research Center study found that in heterosexual marriages where husbands and wives contribute roughly half to household earnings, wives spend an average of 4.6 hours per week on housework, compared to 1.9 hours per week for men. RICHARD FRY, CAROLINA ARAGÃO, KILEY HURST & KIM PARKER, PEW RSCH. CTR., IN A GROWING SHARE OF U.S. MARRIAGES, HUSBANDS AND WIVES EARN ABOUT THE SAME 12 (2023), <https://www.pewresearch.org/wp-content/uploads/sites/20/2023/04/Breadwinner-wives-full-report-FINAL.pdf> [https://perma.cc/PHE7-QPNR]. In marriages where wives earn more than 60% of the couple’s earnings and husbands have some earnings, wives spend an average of 4.8 hours per week on housework compared to husbands’ 2.8 hours. *Id.* at 13. Even in marriages where wives are the sole breadwinners, they do more housework than husbands, an average of 5.2 hours per week compared to husbands’ 4.0 hours. *Id.*

C. *The Role of Government Support*

In the second half of the twentieth century, a fear of “unwed, single mothers,” often implicitly or explicitly understood as Black, and the breakdown of the “traditional” nuclear family abounded.¹³¹ Vice President Dan Quayle famously lit a match in that particular culture war by criticizing Candace Bergen’s television character Murphy Brown, who had decided to keep a child conceived outside marriage as a single mother.¹³² Critics of “single motherhood” tended to double down on the importance of two-parent households.¹³³ Others, particularly political progressives, rejected that advice as either unrealistic or patriarchal, and advocated for more government support for single parents.¹³⁴

Advocacy for embracing a parafamilial framework, rather than idealizing the nuclear family, has the potential to set off a similar set of concerns. But on the contrary, a parafamilial approach has the ability to respond to both worries about family stability and well-being expressed by social conservatives and social progressives. Much conservative and progressive discussion about family assumes a false dichotomy—that dependent care can only realistically be provided by a nuclear family or by the government. *Either* the two-parent family will internalize the costs of child-rearing (and elder care, and other care), *or* government bureaucracy will provide collective solutions. Believing in this false

¹³¹ See *supra* Section II.A; see also FINEMAN, *supra* note 5, at 107 (“[I]n the public’s mind, and despite overwhelming evidence to the contrary, the face of poverty has increasingly become that of a single mother, particularly the African-American single mother.”).

¹³² See Vice President Dan Quayle, Address to the Commonwealth Club of California (May 19, 1992), http://www.vicepresidentdanquayle.com/speeches_StandingFirm_CC_3.html [<https://perma.cc/6787-6MEM>] (last visited Mar. 9, 2025); see also Jacey Fortin, *That Time ‘Murphy Brown’ and Dan Quayle Topped the Front Page*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/arts/television/murphy-brown-dan-quayle.html> (describing the cultural context of Quayle’s speech).

¹³³ See, e.g., Quayle, *supra* note 132 (“Bearing babies irresponsibly is, simply, wrong. Failing to support children one has fathered is wrong . . . We cannot be embarrassed out of our belief that two parents, married to each other, are better in most cases for children than one.”); see also Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC (Apr. 1993), <https://www.theatlantic.com/magazine/archive/1993/04/dan-quayle-was-right/307015/> (expounding on Quayle’s position).

¹³⁴ See FINEMAN, *supra* note 5, at 113 (criticizing how government policies designed to place economic responsibility for children onto fathers instead of the state “reflect the domination of and are derivative and dependent upon the traditional male-headed family model”); Arlene Skolnik, *The Politics of Family Structure*, 36 SANTA CLARA L. REV. 417, 417-18 (1996).

[V]irtually every [Western] country except the United States has adapted to [changes in family life] through family support policies. These policies include parental leave, child care, and family allowances. . . . We are the only country in which government policy has been aimed at reversing the tide of family change, rather than mitigating its effects. *Id.*; see also, e.g., VALERIE LEHR, QUEER FAMILY VALUES: DEBUNKING THE MYTH OF THE NUCLEAR FAMILY 172 (1999) (stating the “most common” way to “guarantee the material basis of choice” is “to develop the welfare state so that it better provides for people”).

binary leads both conservatives and progressives to unnecessarily go “all in” on one option or the other.

Culturally and legally recognizing the importance of parafamilial relationships offers a third option.¹³⁵ What’s important for children’s well-being is stability and support—a two-parent nuclear family is one means to that end, but it is not the only means, nor is it sufficient on its own. Parafamilial commitments and connections mean more support for children—that there will be more resiliency if one beam of a child’s support system breaks.¹³⁶ By encouraging individuals to organize their lives with the people and in the ways that work for them, parafamily has the potential to lessen the need for public support, not increase it. As one of us has put it, “If [more] people want to take legal responsibility for each other, that’s a good thing” for society.¹³⁷

III. IMPLEMENTING THE PARAFAMILIAL TURN

In the previous Parts, this Article has argued that American culture and the American legal system focus too much on supporting the nuclear family, to the exclusion of supporting parafamilial connections that provide logistical support, caregiving support, social support, and a sense of community. Capturing the full benefits of parafamily involves a change both in Americans’ social validation of relationships and in the legal treatment of relationships. These changes are inherently related. Social validation of parafamilial relationships increases the appetite for legal protection or support for parafamilial relationships. Similarly, those whose relationships are supported or protected by legal structures may feel more validated and recognized by the society around them and be more likely to feel comfortable with and commit to their parafamilial connections.

Regarding social validation, this Article’s authors are encouraged by the increased visibility of nontraditional families and lifestyles in media for

¹³⁵ Murray states:

[F]amily law cleaves to the ideal of an exclusive and autonomous nuclear family in which parents alone care for their children. . . . By characterizing caregiving as the exclusive province of parents, the law overlooks the considerable efforts of caregivers who are not parents and therefore does little to facilitate and enable the care networks that support and assist parents.

Murray, *supra* note 17, at 387-88; *see also id.* at 412 (arguing “what is missing” from public-infrastructure-based policy prescriptions such as universal daycare “is some recognition of, and support for, the existing private infrastructure of care” (emphasis omitted)).

¹³⁶ *See* Brooks, *supra* note 1 (noting how nuclear family structures have fewer relatives around “in times of stress to help a couple work through them”); *see also* Goldfeder & Sheff, *supra* note 78, at 199 (“Overall the children seemed remarkably well adjusted, articulate, intelligent, and self-confident . . . [and] appeared to be thriving with the abundant resources and adult attention their [polyamorous] families provided.”); SHEFF, *supra* note 13, at 135 (remarking similarly that children in polyamorous families appeared to be thriving).

¹³⁷ Meredith Goldstein, *Somerville Celebrates Another First for Polyamorous People*, BOS. GLOBE, <https://www.bostonglobe.com/2023/03/23/lifestyle/somerville-celebrates-another-first-polyamorous-people/> (updated Mar. 23, 2023, 9:16 PM).

presenting more possibilities, even as these stories range from a positive tone of “how intriguing!” to a more negative “look at these weirdos!” We hope that articles like this one, which take parafamilial relationships seriously in an academic context, can also serve to dislodge the assumption that the only natural way to order one’s life is in a monogamous marriage and nuclear family.

But what is most necessary and radical now is re-envisioning the possibilities for *legal* recognition and support of parafamilial relationships.¹³⁸ Many aspects of the legal system assume that individuals primarily arrange their life within a nuclear family, and this assumption makes it more difficult for individuals to arrange their life in alternative ways. For a parafamilial life to be as viable an option as a nuclear-family-focused life, designers of the legal system must get in the habit of asking themselves, “how will this affect parafamilies?” when considering, implementing, or revising laws and regulations.

Unlike with same-sex marriage, there is not one simple legal change to make. Plural marriage, where three or four instead of two people form a closed unit, may be desirable for some but does not fully capture the essence of parafamily—a variety of important relationships with differing closeness and commitment. Simply expanding marriage will only reinforce the notion of the closed unit rather than the interconnected community, and further obfuscate the importance of relationships that don’t look like marriage.¹³⁹ In the words of Ariela Dubler, our goal is to move toward a “general revision of the shape of marriage’s shadow,” rather than reifying the centrality of marriage in American law and life.¹⁴⁰ Not all important relationships involve cohabitation, shared finances, and sex. Accordingly, developing legal recognition and support for parafamilies necessitates some creativity.¹⁴¹

Legal recognition and support for parafamilies should advance three goals, not all of which need to be advanced in any individual measure. First, government programs and legal rules should, at a minimum, “get out of the way”

¹³⁸ As Melissa Murray argued in 2008, “[M]oving beyond the paradigm of parental caregiving toward legal recognition of caregiving networks is not impossible. . . . [T]he law is capable of recognizing and validating the importance of care networks when it chooses to do so.” Murray, *supra* note 17, at 389. In that piece, Murray explored, without specifically endorsing, the options of expanding parenthood as a legal category, creating alternative legal statuses that could coexist with parenthood, and dismantling parenthood altogether. *Id.* at 390.

¹³⁹ See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1655-56 (2003); cf. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 161 (2014) (observing that marriage operates in our society as “a deeply entrenched legal norm, a powerful but controversial cultural priority, and a well-understood limiting principle”).

¹⁴⁰ Dubler, *supra* note 139, at 1653.

¹⁴¹ Other scholars have wholly re-envisioned legal relationships, articulating new ideals for how to identify and structure family. For an article proposing a highly flexible, contract-based system for registering relationships, see Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 573-76 (2013).

of those who center their lives on parafamilial connections.¹⁴² Second, to the degree laws provide incentives for individuals to participate in nuclear family structures, they should be adjusted to instead provide incentives for individuals to participate in long-term, committed relationships—be they among romantic partners, platonic friends, neighbors, or extended family. As Cherlin notes, what is most important for children’s development is not the two-parent household specifically, but stability in general.¹⁴³ Third, laws should also indirectly support social recognition of parafamilial relationships, providing validation, and therefore, encouragement, for people to value and commit to nonmarital, nonnuclear family relationships.¹⁴⁴

What follows are particular guidelines and measures that will help recognize and support parafamilial relationships. The topics explored are not comprehensive. Because the primacy of marriage and the nuclear family is so deeply entrenched in American law and culture, we expect that there are as many opportunities to support parafamilial relationships as there are laws and regulations that give preferential treatment to spouses and nuclear families.¹⁴⁵ Developing recommendations in some areas of law would also require a more detailed

¹⁴² One powerful, earlier example of Congress advancing the nuclear family ideal, and the Supreme Court instead deciding to “get out of the way” of people living outside the nuclear family structure, is the case of *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535-38 (1973), discussed in Murray, *supra* note 17, at 422-23. In *Moreno*, the Supreme Court struck down an amendment to the Food Stamp Act that excluded households from participation in the program if they contained any unrelated members. *See Moreno*, 413 U.S. at 530. Jacinta Moreno shared a home with another woman, Emma Sanchez, and Emma’s three children, and both women shared living expenses. *See id.* at 531. The legislative history indicated the amendment was adopted to prevent “hippies” and “hippie communes” from participating in the food stamp program. *Id.* at 534, 537. However, the Supreme Court ultimately concluded that household composition was “irrelevant” to the Act’s purpose of eliminating hunger and malnutrition in the poor. *Id.* at 534.

¹⁴³ CHERLIN, *supra* note 2, at 11 (“I will suggest . . . that we spend less effort promoting marriage and more effort promoting stable family lives for children. These two goals are not the same.”).

¹⁴⁴ *See* Murray, *supra* note 17, at 413-14 (arguing “legal recognition is a powerful expression of the law’s acceptance of particular family arrangements as ‘normal’ and worthy[.]” which is important for marginalized communities, where “departures from the nuclear family ideal frequently are characterized as deviant and pathological, even though they are part of a larger cultural tradition of collaborative care”); Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC’Y REV. 869, 904 (1999) (“[L]egal recognition and validation of rights communicate normative judgments about the underlying rights themselves and those who claim them.” (citation omitted)).

¹⁴⁵ For a list of over one thousand places in federal law where legal marriage conferred a distinctive status, right, or benefit, see U.S. GOV’T ACCOUNTABILITY OFF., GAO/OCG 97-16, COMMITTEE ON THE JUDICIARY: DEFENSE OF MARRIAGE ACT (1997). “Most of the myriad references [in the report] stem from sections on Social Security, federal income tax and estate and gift taxes, and veterans’ benefits.” COTT, *supra* note 84, at 231 n.3.

treatment than is possible to accomplish fairly here. For instance, the question of who should be permitted to immigrate based on family relationship interacts with other non-family-related policy questions in immigration law about who is permitted to immigrate and when. Other authors and articles will be better positioned to consider how immigration and other fields of law could support parafamilial connections, with due regard for the complex realities of their field—and we hope they do. Indeed, it will be a victory if lawmakers and regulators *all* get into the habit of considering parafamilies in their respective areas of law.

A. *Recognizing Important Relationships*

Currently, the legal system places significant emphasis on identifying who is a spouse and who is a parent—understandably so, because of the innumerable rights and responsibilities that arise from those two statuses. However, these narrow categories do not recognize other kinds of meaningful parafamilial relationships or reinforce other important, supportive commitments. Accordingly, a major step in making a parafamilial turn in the law is to be open to creating new statuses that facilitate the development of important commitments and connections outside the nuclear family.

1. Domestic Partnerships and Beneficial Persons

Marriage comes with the default expectation that a married couple is planning their lives together—that they will live together, make financial decisions jointly, share responsibility for children born in the marriage, and inherit substantially from each other. Some of these expectations are not mandatory, and often prenuptial agreements, estate planning, and other private contracts can rearrange the default conditions of marriage. Nonetheless, the package of marital rights and responsibilities is substantial, and “opting out” of aspects of this arrangement is challenging, not least because there is no easily accessible list of all the federal, state, and local legal effects of marriage. Moreover, marriage is presumptively a sexual arrangement—a few states still require a marriage to be sexually consummated for it to be valid—and is limited to exactly one partner.¹⁴⁶ Resultingly, those who live their lives with more of a parafamilial focus might not wish to nor be legally able to marry those they most closely coordinate with, but may still want to indicate socially that someone is an important partner in life’s decision-making or to opt into a more limited set of shared rights and responsibilities. In particular, single people who want to make major life choices with blood relatives and friends, or polyamorous people who have more than one important relationship, may be interested in types of legally recognized partnership that are not as all-encompassing as marriage, or that do not presume a sexual component.

¹⁴⁶ See Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 350, 350 n.284 (2014) (citing statutes and cases requiring consummation of a marriage).

Some states have experimented with these alternative kinds of legal partnership in the past. “Domestic partnerships” or “civil unions” emerged in the years prior to *Obergefell v. Hodges* as mechanisms for same-sex partnerships to gain legal recognition without state governments having to directly confront societal hesitation to extend marriage rights to same-sex couples. But some of the laws passed in this time covered situations beyond same-sex relationships and permitted an even more general flexibility in recognizing different kinds of life partnerships. For instance, Vermont law used to recognize “Reciprocal Beneficiary Status,” an arrangement similar to its former same-sex civil union but available to blood relatives and those related by adoption.¹⁴⁷ Reciprocal Beneficiary Status allowed individuals to designate a relative through blood or adoption as their “point person” in life, so long as they were not already part of another beneficial relationship, civil union, or marriage.¹⁴⁸ When one person had a beneficial relationship with another, that individual “receive[d] the benefits and protections” and was “subject to the responsibilities” granted to spouses in particular areas, including hospital visitation and medical decision-making.¹⁴⁹ Hawaii and Colorado still have beneficiary statuses where one can name any other individual as a partner.¹⁵⁰ France and Canada have made statuses available for two people who share a home or who are economically interdependent, respectively, regardless of the conjugality of the relationships.¹⁵¹ Similarly, Washington, California, and New Jersey made older opposite-sex couples eligible to enter into domestic partnerships,¹⁵² in large part because elderly people often do not want to disrupt previous estate and financial planning with a late-in-life marriage, while still wanting to socially signal their partner’s importance and designate their partner as a “point person” for matters such as

¹⁴⁷ VT. STAT. ANN. tit. 15, §§ 1301-1306 (repealed 2013) (establishing reciprocal beneficiary relationship to provide blood relatives or those related by adoption with some benefits and responsibilities enjoyed by spouses).

¹⁴⁸ *Id.* § 1301.

¹⁴⁹ 2000 Vt. Acts & Resolves 72, 84 (granting reciprocal beneficiaries “the same rights as a spouse with respect to visitation and making health care decisions”).

¹⁵⁰ See John G. Culhane, *After Marriage Equality, What’s Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 382-85 (2015) (describing the eligibility requirements for Colorado’s “designated beneficiary status” and Hawaii’s “reciprocal beneficiary status”).

¹⁵¹ See Rosenbury, *supra* note 8, at 221-22 (discussing the French and Canadian statuses) (citing CARL F. STYCHIN, GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM 50-57 (2003)); Daniel Borrillo, *Who Is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity*, 17 YALE J.L. & FEMINISM 89, 91 (2005); LAW COMM’N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 2-5 (2001); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 218 (2003).

¹⁵² See CAL. FAM. CODE § 297 (West 2024); N.J. STAT. ANN. § 26:8A-4 (West 2024); WASH. REV. CODE ANN. § 26.60.010 (West 2024).

making health care decisions and eligibility for hospital visitation when a hospital limits visits to “family.”¹⁵³

These types of domestic partnership agreements were on the right track—recognizing that people often want to designate a particular other as a supportive figure, logistical helper, and decision-making proxy in times of stress, illness, and death, without necessarily committing to fully intertwine all aspects of life in a marriage. However, these designations remain only narrowly available. They are also limited to exactly one person and, as a result, “encourage individuals to focus time and energy on one interdependent relationship rather than pursuing a range of intimate relationships.”¹⁵⁴ So while these types of laws helpfully expand the circumstances in which one can create legally significant relationships of support, they “maintain[] a hierarchy between family and friends by recognizing friendship only when it functions like a family.”¹⁵⁵ A more parafamilial approach would not limit partnerships and beneficial relationships to just one person.

Very recently, multipartner domestic partnership agreements have been proposed and adopted in several cities in Massachusetts, including Somerville, Cambridge, and Arlington.¹⁵⁶ According to Matthew McLaughlin, the president of Somerville’s City Council, the COVID-19 pandemic motivated the town council to create multipartner domestic partnerships in order to increase access to health care and partners’ health insurance.¹⁵⁷ J.T. Scott, a city councilor, stated that “he knew of at least two dozen polyamorous households in Somerville, which has a population of about 80,000.”¹⁵⁸ So, in June 2020, the city of Somerville, Massachusetts, passed an ordinance that did not restrict a “domestic partnership” to only two people.¹⁵⁹ The ordinance defines “domestic partnership” as “the entity formed by people” that satisfy several criteria, including that they “are in a relationship of mutual support, caring, and commitment and intend to remain in such a relationship” and “consider themselves to be a family.”¹⁶⁰ The ordinance “afford[s] persons in domestic

¹⁵³ See, e.g., WASH. REV. CODE ANN. § 26.60.010 (describing rationale for extending domestic partnership to opposite-sex couples where at least one member is aged sixty-two or older).

¹⁵⁴ Rosenbury, *supra* note 8, at 222-23.

¹⁵⁵ *Id.* at 224.

¹⁵⁶ For a further discussion of multi-partner domestic partnership laws, see generally Kaiponanea T. Matsumura, *Beyond Polygamy*, 107 IOWA L. REV. 1903 (2022).

¹⁵⁷ Ellen Barry, *A Massachusetts City Decides to Recognize Polyamorous Relationships*, N.Y. TIMES, <https://www.nytimes.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html> (last updated July 3, 2020).

¹⁵⁸ *Id.*

¹⁵⁹ Somerville, Mass., Ordinance 2020-16 (June 25, 2020), https://library.municode.com/ma/somerville/ordinances/code_of_ordinances?nodeId=1028806.

¹⁶⁰ SOMERVILLE, MASS., CODE OF ORDINANCES § 2.502(c) (2023), https://library.municode.com/ma/somerville/codes/code_of_ordinances?nodeId=PTIICOR_CH2AD_ARTIXDOPA.

partnerships all the same rights and privileges afforded to those who are married” and interprets “spouse,” “marriage,” and “family” to include domestic partnerships when used in other city ordinances, except to the extent that the provision of such rights “contravene[s] the general laws of the Commonwealth.”¹⁶¹

Aided by advocacy efforts of the Polyamory Legal Advocacy Coalition,¹⁶² the city of Cambridge in March 2021¹⁶³ and the town of Arlington in April 2021¹⁶⁴ voted to amend their respective laws on domestic partnerships to specifically recognize domestic partnerships involving two or more persons.¹⁶⁵

This recognition affords rights to individuals in serious parafamilial relationships that are typically only available to nuclear families. For example, partnered individuals will be permitted to visit each other in healthcare and correctional facilities. This legal recognition also ensures that there is more logistical support for childcare by requiring schools to provide a parent’s domestic partners with “access to the child’s records, access to school personnel in matters concerning the child, and access to the child, including the right to remove such child from the school for sickness or family emergency.”¹⁶⁶

At the urging of the Polyamory Legal Advocacy Coalition, Cambridge also removed requirements that domestic partners reside together or share basic living expenses, thereby allowing for further recognition of families beyond

¹⁶¹ *Id.* §§ 2.505, 2.506.

¹⁶² See *Cambridge Becomes 2nd US City to Legalize Polyamorous Domestic Partnerships*, POLYAMORY LEGAL ADVOC. COAL. (Mar. 9, 2021), <https://polyamorylegal.org/press/d5ydlvtmb8su74osh2wj0jsujfro2y> [<https://perma.cc/6T87-NCML>] (advocating for recognition and protection of multi-partner families).

¹⁶³ Cambridge, Mass., Ordinance 2020-14 (Mar. 8, 2021), https://library.municode.com/ma/cambridge/ordinances/code_of_ordinances?nodeId=1072098.

¹⁶⁴ See Jesse Collings, *Town Meeting Approves Domestic Partnership for Relationships with More than Two People*, WICKED LOC., <https://www.wickedlocal.com/story/arlington-advocate/2021/04/30/arlington-approves-domestic-partnerships-polyamorous-relationships/7410640002/> [<https://perma.cc/JPR7-FWX3>] (last updated Apr. 30, 2021, 3:52 PM).

¹⁶⁵ Concerns surrounding the legality of laws recognizing multiple partnerships have been raised in light of the federal prohibition on bigamy and polygamy. However, because the aim of these laws is to create structures outside of nuclear marriages which are not marriages, supporters of multi-partner domestic partnerships generally argue this type of legal recognition does not necessitate the decriminalization of polygamy. Four states, California, Colorado, Maryland, and Washington, and the District of Columbia have criminalized multiple domestic partnerships. See CAL. PENAL CODE § 5-281 (West 2024) (bigamy); COLO. REV. STAT. § 18-6-201 (2024) (bigamy); MD. CODE ANN., CRIM. LAW § 10-502 (LexisNexis 2024) (bigamy); WASH. REV. CODE ANN. § 26-04-020 (West 2024) (bigamy); D.C. CODE ANN. § 22-501 (West 2025) (bigamy). In these jurisdictions, anti-polygamy and anti-bigamy statutes would likely have to be repealed or modified before multiple-partnership ordinances could be adopted. This has deterred advocates from introducing multi-domestic partner legislation in those states.

¹⁶⁶ CAMBRIDGE, MASS., MUN. CODE § 2.119 (2024), https://library.municode.com/ma/cambridge/codes/code_of_ordinances?nodeId=TIT2ADPE_CH2.119DOPA.

those that look like the traditional, nuclear family.¹⁶⁷ Counterintuitively, many existing two-person domestic partnership ordinances impose sterner requirements on domestic partners than states do on married couples, including by requiring that domestic partners, unlike married couples, must reside together, financially support each other, and hold themselves out as a family.¹⁶⁸ As one of us testified to the Cambridge City Council prior to the passage of the revised ordinance, this distinctive aspect of domestic partnership ordinances is attributable to prejudice rather than legal necessity. The gay activists who invented the term “domestic partnership” and introduced the first domestic partnership ordinances purposefully designed them to contain more restrictive standards as compared to marriages, in order to combat popular prejudices that gay couples were less committed to each other than straight couples.¹⁶⁹ In essence, same-sex couples were willing to be held to an idealized, “marriage-like” standard of behavior in order to receive fewer rights than married heterosexual couples, just to prove that their relationships were worthy of legal protection.¹⁷⁰ The Cambridge City Council wisely chose not to carry that prejudice forward.

The social and legal recognition provided by flexible domestic partnership laws creates both direct and indirect benefits to participants. Directly, the laws allow people in important, committed relationships who can’t or don’t want to get married to establish each other as key parafamilial figures that other institutions like hospitals and schools ought to recognize, respect, and treat in accordance with that status. Indirectly, legal recognition of partnerships has a dignitary impact. As Amos Meeks, an Arlington resident who has two life partners and proposed the Arlington ordinance, observed:

We are a family by any reasonable sense of the word, but not in the eyes of the town or the state. I think a really important part of laws like this is just recognition and external validation. . . . (When the ordinance was

¹⁶⁷ See *id.*

¹⁶⁸ See Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1203-04 (2010) (comparing requirements for domestic partners versus married spouses in different jurisdictions, and observing that unlike many domestic partnership regimes, “[a] marriage certificate now allows heterosexual couples to have an open marriage, to live in different cities or in different apartments in the same city, to structure their finances as they please, without having their commitment or the legal benefits that follow from it challenged”); see also Claudia Card, *Against Marriage and Motherhood*, HYPATIA, Summer 1996, at 1, 12 (“[E]ligibility for the benefits of domestic partnership may be more restrictive than marriage.”).

¹⁶⁹ See Leland Traiman, *A Brief History of Domestic Partnerships*, GAY & LESBIAN REV., July-Aug. 2008, at 23, 23 (explaining original domestic partnership framework was designed to mirror stability and strictness of marriage, with added requirements to counteract prejudices against same-sex couples); NeJaime, *supra* note 139, at 114-21.

¹⁷⁰ See NeJaime, *supra* note 139, at 121; see also Case, *supra* note 168, at 1203-04.

approved) I felt welcomed and accepted by my neighbors. I felt proud to be part of this community¹⁷¹

As this Article has emphasized throughout, the goals of committed relationships are human flourishing and providing care. By reinforcing meaningful partnerships publicly, flexible domestic partnership laws can bolster the bonds between those who organize their lives around parafamily and better facilitate care and flourishing.

2. Semi-Parenthood

The law of parent-child relationships is large and multifaceted, and therefore this Article's discussion will leave to the side the question of who can qualify as a parent and under what circumstances, with the note that some states' choice to allow a child to have more than two legal parents is a positive one. This Article also does not engage with issues like those explored by the Supreme Court in *Troxel v. Granville*,¹⁷² concerning how the legal system should respond to conflict between parents and other adults who have an important quasi-parental relationship with a child.¹⁷³ Michael Higdon's article *The Quasi-Parent Conundrum* explores this question in great depth, with the aim of offering "guidance on specific ways to make the law of quasi-parenthood more reflective of the contemporary family and less discriminatory toward family structures that stray from the traditional nuclear family model."¹⁷⁴

In contrast to asking who can be a parent or who wins in a conflict over a child, this Section will focus on how law reform could help parents voluntarily legitimize the role of other caregivers in their children's lives, for whom legal parenthood would not be the right fit. Many individuals—neighbors, a parent's close friends, and extended family—can have an important and supportive role in a child's life. But often those individuals would not want to take on the full responsibility of child-rearing, at least while a child's parents were still alive and able to care for their child, or the existing parents would not want to permanently share decision-making authority about the child with these individuals as full coparents.

As Laura Kessler posited in 2007, "[W]e may need to further disaggregate the bundle of parental rights. Currently, it is all or nothing. You are in or out—a

¹⁷¹ See Collings, *supra* note 164; see also Matsumura, *supra* note 156, at 1905 (observing Somerville's official recognition of multi-partner relationships "amounts to a declaration by the city that plural relationships are valuable and worthy of respect").

¹⁷² 530 U.S. 57 (2000).

¹⁷³ See *id.* at 63.

¹⁷⁴ Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941, 949-50 (2019); see also Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 881-82 (1984) (exploring how the law should regard relationships that form between children and adults outside of the nuclear family and urging states not to presume exclusivity of parenthood).

legal parent or a stranger.”¹⁷⁵ Care needs to be taken in facilitating parafamilial recognition in a way that neither problematically undermines parental rights nor imposes parenting obligations on those who did not agree to them.¹⁷⁶ But reforms that completely preserve parental authority and do not unwillingly impose responsibilities on anyone are possible. Inspiration can be taken from the increasingly popular “power of attorney,” a legal instrument able to grant another a power to act financially and legally on one’s behalf. States could create a form that would allow parents to revocably grant authority to stepparents, neighbors, and relatives to pick up children from school, make medical decisions if parents are unavailable, or otherwise take consequential actions on the child’s behalf.¹⁷⁷ This effective “durable power of parenting” would have to be accepted by the power holder and could be revoked at any time by a parent, thereby returning all legal authority over a child to the legal parents. The availability of such power would be beneficial to legitimizing and identifying important kinship relationships otherwise unseen by the state and may have the knock-on effect of incentivizing parental powerholders to be more committed to their formalized and official role.

A substantially more challenging issue arises in situations where parents are no longer able to take care of their children, but the most stable adult figures in a child’s life have not been extended family members. Writing in 1996, Barbara Bennett Woodhouse lamented the way departments of human services and child protective services did not recognize kinship relationships that had developed between those who were not legally family.¹⁷⁸ In one story, Woodhouse recounted how a woman, whom she called Mrs. Hoover, had taken care of her “godchild” for months at a time while her mother struggled with mental illness.¹⁷⁹ When the Philadelphia Department of Human Services removed the child and her sibling from their mother, Hoover volunteered to take in her godchild with the consent of the child’s mother.¹⁸⁰ However, because she was not a relative of the child, the DHS “treated Mrs. Hoover as if she were a

¹⁷⁵ Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47, 74 (2007); see also Elizabeth J. Aulik, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C. DAVIS L. REV. 604 (1979) (exploring intermediary parenting status for stepparents).

¹⁷⁶ Cf. Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 640-44 (2002) (arguing that recognizing functional parents could undermine legal parents’ authority); June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1304-06 (2005) (suggesting legal recognition of “functional parents” imposes obligations on people who did not necessarily agree to become parents).

¹⁷⁷ This proposal bears some resemblance to the custodial power of attorney and standby guardianship designations described in Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 579-589 (2019).

¹⁷⁸ See Woodhouse, *supra* note 20, at 597-98.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 598.

‘stranger’ engaging in an act of altruism or charity.”¹⁸¹ Woodhouse opined, “DHS’s mistake, in Mrs. Hoover’s case, was not in preferring family resources over public charity, but in failing to see that this child was ‘family’ to her ‘Godmomma.’”¹⁸² From a parafamilial perspective, one would not need to ask whether Mrs. Hoover “really” was part of the child’s family. Instead of line drawing, the substance of the pair’s relationship would be what was important, particularly Mrs. Hoover’s longstanding caretaking role and the child’s mother’s support for the relationship.

One example of American law recognizing the importance of nonfamilial kinship relationships is the Indian Child Welfare Act of 1978, which was enacted out of concern that state agencies were perpetuating the policies of Indian removal described *supra* in Section II.A by continuing to remove children from “an alarmingly high percentage of Indian families” and placing them in “non-Indian foster and adoptive homes and institutions,”¹⁸³ with “devastating effects on children and parents alike.”¹⁸⁴ The law, which was upheld by the Supreme Court in 2023, recognizes the value of Indian kinship relationships and cultural ties by establishing a hierarchy where preferences are given for adoption placements with “(1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families” over unrelated non-Indians.¹⁸⁵

The myriad matters that contribute to removing children from their parents, or placing children with new guardians when their parents or guardians are deceased or unable to provide care, are beyond the scope of this Article, and as a result this Article does not take a position on particular policy prescriptions in those areas. However, as a general matter, a policy of supporting parafamilial relationships would allow for a parent and child’s genuine connections with nonrelatives to be recognized. Existing “powers of parenting” could even serve as *prima facie* evidence of a meaningful semi-parent-like relationship, helping to distinguish those with important relationships to a child from well-meaning strangers.

B. *Family-Neutral Reforms*

This Article does not call for the extension of any *particular* benefits to parafamilial connections. However, where the law privileges the relationships of spouses or monogamous domestic partners, but not platonic relationships or nonmonogamous domestic partners, lawmakers ought to consider revision. By

¹⁸¹ *Id.* at 599.

¹⁸² *Id.* at 600.

¹⁸³ See Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1963); *Haaland v. Brackeen*, 599 U.S. 255, 265 (2023) (quoting 25 U.S.C. § 1901(4)-(5)).

¹⁸⁴ *Haaland*, 599 U.S. at 297 (Gorsuch, J., concurring).

¹⁸⁵ *Id.* at 267 (majority opinion) (quoting 25 U.S.C. § 1915(a)). Similar preferences are mandated for foster care placements. *Id.* (quoting 25 U.S.C. § 1915(b)).

granting privileges to nuclear-family relationships only, the legal system reinforces the idea that the preferred relationship structure is the nuclear family, a sexual dyad with children, as opposed to other supportive parafamilial arrangements. Limiting benefits to spouses and similar relationships also creates pressure on individuals to conform their behavior to more traditional norms in order to be eligible for benefits, and to distance themselves from parafamily to their detriment.

1. Government & Workplace Benefits

The Federal Government's Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002 ("Benefit Act") illustrates how federal benefit programs could be structured to be more inclusive of all relationships.¹⁸⁶ The Benefit Act extended eligibility for a \$250,000 federal benefit for survivors of public safety officers killed in the line of duty to any "individual designated by such officer as beneficiary under such officer's most recently executed life insurance policy," so long as the officer did not have a surviving spouse or child.¹⁸⁷ A prior version of the law had limited eligibility for the benefit to a deceased officer's parent, child, or spouse only.¹⁸⁸ While not explicitly styled as a law designed to extend benefits to same-sex partners, commentators at the time of its passage noted that the Benefit Act was a step toward federal recognition of same-sex relationships.¹⁸⁹ In fact, the law functions as a way for public safety officers to designate *any* important person as eligible to receive government aid if the worst befalls them. These kinds of legal mechanisms are excellent ways to support parafamilial relationships. They are flexible and capable of accommodating a variety of parafamilial realities, but the objective criteria of tacking eligibility to an officer's life insurance policy kept the administrative burden of implementing the policy low.

Other opportunities to make laws more inclusive of parafamilial relationships will depend on the nature of the law but may be present anywhere a law gives rights or benefits to family members. For instance, as Deborah Widiss has discussed, some states have begun to extend family leave to people in informal

¹⁸⁶ Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (codified as amended at 42 U.S.C. §§ 3796, 3796b). See generally *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 1999 (2003) (discussing effect of the Benefit Act on same-sex couples).

¹⁸⁷ § 2(b)(4), 116 Stat. at 719; *Developments in the Law—The Law of Marriage and Family*, *supra* note 186, at 1999.

¹⁸⁸ H.R. REP. NO. 107-384, at 3 (2002).

¹⁸⁹ See *Developments in the Law—The Law of Marriage and Family*, *supra* note 186, at 1999 (citing Mike Allen, *Law Extends Benefits to Same-Sex Couples: Firefighters, Officers Killed on Duty Covered*, WASH. POST, June 26, 2002, at A8) ("[T]he White House acknowledged in a one-sentence e-mail that President Bush had signed into law a bill allowing members of same-sex couples to receive federal death benefits.").

relationships.¹⁹⁰ These state laws take several different approaches, including extending benefits to interdependent partners, allowing workers to demonstrate that a relationship is equivalent to an established family relationship, allowing “partners to claim that they have a significant personal bond,” or covering any relationship “in which the ill individual is dependent upon the worker for care.”¹⁹¹ As Kaiponanea Matsumura observes, the “latter two approaches, which depend more on self-identification or caregiving (rather than financial interdependency) come closer to vindicating the purposes of family leave and should be emulated and extended.”¹⁹² They also facilitate mutual care among those prioritizing their parafamilial connections.

Workplaces could also choose to adopt more parafamily-friendly policies, to more effectively recruit and retain employees who prioritize parafamilial connections. Most easily, they could ensure that where beneficiaries can be chosen, any person can be listed. More challenging are questions surrounding extension of health insurance policies and other types of benefits enjoyed by spouses to workers’ nonmarital partners, because employers would generally prefer to avoid carrying the cost of more people’s care.¹⁹³ But as long as health insurance remains bizarrely tied to employment, if we want to encourage commitment and mutual support throughout society, workers should be able to advocate for broader benefit eligibility from their employers, and workplaces ought to take steps to offer it.¹⁹⁴ Worries about potential abuse are understandable, but addressable. Just as the multipartner domestic partner ordinances do, workplaces could require eligible partners to affirm they are “in a relationship of mutual support, caring and commitment” with the intent to “remain in such a relationship” and to “consider themselves to be a family.” Someone who fabricates multiple partnerships among acquaintances to extend health insurance to friends could be liable for fraud if they misrepresent the nature of their situations.

It’s important for workers and their advocates to recognize the prejudices and value judgements that might underlie a workplace’s hesitation to extend benefits. To highlight a historic example, the restrictive criteria for same-sex domestic partnership benefits described in Section III.A partially were responses to fears that—amid the backdrop of the AIDS crisis—LGBT people would

¹⁹⁰ See Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J.F. 215, 230-34 (2021); Matsumura, *supra* note 156, at 1956-57 (arguing that extending eligibility for family leave based on caregiving and claiming a significant bond with a partner better reflects the purpose of the policies than eligibility based on traditional relationship roles).

¹⁹¹ Matsumura, *supra* note 156, at 1956 (citing Widiss, *supra* note 190, at 230-34).

¹⁹² *Id.* at 1956-57.

¹⁹³ Cf. NeJaime, *supra* note 139, at 141 (describing how during the AIDS crisis, some employers worried that domestic partnership laws would allow individuals to extend benefits to friends with AIDS).

¹⁹⁴ Non-discrimination laws protecting people regardless of family structure, discussed *infra* Section III.D, will be an important factor to facilitate employees being comfortable advocating for parafamily-friendly workplace benefits.

become domestically partnered with their friends to help them gain access to health insurance, with a consequent impact on the bottom lines of employers and insurers.¹⁹⁵ As one benefits manager put it, “An employee could say to a friend who was dying of AIDS, ‘Yes, you’ll be my partner for the remainder of your life.’”¹⁹⁶ Similar concerns animated the inclusion of requirements that same-sex domestic partners not be related to each other by blood.¹⁹⁷ While it is true that workplaces can fairly consider their bottom line, it is still worth noting *when* it appears culturally acceptable for such considerations to come into play. It would seem monstrous for a workplace to limit an employee’s health care coverage to their first three children but refuse to cover a fourth.

We do not expect workplaces to extend benefits to multiple partners anytime soon, but we do urge other workplaces and government entities to keep an eye on the “laboratories of democracy” of Somerville, Arlington, and Cambridge.¹⁹⁸ Their multipartner domestic partnership ordinances require the local government to extend benefits to partners of those who work for the local government, even where a worker has more than one partner. Soon it will be possible to see whether this eligibility invites any abuse—and to invite other entities to adopt similar rules when the evidence is in.

2. Zoning Laws

Adjusting zoning laws to be family neutral would also provide a major benefit to adults living in parafamilial arrangements. Numerous municipalities limit the

¹⁹⁵ See NeJaime, *supra* note 139, at 141 (“On one hand, the AIDS crisis highlighted the need for the rights conferred by domestic partnership; healthcare coverage, medical decision making, hospital visitation, and survivors’ rights for same-sex couples took on a new sense of urgency. On the other hand, HIV/AIDS complicated the demand for domestic partner coverage by heightening the financial concerns voiced by insurance carriers and employers. Some employers worried that domestic partnership provisions would allow individuals to cover ailing friends.” (footnotes omitted)).

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* at 136 (highlighting the testimony of an insurance company executive in response to San Francisco’s consideration of a domestic partnership ordinance in 1989 that “when the restriction, ‘not related by blood or marriage,’ is taken out, carriers . . . lose interest” because “[t]he selection element—adding relatives who have the greatest need for health coverage—would drive up the costs”). Cambridge’s revised ordinance still requires that domestic partners are “not related by blood closer than would bar marriage in the Commonwealth of Massachusetts.” See CAMBRIDGE, MASS., MUN. CODE § 2.119.020 (2024), https://library.municode.com/ma/cambridge/codes/code_of_ordinances?nodeId=TIT2ADPE_CH2.119DOPA.

¹⁹⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[I]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

number of unrelated individuals who can live in a single home.¹⁹⁹ Rather than function as a regulation about overcrowding, these limitations generally are unrelated to the size of the house and do not apply to large nuclear families. Often these regulations are motivated by a desire to keep large groups of twenty-somethings or college students from living in a neighborhood and changing its “character,” but these regulations also serve to prevent individuals who do not live in nuclear families from coming up with arrangements that solve their own problems concerning dependent care.²⁰⁰

For instance, single mothers increasingly turn to each other to provide mutual support for their children—so much so that there’s now a website, CoAbode, that matches single mothers who want to cohabitate. CoAbode’s founder and a single mother herself, Carmel Sullivan, described to Bella DePaulo why parents gravitate to the site: “Single-parent families flock to CoAbode not just to share dwellings but also to share lives.”²⁰¹ Most mothers who sign up for CoAbode have a low income, but others live in mansions. Carmel explained, “the motivation to live together is not just about money—it is also about loneliness.”²⁰² The *New York Times* similarly ran an essay in early 2023 describing single mothers banding together to form a household.²⁰³ In that piece, single mother Kristin Batykefer, living with four adults and three children, expressed the support and care she had felt in that arrangement when she got sick and her housemates made her soup and handled childcare responsibilities. “Support system like no other Shoulda moved into a mommune a long time ago,” she said, using a portmanteau of “mom” and “commune.”²⁰⁴ Another mother, Herrin Hopper, opined:

In the patriarchal, heteronormative story, you get divorced and stay in the house, or you buy another home, and you live this isolated life where you’re supposed to date and fall in love again and get remarried or blend

¹⁹⁹ See Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1, 2 (2020) (providing an overview of zoning restrictions for unrelated people living in one home).

²⁰⁰ See Michael Waters, *Where Living with Friends Is Still Technically Illegal*, ATLANTIC (May 22, 2023), <https://www.theatlantic.com/family/archive/2023/05/zoning-laws-nuclear-modern-family-definition/674117/> (describing how one woman had to fight a cease-and-desist letter demanding her household of eleven people leave a nine-bedroom mansion because of a law limiting more than two unrelated people from cohabiting); see also Kate Redburn, *Why Are Zoning Laws Defining What Constitutes a Family?*, BLOOMBERG (June 17, 2019, 8:48 AM), <https://www.bloomberg.com/news/articles/2019-06-17/zoning-law-shouldn-t-define-what-makes-a-family> [<https://perma.cc/KE5W-MTDU>] (“By uncoupling the definition of family from residential limits, all kinds of chosen families—foster families, communes, students, seniors, and group homes—would be able to live together legally.”).

²⁰¹ DEPAULO, *supra* note 43, at 124.

²⁰² *Id.*

²⁰³ Debra Kamin, *‘Mommunes’: Mothers Are Living Single Together*, N.Y. TIMES (May 12, 2023), <https://www.nytimes.com/2023/05/12/realestate/single-mother-households-co-living.html>.

²⁰⁴ *Id.*

families It seems like it's always a binary, and we have dispelled this myth that there's only one path forward.²⁰⁵

If a policy goal is to facilitate parents finding their own solutions to childcare needs and building supportive, stable homes, rather than to advance the nuclear family as an end in itself, municipalities should be encouraging these sorts of arrangements where single parents band together. However, depending on the zoning laws in particular neighborhoods, some of these arrangements could be illegal solely because the household members do not legally qualify as part of the same family.

Some municipalities are already taking the lead on passing laws supporting “functional families,” as the term is often used in zoning law.²⁰⁶ A Burlington, Vermont, ordinance states that a “functional family unit,” as determined by a many-factor standard, constitutes a family for zoning purposes.²⁰⁷ Mount Pleasant, Michigan, provides that families can include functional families, which are defined as having “a permanent and distinct character with a demonstrable and recognizable bond characteristic of a cohesive unit.”²⁰⁸ But just as there have traditionally been heightened requirements to enter a domestic partnership compared to a marriage, even though the former offers fewer benefits and protections,²⁰⁹ typically “there are more restrictions imposed on the functional family than on the ‘traditional’ related family. . . . [T]he law does not ‘care’ whether [blood relatives] share meals together, or whether Grandma . . . and her sprawling clan share a household budget.”²¹⁰ Some jurisdictions only inquire about a functional family’s relationships if there is some action against them; others seem to require advanced approval to live as a functional family in a single-family zoned area.²¹¹

Laws that give any path for recognizing “functional families” are a very welcome start, but even they are influenced by the nuclear family ideal—the notion that there is a particular family unit that one is *within* or *without* and that

²⁰⁵ *Id.*

²⁰⁶ See Bronin, *supra* note 199, at 2 n.6 (detailing the legal use of “functional family” and “intentional community” on Westlaw).

²⁰⁷ BURLINGTON, VT., COMPREHENSIVE DEV. ORDINANCE art. 13 (2018), https://outside.vermont.gov/agency/ACCD/bylaws/Bylaws%20and%20Plans%20Approved/Burlington_AdoptedAmendments_Bylaws_February_2018.pdf [<https://perma.cc/6TG8-ZAKV>] (defining family as including a “functional family unit” as well as families connected by blood, adoption, marriage or civil union), *cited in* Waters, *supra* note 200.

²⁰⁸ MOUNT PLEASANT, MICH., CITY CODE ORDINANCE 927, § 152.004 (2007); MOUNT PLEASANT, MI, ZONING ORDINANCES § 154 art. VII (2017) (defining “family” and “functional family”); *see also* ANN ARBOR, MICH., UNIFIED DEV. CODE, ch. 55, art. VIII, § 5.37.2 (2018).

²⁰⁹ See Case, *supra* note 168, at 1203-04 (contrasting flexibility of marriage with strict requirements for domestic partnership like living together, comingling finances, and being sexually faithful).

²¹⁰ Bronin, *supra* note 199, at 6-7.

²¹¹ *Id.* at 9-12.

whether someone is inside or outside a family has significant legal consequences. A parafamilial approach would put less emphasis on whether a cohabiting group share a single household budget and eat meals together, and instead encourage people to live in supportive environments, regardless of whether they merge finances and furniture. Moreover, recognizing that not every important relationship looks like a nuclear family facilitates relationships becoming *more* committed over time. What starts as a group of roommates might over time become a deeply connected and committed permanent arrangement.²¹²

One way to approach zoning in a parafamilial way is to follow what Sara Bronin calls “the density model”—an approach that would “aim to control the number of people living in a particular type or size of dwelling unit, without regulating for character of the relationships of members of a household.”²¹³ Under this approach, municipalities could address crowding concerns without having to determine who did and did not count as a family by asking invasive questions about shared bank accounts and dining habits.²¹⁴ Other neighborhood goals could be achieved through regulation more directly aimed at a community’s concerns. For example, maintaining a quiet suburban neighborhood would be more directly and fairly achieved by passing and enforcing regulations concerning loud noise at night, rather than by limiting the number of unrelated people who can live in a home in the hopes of keeping young partygoers away.

Ideally, zoning boards and municipalities would facilitate parafamilial households through family-neutral zoning rules, or at a minimum, recognizing a broad definition of functional family. But where they do not, there are still some legal avenues for expanding the rights of those living outside the nuclear family structure. Although in *Village of Belle Terre v. Boraas*,²¹⁵ the Supreme Court upheld restrictions on the number of unrelated individuals who can live together as not violating one’s right to freedom of association under the First Amendment,²¹⁶ there remains some ability to challenge restrictive single-family zoning laws in general or in particular cases. Bronin observes, after canvassing a variety of cases, that courts sometimes recognize “functional families” even in cases where the law in question does not include them.²¹⁷ Moreover, as Rigel Oliveri argued, *Belle Terre* sits in tension with some more recent Supreme Court precedent on privacy and rights of intimate association, although the current

²¹² See, e.g., Ianzito, *supra* note 9; Howard, *supra* note 9.

²¹³ Bronin, *supra* note 199, at 34.

²¹⁴ *Id.* (“[T]he density model of regulations protects privacy Households need not submit applications with affidavits stating that they dine together or share a bank account.”).

²¹⁵ 416 U.S. 1 (1974).

²¹⁶ *Id.* at 7.

²¹⁷ Bronin, *supra* note 199, at 13-29 (canvassing and analyzing cases concerning the legal treatment of functional families).

composition of the Supreme Court puts some of that precedent in question.²¹⁸ But even if the federal constitutional arguments Oliveri identifies are less likely to be available, similar actions may be viable under state constitutional law.

3. Altering Adultery Laws

Finally, laws that punish behavior outside the norms of monogamous marriage and the nuclear family should be amended to allow for consensual, ethical alternative arrangements—or, in some cases, eliminated completely. In particular, antiquated laws criminalizing adultery ought to be repealed or amended to require the adultery be nonconsensual.²¹⁹ These laws are rarely enforced—and resultingly, are rarely enforced in an even-handed way.²²⁰ Without a consent exception, they put at risk innumerable married couples engaged in consensual and ethical nonmonogamy. And most importantly, they prevent the public establishment of polyamorous relationships where any subset of the group is married.²²¹ Consider, for example, members of a lesbian “triad” or “throuple” in Massachusetts who described how they used a combination of marriage and other legally binding documents to create a relationship in which the three members of the relationship “felt equal.”²²² In a comment to a blog post

²¹⁸ Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1404, 1434-35 (2015) (stating how the Court, during the same time period as the *Belle Terre* decision, “was recognizing an increasingly robust right of association in the context of intimate relationships and strong ‘spatial privacy’ rights within the home.”).

²¹⁹ See Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. 147, 178-79 (2020) (describing both an “abolitionist” approach to adultery laws and a “revisionist” approach which would permit adultery in the context of consensual nonmonogamy); see also Linda S. Anderson, *Marriage, Monogamy, and Affairs: Reassessing Intimate Relationships in Light of Growing Acceptance of Consensual Non-Monogamy*, 22 WASH. & LEE J. C.R. & SOC. JUST. 3, 6 (2016); Emens, *supra* note 123, at 364 (arguing for repealing adultery laws that are rarely enforced). Some have argued that adultery laws are unconstitutional after *Lawrence v. Texas*, 539 U.S. 558, 564-579 (2003) (holding Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct as unconstitutional). See, e.g., Andrew D. Cohen, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605 (2010); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 860 (2006) (discussing viability of adultery statutes following *Lawrence* decision).

²²⁰ See DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 60-61 (2016) (“Enforcement of criminal prohibitions has been infrequent, intrusive, idiosyncratic, and ineffectual, and should be unconstitutional.”).

²²¹ See Stein, *supra* note 219, at 163 (“States, through their laws, say what is good and bad. Even when a law is rarely used or never enforced, as long as people know (or believe) that the law takes a negative attitude toward a behavior, it thereby shapes and reinforces social attitudes, pushes the behavior underground, and keeps it secret.”).

²²² See Kitten, Brynn, and Doll’s *Rainbow Garden of Poly Love Three-Bride Wedding*, OFFBEAT WED, <https://offbeatwed.com/massachusetts-lesbian-poly-wedding/> [https://per

about their wedding, one woman in the triad explained that she and one of her partners legally married because she needed access to that partner's health insurance.²²³ Massachusetts repealed its adultery law in 2018, but in Wisconsin adultery is still a crime both for the spouse and any party outside the marriage.²²⁴ If this triad lived in Wisconsin, all three of them would regularly be committing a crime, despite acting completely within the terms of the relationship they created. This absurdity can be easily corrected by repealing adultery laws or adding nonconsensuality as an element of the crime.²²⁵ Nonconsensual adultery can also remain a consideration in the adjudication of divorce cases. But polyamorous individuals should not be made criminals for loving and supporting multiple individuals. Moreover, the presence of adultery laws that lack exceptions for consent have an important symbolic, messaging effect as well. As they stand, they indicate that the government believes that there is *no* circumstance where a nonmonogamous marriage is acceptable and that nonmonogamy in a marriage is always the proper subject of censure, regardless of how its participants feel about it. But as the triad example illustrates, individuals may have many reasons for being nonmonogamous and married, and adultery statutes harmfully stigmatize supportive, committed polyamorous relationships that the law should instead celebrate as contributing to their members' flourishing and care.

ma.cc/LU4P-5Y65] (describing the triad family referenced *supra* note 65, with one partner noting, "[a]s being married to more than one person is not yet legal, we had to combine handfasting, legally binding documents, and legal marriage to come to a configuration we all felt equal in").

²²³ Kitten, Comment to *id.*; Kirkova, *supra* note 65 (noting Kitten and Brynn were legally married).

²²⁴ WIS. STAT. ANN. § 944.16 (West 2024) (declaring that "[a] married person who has sexual intercourse with a person not the married person's spouse; or . . . [a] person who has sexual intercourse with a person who is married to another" is guilty of a Class I felony).

²²⁵ See Stein, *supra* note 219, at 177-86 (describing in greater detail methods to decriminalize adultery and limit other negative legal consequences of consensual nonmonogamy). Stein raises the important matter that, in practice, it may sometimes be difficult to differentiate between consensual nonmonogamy and infidelity in a legal context. *Id.* at 184 (noting distinction between consensual nonmonogamy and nonconsensual nonmonogamy "may not be robust, either in theory or in practice"). This is all the more reason to take care in lawmaking when amending adultery statutes and laws. For example, to make sure consensual nonmonogamy is not retroactively and mistakenly taken to be criminal, lawmakers could choose to make nonconsent an element of criminal adultery which must be proven by the prosecution, rather than a defense which must be established by a defendant. But regardless, any exception for nonmonogamy will take the important step of signaling to the public that not all adultery is wrongful. *Cf. id.* at 163-64 (explaining the expressive nature of adultery laws "creates a stigma around marriages that are in any way non-monogamous").

C. *Ex-Ante Registration and Equitable Ex-Post Recognition*

Making zoning laws family neutral and allowing individuals to choose who receives survivors' benefits are situations where the choice to support parafamily could be fairly straightforward. In both of these cases, those in parafamilial arrangements would clearly benefit from the change. The deceased officers' designees would benefit when otherwise no one else would receive the benefit; the parafamilies previously subject to restrictive zoning would get to live together when they otherwise wouldn't.

Developing the right laws that support parafamily are trickier when the law involves recognizing statuses or preferences that are not universally desirable or are contestable in fact. For example, the American Law Institute has proposed principles which, if followed, would transform certain cohabiting relationships into something marriage-like, creating not just benefits for the participants but also obligations.²²⁶ While supporters argue this type of rule would protect less powerful members of a couple, others wince at the possibility that the legal system would decide two people were effectively married, potentially over both parties' objections.²²⁷ Similarly, Martha Minow expressed concern, in an article arguing for more expansive definitions of family, about circumstances where the government would "assign[] family-like status in order to punish people or deny them benefits for which they would otherwise be eligible."²²⁸

Here, we urge different approaches depending on the type of legal situation. Where possible, individuals should be allowed to explicitly *opt in* to statuses with parafamilial relations, such as naming beneficiaries or becoming domestic partners. The ability to formally opt in is particularly important in circumstances where the status creates obligations or responsibilities as well as benefits, or where a benefit is zero-sum (i.e., if one person gets it, another does not), because parties' intentions will be clear and there will be a written record of the status. However, while *allowing* individuals to formally identify their important parafamilial relationships is critical, it won't always be sufficient. To quote Barbara Bennett Woodhouse:

A smoothly functioning society needs crystalline rules that operate *ex ante* so family members can know what to expect from each other, and so those who deal with the family are on notice of the family relationship. However, a just society also needs equitable mechanisms that operate *post hoc* to

²²⁶ See PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 7.01(2)(a), 7.04(1) (AM. L. INST. 2002); see also Ira Mark Ellman, *Chief Reporter's Foreword* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at xvii (2002) (describing ALI's approach).

²²⁷ See generally David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467 (2001) (criticizing the proposed imposition of marital obligations on parties in informal relationships).

²²⁸ Minow, *supra* note 7, at 278.

mitigate the damage inflicted by relentless application of bright-line rules.²²⁹

Lack of access to legal resources, lack of knowledge, and carrying large work and dependent care responsibilities can act to prevent people from taking steps to formally acknowledge another as a beneficiary, functional family member, or coparent. These situations present a great challenge for judges and government administrators who want to do justice when problems arise. Judges and administrators face evidentiary problems—the challenge of knowing what someone intended or wanted, or what the “best” result would be—and the administrative problem of handling the evidentiary problems *at scale* without effectively denying justice through extreme delay. Nonetheless, there are also times when post-hoc investigation into what was *really* happening, as opposed to what happened on paper, is necessary to create just outcomes.

Handling parafamilial legal issues post-hoc involves policy judgement calls. In making them, we urge lawmakers and judges to go back to first principles. The goal of American family policy is to facilitate the flourishing of individuals and society, and to solve problems of dependent care.²³⁰ As has been discussed throughout this Article, promoting marriage and the nuclear family is not enough to achieve these goals—people need rich communities and social networks, and a multitude of options for how to order their lives. Accordingly, just as governments have previously adopted “pro-marriage” or “pro-family” policies, governments should adopt “pro-parafamily” policies, making it easier for parafamily members to mutually support each other.

Accordingly, in cases where a situation is not zero-sum, governments could choose to support a “presumption of parafamily”—a policy of favoring an individual seeking to establish the existence of an important parafamilial relationship.

One recent decision finding a “post-hoc” relationship that reinforced parafamilial values was *West 49th Street, LLC v. O’Neill*,²³¹ concerning the partner of a deceased tenant of a rent stabilized apartment in New York City.²³² Markyus O’Neill and the decedent Scott Anderson had lived together in Anderson’s rent stabilized apartment from 2012 until Anderson’s death in 2021.²³³ Shortly after meeting in 2011, they had “become more than friends,” despite Anderson being in a longstanding relationship with another individual, Robert Romano.²³⁴ Although Anderson and Romano did not live together, they shared other indicia of partnership, such as shared credit card and cell phone

²²⁹ Woodhouse, *supra* note 20, at 578-79.

²³⁰ See *supra* notes 14-19 and accompanying text.

²³¹ 178 N.Y.S.3d 874 (N.Y. Civ. Ct. 2022).

²³² *Id.* at 875 (“This is a licensee holdover proceeding . . . against Markyus O’Neill . . . after the death of the rent-stabilized tenant of record, Scott Anderson.”).

²³³ *Id.* at 876-77 (noting respondent lived with decedent from 2012 until 2021).

²³⁴ *Id.* at 877 (stating decedent had romantic relationships with respondent and another man).

accounts, and naming each other as the beneficiary of their respective retirement funds.²³⁵ Nonetheless, Judge Bacdayan found Anderson's relationship with Romano did not preclude O'Neill from qualifying as a "nontraditional family member" entitled to protection from eviction procedures under New York City's law, writing, "If [O'Neill] could potentially qualify [for noneviction protections] in his own right, it should not be a dispositive factor that another person who does not live in the subject premises could also qualify if only they lived in the apartment."²³⁶

Because *O'Neill* involved cohabitants, Judge Bacdayan was faced with the narrow question of whether O'Neill could continue to live in Anderson's rent-stabilized apartment. Finding for O'Neill was perhaps an easier call because the question was simply whether O'Neill could stay, and not, for instance, whether O'Neill *or* Romano would inherit the apartment. Adopting a presumption of parafamily is easier when no one in the parafamilial network stands to lose from a decision. But deciding how to approach zero-sum questions surrounding parafamily is potentially much harder.

There won't be a one-size-fits-all approach to zero-sum situations, but lawmakers can be creative in finding just ways to recognize parafamily. Consider questions of intestate succession. The law of intestate succession has historically been completely determined and formulaic, to prevent an already burdened probate system from having to answer contestable and messy questions about who loved whom more and whose relationships were important.

²³⁵ *Id.* at 876. Anderson's relationship with Romano and O'Neill is hardly a feel-good story of polyamory. Romano indicated he was not friends with O'Neill; O'Neill averred that "when Mr. Anderson had problems with Mr. Romano, Mr. Anderson would cry on his shoulder." *Id.* at 877.

²³⁶ *Id.* at 884. An earlier New York opinion recognized that members of two-person same-sex relationships were entitled to noneviction protections. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989). Shortly after *Braschi* was decided, the New York City Rent & Eviction Regulations were amended to reflect the decision, adding factors to be considered when determining whether a person has a sufficient emotional and financial commitment to a former tenant of record to qualify for noneviction protections. *O'Neill*, 178 N.Y.S.3d at 880 (citing N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d)(3)(i)(a)-(h) (2024)). These factors included the longevity of a relationship, sharing or relying on each other for payment of expenses, intermingling of finances, engaging in family-type activities such as celebrating holidays and family functions, formalizing legal relationships such as naming each other in a will or conferring a power of attorney or entering into a "personal relationship contract," holding each other out as family members, performing family functions such as caring for family members, or engaging in any other behavior which "evidences the intention of creating a long-term, emotionally committed relationship." N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d)(3)(i)(a)-(h) (2025). Notably, considering sexual relations is "explicitly prohibited" by the city's Emergency Housing Rent Control regulations when considering whether a nontraditional, family-like committed relationship exists between two people. *O'Neill*, 178 N.Y.S.3d at 880 ("[C]onsidering sexual relations is already explicitly prohibited by the [Rent Stabilization Code] when determining whether a nontraditional, family-like, committed relationship exists between two people . . .").

Allowing inheritance by parafamily members who weren't designated as beneficiaries in a will or through some other registration process thus initially appears unworkable, inviting endless contests and subjective judgments about relationships' worth and importance.

However, there might be ways of limiting the potential universe of heirs, even while potentially expanding inheritance rights to parafamily. Even where no will was written, probate judges could look to other objective indicators, such as beneficiary designations on bank accounts and life insurance policies, to identify a potential class of additional heirs. While judges would possibly have to make subjective judgments about what percentage of an estate this class could take, limiting the potential universe of relations to those for whom there are external indicia of partnership could allow judges to sit in a role more similar to the judge in *O'Neill*, rather than having to assess a potentially unbounded group.

In both zero-sum and obligation-creating situations, we urge cautious approaches. When it comes to recognizing relationships that create obligations between adults, the legal system will need to strike a balance between making it easy to create mutual obligations if desired without creating situations where unwilling parties fall into legal relationships by accident, or worse, over their stated objections.²³⁷ Zero-sum situations must also be resolved carefully, with consideration for both fairness and administrability.

With these cautions in mind, however, examples such as the Benefit Act and *O'Neill* should serve as useful guideposts for how lawmakers and judges can effectively recognize parafamilial connections under the law. Lawmakers should create opportunities for individuals to proactively, ex ante designate individuals to receive benefits or otherwise be associated with them in a legally significant way. Where problems can't totally be solved by ex ante designation, judges and other administrators should adopt a policy in favor of finding parafamilies where no one "loses," and be sensitive to the existence of parafamily even in more complicated situations.

D. *Nondiscrimination Laws for People in Non-Normative Relationships*

Lawmakers should also enact laws protecting parafamilial relationships from discrimination. Very recently, Somerville became the first municipality in the nation to adopt model nondiscrimination ordinances developed by the Polyamory Legal Advocacy Coalition, unanimously²³⁸ enacting ordinances banning discrimination on the basis of "family or relationship structure" in housing, policing, and city employment.²³⁹ "Family or relationship structure" is defined broadly to "mean the actual or perceived involvement or uninvolvement

²³⁷ Thanks to Mary Louise Fellows for this formulation.

²³⁸ Safronova, *supra* note 120.

²³⁹ Somerville, Mass., Ordinance No. 2023-08 (Mar. 23, 2023) (defining family and relationship structure); Somerville, Mass., Ordinance No. 2023-09 (Mar. 23, 2023) (city employment); Somerville, Mass., Ordinance No. 2023-10 (Mar. 23, 2023) (policing); Somerville, Mass., Ordinance No. 2023-12 (May 25, 2023) (housing).

of an individual in an intimate personal relationship or relationships. It includes an individual's actual or perceived affinity, or lack thereof, for any given type of intimate personal relationship, regardless of whether the individual is currently in any intimate personal relationship(s)."²⁴⁰

In turn, "intimate personal relationship" is defined to "include any interpersonal relationship between two or more adult individuals that involves romantic, physical, or emotional intimacy. This includes, but is not limited to, multi-partner/multi-parent or non-monogamous families or relationships, stepfamilies, and multi-generational households."²⁴¹ The Polyamory Legal Advocacy Coalition consulted with a range of community members to ensure that the legislation was explicitly inclusive of not just polyamorous people, but also asexual and aromantic people who desire to form families,²⁴² as well as chosen, blended, and extended families.

As one of us emphasized in testimony to the Somerville City Council prior to passage of the ordinances, the example of the LGBTQ+ civil rights movement illustrates the importance of establishing non-discrimination protections in tandem with legal recognition of new relationship forms. In the years prior to *Bostock v. Clayton County*,²⁴³ the Supreme Court's 2020 decision to expand the interpretation of Title VII of the 1964 Civil Rights Act to prohibit employment discrimination on the basis of sexual orientation or gender identity, same-sex couples who became able to register as domestic partners, have civil unions, and then to marry could still lose their jobs the next day for seeking legal recognition of their relationships—and sometimes did.²⁴⁴

Similarly, research has shown that fear of losing jobs, housing, and access to health care haunts the minds of people with nonnormative parafamilial relationships and causes them to hide their parafamilial ties, with concomitant impacts on people's mental health and relationships.²⁴⁵ These concerns are such a powerful driver that some parafamilies have moved to Somerville from other areas of the country to seek the legal protections the city provides.²⁴⁶ More laws

²⁴⁰ Somerville, Mass., Ordinance No. 2023-08 (Mar. 23, 2023).

²⁴¹ *Id.*

²⁴² See Chen, *supra* note 4 (describing an asexual man's three-parent family).

²⁴³ 590 U.S. 644 (2020).

²⁴⁴ See *id.* at 683 ("An employer who fires an individual merely for being gay or transgender defies [Title VII].").

²⁴⁵ See Amy C. Moors, Amanda N. Gesselman & Justin R. Garcia, *Desire, Familiarity, and Engagement in Polyamory: Results from a National Sample of Single Adults in the United States*, FRONTIERS PSYCH., March 2021, at 1, 9, <https://pmc.ncbi.nlm.nih.gov/articles/PMC8023325/pdf/fpsyg-12-619640.pdf>; Ryan G. Witherspoon & Peter S. Theodore, *Exploring Minority Stress and Resilience in a Polyamorous Sample*, 50 ARCHIVES SEXUAL BEHAV. 1367, 1380 (2021).

²⁴⁶ See, e.g., Safronova, *supra* note 120 (describing a non-binary person who moved to Somerville from Alabama along "with their two partners and a partner of one of those partners" largely because of the city's recently enacted laws).

like Somerville's will ease the discrimination and stigma deterring people from orienting their lives around parafamilial ties.

IV. CONCLUSION

Throughout this Article, we have striven to make the parafamilial turn both ambitious and practical. All of its suggestions can be incorporated and absorbed into our existing legal system, without having to dismantle or complicate legal marriage and other existing legal relationships. As emphasized throughout this Article, parafamily isn't hostile to the nuclear family. It's just bigger.

We hope this Article serves as a key step toward American society making the parafamilial turn—recognizing that the most meaningful, stable, and healthy life is one that values and prioritizes the many important relationships each individual has. We should spend less time asking who is *in* and *out* of a family, and more time supporting all relationships that contribute to each other's flourishing and care.

There won't be an *Obergefell* moment for a parafamilial movement. Supporting all of our varied and important relationships is not one problem to solve. Rather, we hope that articles like this one, cases like *O'Neill*, local ordinances creating and protecting non-exclusive domestic partnerships, and the actual, lived experiences of parafamilies will move the needle, culturally and legally, until everyone's important relationships are recognized and celebrated for the good they create.