

## THE LAW AND ECONOMICS OF THE HOUSEHOLD

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## Note to Attendees at Yale Law, Economics & Organization Workshop

While lengthy, this draft is incomplete. Parts V & VI are particularly rough and fragmentary. I have yet to write the Conclusion, which will call for more empirical work on property rights and governance mechanisms within households.

Figures 1 and 2 are located at the very end of the draft. Because electronic transmission may garble them, I will use transparencies of the Figures in my presentation.

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A multiperson household is a private space where two or more persons regularly share shelter and meals.<sup>1</sup> Because many people spend over half their time at home, the household is a prime site for economic production, leisure activity, and intimate social interactions. In the 1980's, American women, irrespective of their marital status, were spending an average of 32.9 hours a week on housework, and men, 15.7 hours.<sup>2</sup> In the United States, estimates of the value of within-household production have run from 24% to 60% of GDP — that is, to trillions of dollars per year.<sup>3</sup>

Although many social historians, demographers, and sociologists have written about the

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<sup>1</sup> The U.S. Census Bureau, which faces the practical task of categorizing various living arrangements, provides a similar definition: “A ‘household’ comprises all persons who occupy a ‘housing unit,’ that is, a house, an apartment, or other group of rooms, or a single room that constitutes ‘separate living quarters.’” Statistical Abstract 1999, at 6. The Bureau in turn defines a “housing unit” as a room or rooms lived in by persons who do not live and eat with any other occupants of the same structure (and thus, by implication, who *do* often live and eat with one another). *Id.* at 718. The Bureau defines *family* more narrowly, as a set of persons related by birth, marriage, or adoption who live together in the same housing unit. *Id.* at 6. It uses the term “group quarters” to describe the residences of persons in dormitories, jails, nursing homes, military barracks and the like. *Id.* In 1990, just under 3% of the United States population lived in group quarters. Statistical Abstract 1996, at 67. On group quarters, see *infra* text at notes \_\_\_\_-\_\_\_\_.

<sup>2</sup> John P. Robinson & Geoffrey Godbey, *Time for Life: The Surprising Ways Americans Use Their Time* (1997) (reporting data from time diaries)[check]. Empirical studies of time devoted to housework in the United States are summarized in Table 1 of Joni Hersch, *Marriage, Home Production, and Earnings*, in *Marriage and the Economy* (Shoshana Grossbard-Shectman ed., 2001?).

<sup>3</sup> For reviews of the literature, see Euston Quah, *Economics and Home Production: Theory and Measurement* 80-89 (1993); Oli Hawrylyshyn, *The Value of Household Services: A Survey of Empirical Estimates*, 22 *Rev. Income & Wealth* 101 (1976). Most estimates fall in the lower part of the range described. Perhaps surprisingly, home production’s share of the national economy did not decrease much during the twentieth century. See *id.* at 107-11. Household production is even more important in the economies of less developed nations. See Stephen L. Parente, Richard Rogerson & Randall Wright, *Homework in Development Economics: Household Production and the Wealth of Nations*, 108 *J. Pol. Econ.* 680 (2000). Without citing authority, Gary Becker asserts: “Families [sic] in all societies, including modern market-oriented societies, have been responsible for a sizable part of economic activity — *half or more* — for they have produced much of the consumption, education, health, and other human capital of the members.” Gary S. Becker, *A Treatise on the Family* 303 (enlarged ed. 1991) [emphasis added].

household,<sup>4</sup> few law and economics scholars have focused on this basic social molecule.<sup>5</sup> Positive questions abound. Why are so many households based on kinship? Why have households become smaller, particularly during the twentieth century? More fundamentally (and to redirect a question Coase famously asked in another context),<sup>6</sup> why don't all adults live alone? Or, conversely, all in one huge household? From where do households obtain the rules that govern their internal operations?

In this article I make an initial foray into describing the structure of households and the rules that govern them. In so doing, I link three literatures that heretofore have developed separately: those on the governance of the commons; on the organization of business enterprise; and on the “family.”

Because a household revolves around a physical space, it is a commons — a shared domain that invites opportunism by one user at the expense of others.<sup>7</sup> Households therefore must develop mechanisms for avoiding the tragic results that shared ownership may cause.

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<sup>4</sup> In Book I of the *Politics*, Aristotle analyzes the household (*oikos*), which he sees as the basic building block of larger social institutions — first, the village, and, beyond that, the city (*polis*). Aristotle, *The Politics* 9 (Ernest Barker trans., R.F. Stalley revision, 1995). Although *oikos* is the etymological root of *economics*, until recent decades economists have given scant attention to “home economics.” Instead, during the nineteenth century the topic became the province of popularists. One influential work was Catharine Beecher, *A Treatise on Domestic Economy* (1841), reprinted many times over during the ensuing decades. On Beecher’s influence, see Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 61-63 (1985).

<sup>5</sup> After my work on this article was underway, I learned that two other scholars were nearing completion of an article on the dynamics and law of the mini-commons: Hanoeh Dagan & Michael A. Heller, *The Liberal Commons*, 110 *Yale L.J.* 549 (2001). Although I do not agree with all of Dagan & Heller’s analysis, I have benefitted greatly from their work.

<sup>6</sup> R.H. Coase, *The Nature of the Firm*, 4 *Economica* 386, \_\_\_ (1937).

<sup>7</sup> The canonical literature on the commons pays little attention to the household. It typically contrasts the merits of ownership of a pasture (or similar resource) by a single individual with its ownership by, say, dozens of villagers. See, e.g., Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243 (1968); Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347 (Pap. & Proceedings, 1967). This stylized bifurcation of ownership options neglects the reality that many, perhaps even most, pastures are owned and occupied by members of multiperson households — institutions that are halfway houses between individual and communal ownership. See Robert C. Ellickson, *Property in Land*, 102 *Yale L.J.* 1315, 1394-97 (1993). See also Elinor Ostrom, *Governing the Commons: The Evolution of Institutions of Collective Action* 13-28 (1990) (urging a more pluralistic view of possible solutions to the challenge of the commons). See generally R. Quentin Grafton, *Governance of the Commons: A Role for the State?*, 76 *Land Econ.* 504 (2000) (citing later-published sources on the commons).

A household also is an enterprise that requires inputs of both labor and capital for the internal production of goods and services. (Hereafter I usually refer to providers of labor as “occupants,” and providers of equity capital as “owners.”) When different individuals provide these two inputs, the members of the household must determine how the various providers are to share power to control household decisions and to bear the consequences of choices made. When the occupants of a household are not its owners, there may arise a separation of ownership from control — a homespun version of a problem commonly encountered in the business context.<sup>8</sup>

There is an extensive literature in law and in economics on both marriage and the “family.” These forms of association, while closely related to the household, are conceptually distinct from it, as Figure 1 illustrates. *Marriage* denotes a legal relationship between two people, but one that need not involve cohabitation. Indeed, in the United States 6% of married persons do not live with their spouses.<sup>9</sup> In addition, when a married couple does cohabit, some core marital property rules govern assets other than the shared household space itself — for example, children, financial investments, and the spouses’ aggregate human capital. I largely ignore these much discussed issues and focus instead on the property rights and governance mechanisms associated with a household’s physical domain.<sup>10</sup>

Similarly, *family* denotes a kinship relationship, but not necessarily the sharing of a physical space.<sup>11</sup> A family necessarily must resolve certain issues of resource distribution, notably intergenerational wealth transmission. Like spouses, however, family members need not cohabit, and cohabitants need not be kin. In the United States in 1998, there were 70.9 million multiperson households where two or more kin lived together.<sup>12</sup> Some of these family households also included non-kin — for instance, boarders or live-in help. In 1998, however, there also were 5.3 million

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<sup>8</sup> Classic treatments of this problem in the corporate context include Adolph Berle & Gardiner Means, *The Modern Corporation and Private Property* (1932); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976).

<sup>9</sup> In 1998, 110.6 million married Americans were living with their spouses, but 7.3 million were not. *Statistical Abstract 1999*, at 60.

<sup>10</sup> On the law and economics of the marriage relationship itself, see, e.g., Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 *Va. L. Rev.* 1901 (2000); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 *Va. L. Rev.* 509 (1998).

<sup>11</sup> Many adept commentators overlook this point. See, e.g., Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *Stan. L. Rev.* 1599, 1622-30 (2000) (blurring distinction between Chinese households and families).

<sup>12</sup> 1999 *Statistical Abstract*, at 60.

multiperson households consisting entirely of unrelated individuals.<sup>13</sup> Examples include unmarried heterosexual couples, gay or lesbian partners, Platonic housemates, and residents of intentional communities.<sup>14</sup>

Households, marriages, and families have potentially distinct governance structures. Suppose, for example, that a woman were to have sole title to a farm where she resided with her husband and adult son. In this setting, she might have special power to control the farm acreage itself; she and her husband, to control their marital assets apart from the farm; and all three family members, to control their joint farming enterprise (which might involve operations on neighboring acreage leased from others). Because marriages and families both are so commonly nested within households, analysts of intimate human associations tend to ignore the possibility of these subtle distinctions in governing powers.

A final point to motivate the topic: Households are some of most ancient human institutions and doubtless have had Promethean influence. The rules that our ancestors developed to resolve problems arising around their hearths doubtless have provided templates for solutions to other small-scale problems of human coordination. It is within the household that most children first learn how to recognize and deal with the problems posed by common property, collective enterprise, and intrafamily dependence. A deeper understanding of the household therefore may shed light on more complex institutions.

Part I of the article offers a general model of the household economy and identifies the major participants in that endeavor. Part II turns to the issue of which of these participants is chosen to control the household. It seeks to explain why most households appear to be governed by their providers of risk capital. Part III describes the typical attributes of households in all historical periods and offers transaction-cost explanations for these features. Part IV addresses more systematically the Coasean question of the boundary between a household and the larger economy, and offers theories of why households have become smaller and less self-sufficient over time. The ensuing portions of the article address the internal rules of a household. Part V analyzes whether household members in midgame can be expected to tailor their own rules, borrow from prevailing social norms, or look to the legal system. It also discusses the sorts of substantive and procedural rules that a ongoing household is apt to adopt. Finally, Part VI examines the rules that apply when housemates reach endgame, in particular the law of co-ownership.

## I. THE HOUSEHOLD ECONOMY

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<sup>13</sup> 1999 Statistical Abstract, at 60.

<sup>14</sup> 1999 Statistical Abstract, at 60. These households increased in number from 1.1 million in 1970 to 5.3 million in 1998. *Id.*

Households vary in the goods and services they produce. By definition, a household must provide both shelter and meals to its occupants. Particularly in a family household, occupants also are likely to provide emotional and medical care, child training, entertainment, and other intimate services.

#### A. Participants and Flows Within the Household

Figure 2 depicts in bloodless fashion the building blocks of a household economy. The rounded rectangles in the figure indicate the four chief participants in household trade: owners, lenders, occupants, and outsiders. (N.B. A single individual may play more than one of these roles, e.g., an occupant may also be an owner.) The arrows in the figure indicate possible inflows and outflows from each type of participant. The participants' inputs supply the factors necessary for household production. Owners supply land and equity capital. Lenders provide debt capital. Occupants supply most household labor.<sup>15</sup> A household also may import goods and services — e.g., lawn mowing — by means of contracts with outsiders. Using its various inputs, the household generates goods and services. It distributes most of these to occupants, but may export some products to outsiders and may trade some services with casual guests invited in to share meals or accommodations. Residual outflows go to owners.

The rules of a household determine what it produces, how particular owners and occupants share in the flows of inputs and outputs, and how much the household trades with outsiders. A household's rules also include procedures for making decisions on all these fronts.

#### B. Liberal and Illiberal Households: On Freedom of Exit

A household is “liberal” when all its owners and occupants individually have the power to exit from the arrangement, and collectively have the power to control the entry of new occupants.<sup>16</sup> To illustrate, imagine a rural commune in Vermont occupied by 12 idealistic twenty-somethings but owned by but 3 of them (the “trustfund kids”). For this household to qualify as liberal, each occupant would have to be free to decamp (a power commonly protected by legal prohibitions on

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<sup>15</sup> For analysis of how occupants of a multiperson household decide how to allocate their labor to internal and external production, see Patricia F. Apps & Ray Rees, *Collective Labor Supply and Household Production*, 105 *J. Pol. Econ.* 178 (1997).

<sup>16</sup> I owe the term to William James Booth, *Households: On the Moral Architecture of the Economy* 95-176 (1993). Dagan and Heller place protection of the privilege of exit at the center of their vision of a normatively attractive regime that they call the “liberal commons.” See Dagan & Heller, *supra* note \_\_, at 567-77. [they cite Hirschman at 22-25 as key discussion of exit as a control mechanism]

slavery and kidnaping).<sup>17</sup> In addition, each owner would have to be privileged to withdraw his capital, if necessary by invoking the legal power of a co-owner to partition jointly owned property. Finally, in a liberal society the market for households must enable diverse individuals to create living arrangements of their own design. To assure this degree of self-determination, no outsider could force the Vermont commune to admit an unwanted person as an additional occupant or owner.<sup>18</sup>

With rare exceptions, I restrict my analysis to the liberal household, the form that best honors the ideal of individual self-determination long central in American law. Many households in the United States—ordinary roommate situations, for example—comfortably fit this ideal type. Over the course of recent centuries, moreover, households in most developed nations generally have become more liberal.<sup>19</sup>

It is important to recognize, however, that even in the United States today many households are not entirely, or in some cases even remotely, liberal. First, exit is never costless. Occasionally, a occupant may be able to leave a household as easily as checking out of a hotel. At the other extreme, however, an entrant may expect to be locked in for life — for instance, a lady about to marry the English lord of a medieval manor. Moreover, any occupant who leaves a household must incur moving expenses, the transaction costs of winding up intra-household claims, and the sacrifice of any household-specific human capital. In total, these costs may be small, as is likely when a graduating senior departs from a room in a college dormitory. In middle age, when ties are deeper and knowledge of household operations has become more specialized, exit from a household is likely to involve significant costs.

Second, exit is not always available.<sup>20</sup> Residents of group homes and other institutions

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<sup>17</sup> In a liberal society, a court would not order specific performance of a promise to remain in a household, but might conceivably award damages for breach of a contractual commitment to reside there.

<sup>18</sup> Cf. U.S. CONST., amend. III, limiting the quartering of troops in “houses.”

<sup>19</sup> See Mary Ann Glendon, *The New Family and the New Property* 11-13, 41-46 (1981) (endorsing Henry Maine’s notion of a broad historical trend toward the freeing of the individual from immutable blood and marriage obligations).

<sup>20</sup> Although entry into a liberal household usually is voluntary, it need not be. For example, as a result of a will or the application of a statute governing intestate succession, several persons who never would have sought the arrangement may find themselves to be co-owners of a household. For descriptions of how the traditional reliance of African Americans on intestate succession led to fractionated ownership of rural lands in South, see Dagan & Heller, *supra* note \_\_\_, at 551, 603-09; Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 *Nw. U.L. Rev.* 505, 517-23 (2001).

commonly are not free to leave.<sup>21</sup> A parent may have effective power to keep a minor child from running away from home. A conservator may control where an adult incompetent resides. Social norms and legal obligations may shackle a competent adult, for example, one who remains in a nuclear household only on account of fear of social stigma that exit would trigger. A spouse may stay put out of fear of that leaving would provoke a violent response from the abandoned mate. A person who is risk averse may stick with a known, but imperfect, household, out of fear that another, seemingly better, prospect would not pan out.<sup>22</sup> Finally, to the extent that law and norms permit, the owners and occupants of a household might contract to limit their exit rights, making their arrangement less liberal.<sup>23</sup> The members of the Vermont commune, for example, might agree to constrain exit in hope of enhancing members' solidarity and resort to voice.

Liberal households have been even less common in other times and places. In the Soviet Union, where urban housing was notoriously scarce, the authorities often randomly assigned unrelated families to share communal housing units (the notorious *komunalkas*).<sup>24</sup> In many societies, parents still arrange their children's marriages. Three millennia ago, the Homeric household portrayed in the *Odyssey* took the form of a large (c.30-member) extended-family households hierarchically governed by a *pater familias*.<sup>25</sup> Most slaves—whether chattel or debt—traditionally have resided in households. Indeed, in the *Politics*, Aristotle devotes much of his pioneering discussion of the household to rationalizations for slavery.<sup>26</sup>

### C. Distribution of Power and Surplus Within a Liberal Household

#### 1. Household Surplus

The internal social and economic exchanges within a household typically enable its

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<sup>21</sup> The 1990 Census tallied 3.3 million persons “institutionalized” in nursing homes, prisons, mental health facilities, and so on. See 1996 Statistical Abstract, at 67. [check primary Census data for more detail]

<sup>22</sup> See generally Andreas Flache, Individual Risk Preferences and Collective Outcomes in the Evolution of Exchange Networks, 13 *Rationality & Soc'y* 304 (2001).

<sup>23</sup> See *infra* text at notes \_\_\_-\_\_\_.

<sup>24</sup> On *komunalkas*, see Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 *Harv. L. Rev.* 621, 650-58 (1998); Michael Wines, Tight Space. No Privacy. Soviet Decor., *N.Y. Times*, Feb. 5, 2000, at A1.

<sup>25</sup> For discussion of the Homeric household, see Booth, *supra* note \_\_\_, at 15-34.

<sup>26</sup> According to Aristotle, “every household is monarchically governed by the eldest of kin” – not exactly a liberal approach. Aristotle, *supra* note \_\_\_, at 9. On the Hellenic household, see Booth, *supra* note \_\_\_, at 34-93; Cheryl Anne Cox, Household Interests: Property, Marriage Strategies, and Family Dynamics in Ancient Athens (1998).

members to obtain more utility that they would enjoy if they were to live and own alone. This increment in utility is the *household surplus*.<sup>27</sup> A particular household's surplus is enhanced by efficiencies of scale and scope that its members are able to exploit, especially ones that take advantage of their affective ties.

The magnitude of a household's aggregate surplus depends in part on the efficiency of its internal substantive and procedural rules. A household's substantive rules determine both the duties that individual owners and occupants owe and entitlements that they each have to shares of the household's output. A household can maximize its surplus by adopting rules that minimize the household's sum of: (1) deadweight losses arising from failures to exploit potential gains from internal trade; and (2) transaction costs. In general, a household can increase its surplus by adopting substantive rules that give each member incentives to consider the effects his decisions have on other members and that take advantage of asymmetries in members' information and ability to act.

A household's transaction costs are affected not only by its substantive and procedural rules, but also by the level of trust within it. As discussed below, when members of a household trust one other, they incur fewer transaction costs when achieving cooperative outcomes, and therefore reap a larger surplus. Although a household's rules affect its level of trust, the identity of the household's members commonly matters even more. Historically, most households have been kinship-based because kinship tends to enhance trustworthiness.<sup>28</sup>

## 2. The Distribution of Household Surplus Among Members

Until a generation ago, economists modeled the family household as if all members had identical preferences. Paul Samuelson supposed that household members were cohesive enough to resolve all issues by consensus. Gary Becker hypothesized the existence of an altruistic dictator who served as the household head and whose decisions would thwart opportunism by any household member. More recently, however, economists have begun to apply game theoretic models that assume that household members may battle over shares of household production.<sup>29</sup> This conception is more consistent with the rational-choice approach that is dominant in economics,

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<sup>27</sup> This is an extension of the notion of a "marital surplus," a concept used in some law-and-economics work on the family. See, e.g., Wax, *supra* note \_\_\_, at 529-31. Researchers find that, all else equal, marriage increases a husband's wages by at least 10 percent. Eng Seng Loh, Productivity Differences and the Marriage Premium for White Males, 31 J. Human Resources 566 (1996) [check].

<sup>28</sup> See *infra* text at notes \_\_\_-\_\_\_.

<sup>29</sup> Noncooperative game theory stresses the risk that household members may become stuck at some suboptimal equilibrium. Cooperative game theory assumes that they will maximize total surplus, but wrangle over how to distribute it among themselves.

and also with observations of actual households.<sup>30</sup>

In game-theoretic terms, a member's utility level in the event of exit establishes that member's "threat point."<sup>31</sup> A liberal household, to deter exit by a valued member, must allocate to that person enough household surplus to make it more advantageous for that person to stay than to leave. In many households, however, particularly ones based on kinship, there is likely to be enough surplus to accomplish this result for all members. If there is an excess of surplus, how can the members be expected to divide it up? Game theory suggests that a member's prospective bargaining power within a household turns on the effects that the exit of that member would have on all involved.<sup>32</sup> Those effects depend both on the uniqueness of the contributions of the various members to the generation of the household surplus and on current household policies governing the distribution of that surplus. The power of a member within a household is positively associated with the irreplaceable contributions that member currently makes to the welfare of the other members.

As a member's opportunities on the outside improve, his threat of exit becomes more credible. Recognizing this reality, the other members may reallocate prospective shares of household surplus to reduce the likelihood that the threat will be carried out. In colonial Andover, Massachusetts, for example, as young men had increasingly good opportunities to the west, fathers had to grant their youngest sons land to dissuade them from migrating.<sup>33</sup> It is widely believed that a husband is likely to obtain a majority of the surplus from a marriage because he usually has greater opportunities to remarry after divorce, a reality that makes his threat of exit more credible than his wife's.<sup>34</sup> A wife, however, may be able to increase her power within a household either by increasing her conferrals of irreplaceable services within it or by improving the quality of her opportunities outside it.

Changes in law and social norms can alter threat points by changing both opportunity sets

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<sup>30</sup> For a valuable review of the intellectual trends described in this paragraph, see Shelly Lundberg & Robert A. Pollak, *Bargaining and Distribution in Marriage*, 10 *J. Econ. Persp.* 139 (Fall 1996). Wax, *supra* note \_\_\_, provides a tour-de-force of the legal and social scientific literature on bargaining within a marriage.

<sup>31</sup> See Lundberg & Pollak, *supra* note \_\_\_, at 146-49.

<sup>32</sup> In some contexts, however, a threat of uncooperative action within a household might be more potent than a threat to exit from it.

<sup>33</sup> See Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 *J. Econ. Persp.* 581, 603-04 (1985) [hereinafter Pollak, *Families and Households*] (drawing this example from Philip J. Greven, *Four Generations* (1970)).

<sup>34</sup> See, e.g., Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 *Int'l Econ. Rev.* 31 (1980) [check]; Wax, *supra* note \_\_\_, at \_\_\_-\_\_\_.

and the transaction costs of exit. Enhancement of women's employment opportunities outside the home serves to boost women's power within the home. Legal reforms that make it easier for a co-owner to partition property, or a spouse to divorce, ease exit and thereby strengthen the bargaining position of those with comparatively good opportunities on the outside.<sup>35</sup>

This "economistic" view of household life may strike many as inapt. Family households in particular appear to be sites for staggering amounts of altruistic giving (especially from parents to children) and not prime venues for the pursuit of self-interest. Economic models, however, readily accommodate the phenomenon of voluntary gifts, which are assumed to enhance the expected utility of donors. The game-theoretic vision of the liberal household, however, is inconsistent with any practice of nonconsensual redistribution of wealth among the household's members. A prospective net loser from a liberal household's anticipated coercive redistributive efforts would be reluctant to enter and, if victimized after entry, would be prone to decamp.<sup>36</sup>

A household can adjust an owner's or occupant's share of the surplus by changing the rules that control the size of the flows of inputs and outputs from that person. An example involving a nonfamily household can illustrate how housemates might do this. Suppose three unmarried graduate students are sharing an rented apartment unit that contains three bedrooms, one of which is much superior to the other two. The student occupying the better bedroom would receive a higher level of in-kind benefits than would the other two students. To assure that all occupants would receive some of the household surplus, the three might agree that the student occupying the best bedroom had to pay a larger share of the common rent.<sup>37</sup> Or, if the three were willing to incur the transaction costs of achieving a more egalitarian arrangement, they might decide to keep their rent contributions equal but to rotate occupancy of the bedrooms so that each of them had the

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<sup>35</sup> The Coase Theorem might be thought to suggest otherwise. For example, if it were efficient for a disgruntled wife to remain in a household, her husband arguably could bargain with her to stay regardless of her legal entitlement to exit. See Becker, *supra* note \_\_ at 331-34 (making this argument and offering data to support it). The Coase Theorem's invariance proposition, however, is implausible in this context for a number of familiar reasons. First, shifting an entitlement may have wealth effects. Second, because of bilateral monopolies and emotional overlays in a household setting, transaction costs may be high even though few are involved. Third, there is the familiar asymmetry between willingness to pay and willingness to receive, which tends to make entitlements stick where they are allocated. For evidence contrary to Becker's, see Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 *Harv. J.L. Pub. Pol'y* 241 (1993) (finding that no-fault divorce statutes increase the rate of divorce).

<sup>36</sup> Coerced *ex post* redistributions should be distinguished from consensual *ex ante* loss-spreading policies. Loss spreading has been a classic function of the household.

<sup>37</sup> On how housemates might best determine these rent differentials, see Francis Edward Su, *Rental Harmony: Sperner's Lemma in Fair Division*, *Amer. Math. Monthly* (1999?); Steven J. Brams & D. Marc Kilgour, *Competitive Fair Division* (working paper, April 1999).

superior room for one-third of the term of the lease.

An elaboration of this example can illuminate how members' external opportunities may affect their shares of the household surplus. Suppose that one of the three graduate students was a master chef with a winning personality, while the other two were friendless nerds wholly inept in the kitchen. Because (by assumption) the first student would be a more welcome addition in other households, game theory suggests that the nerds in practice might let the master chef hog the television set and skimp on bathroom cleaning chores.

Housemates, however, are likely to have a strong mutual commitment to equality within their group, a stance that tends to mute their attentiveness to small differences in their individual threat points.<sup>38</sup> Equality, apart from whatever independent value it may have, has the instrumental merit of fostering cooperative group outcomes.<sup>39</sup> As a result, three househunting graduate students typically would prefer to lease a dwelling unit with three relatively equal bedrooms than one with three unequal ones, and to frown on any attempt by one of them to hire another of them to do a household chore.

## II. The Governance of Households: Why Ownership Typically Is Bestowed on Providers of Equity Capital

Who "owns" a household? If asked this question the occupants of, say, a single-family house probably would respond by listing the names of the grantees on the most recent deed conveying the house. Logically the next question to put to them then would be: what contribution did those persons make that led them to having been listed as the grantees? The occupants typically would answer that the grantees had provided the equity capital – that is, the funds used to defray the portion of the purchase price not financed by means of debt capital provided by mortgage lenders with fixed claims. After acquiring title, these same "owners" also are likely to be the persons who provide additional infusions of equity, either to cover deficits incurred in household operations or to finance improvements to the premises.<sup>40</sup> As this Part explains, in return for these

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<sup>38</sup> On rival conceptions of equality of inputs and outputs in the household context, see Su, *supra* note \_\_\_ [check]; see also Wax, *supra* note \_\_, at 533-37 (discussing notions of equality within marriage).

<sup>39</sup> This is a staple of sociological theory. See, e.g., Donald Black, *The Behavior of Law* 11-36 (1976). Transaction-cost economics supports the same proposition. Equality among decisionmakers enhances their homogeneity and thus reduces their decisionmaking costs. See Henry Hansmann, *The Ownership of Enterprise* 39-44 (1996).

<sup>40</sup> The donee of a dwelling conveyed as a gift initially puts up no equity, but typically does make later cash infusions. In an instance where an owner has been exceptionally passive, the doctrine of adverse possession may confer title to a household premises on long-time occupants,

equity inputs, owners tend to be granted both the power to make key household decisions and right to reap any beneficial financial consequences of those decisions. In short, contributors of equity capital typically rule a household, just as they typically rule a business firm.<sup>41</sup>

To illuminate issues of household governance, I feature a hypothetical household that might be the subject of a television sitcom. The sitcom is staged in a house with five permanent occupants: Mom; Dad; Junior, their affable but unemployed 25-year old son; wisecracking Granny; and Cheri, a ditzy but nubile live-in housekeeper. These five occupants provide virtually all household labor.<sup>42</sup> Only Mom and Dad, however, are owners; they're the ones who provided the down payment for the house long ago and they're the ones who have been making the mortgage and property tax payments over the years.

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

The theory of the organization of enterprise can readily be extended to the household sector. According to this theory, the owner of any firm possesses two key entitlements: the power to make residual control decisions and the right to receive residual financial flows.<sup>43</sup> What are these entitlements, and why do they tend to be tied together in both business enterprises and domestic households?

#### 1. Residual Control Decisions

Household ownership is a form of land ownership. In a society with a private property system, a private landowner has broad powers to decide three basic sorts of issues: (1) who can enter and remain on the premises; (2) how the premises are to be used and developed; and (3) under what circumstances the premises are to be transferred to another owner.<sup>44</sup> Within a given

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including ones who previously had not contributed capital. Once adverse possessors obtain title, however, they similarly are likely to become capital providers.

<sup>41</sup> Although I know of no empirical studies that document that providers of risk capital indeed own households, I have not encountered anyone who disputes the truth of the proposition. A young adult who wishes to acquire a home knows that the key step is to marshal enough money for a down payment (as opposed, say, to acquiring labor skills with an eye later to trading labor services for a share of household ownership).

<sup>42</sup> Present in a household also may be house guests, employees of contractors, and other temporary licensees. Household members are highly unlikely to confer ownership rights on these transients, but do need rules for controlling their conduct within the commons.

<sup>43</sup> For a lucid formulation of these notions, see Paul Milgrom & John Roberts, *Economics, Organization and Management* 289-90 (1992).

<sup>44</sup> See Ellickson, *Property in Land*, *supra* note \_\_\_\_, at 1362-63.

household, some decisions about the exercise of these basic powers may already be settled – that is, controlled by law, binding social norms, or contract. Cheri’s employment contract, for example, might entitle her to dwell in the guesthouse and paint its interior in a color of her choice. Because law, norms, and contracts invariably are incomplete, however, many decisions about the use of a household commons remain up for grabs. These are the residual control decisions. Has the time come to charge Junior rent or to kick him out of the house? To let Cheri invite her lover to move in with her? To limit Granny’s use of the dining table for jigsaw puzzles? To add a swimming pool? To sell the house because Mom and Dad now prefer an empty nest? The owners of a household have the ultimate power to decide these open questions.

There are, of course, limitations on the powers of the owners of a household. First, an owner may choose not to enjoy the entitlements of ownership, but instead to trade or give them away. For example, altruism might lead Mom and Dad to refrain from interfering with Granny’s wish to do her jigsaw puzzles on the dining table. Or, in a nice twist of the sitcom drama, Cheri might charm Mom and Dad into ceding her control over key decisions over whom to invite to a dinner party. The possibility of these sorts of transfers complicates empirical analysis of the locus of power within households.

Second, the theory of ownership suggests that the residual powers of the owners of a household would be limited in scope — that is, only cover the management of the physical premises and not extend to a more general control over all aspects of the lives of the occupants. Suppose, for example, that Junior wanted to keep a dog as a personal pet. Because the dog’s presence would affect the quality of the shared environment, Junior would have to obtain Mom and Dad’s approval (because they own the household, and not because they are his parents). If Mom and Dad did agree to allow the pet, however, Junior likely would retain general powers to decide the dog’s name, diet, and training. Similarly, as the household’s owners, Mom and Dad can control the spaces that Granny occupies, but not the books she reads, the products she buys, or the friends she visits. Mom and Dad’s ownership rights would entitle them to control Granny’s choices along those lines only if her decisions would affect either the other occupants’ enjoyment of the premises or the value of residual financial flows from household operations. Conversely, if Granny were to own the sitcom-family house, she could control how Mom and Dad used the premises, but not how they invested their savings, used their vacation time, or governed aspects of their marital relationship that did not affect the value of the real estate.

Third, legal rules may regulate owners’ powers to control occupants. For example, statutes may limit self-help evictions by owners. In exceptional cases where an owner has slept on his rights, the law of adverse possession even may elevate a mere occupant to the status of owner.

## 2. Residual Financial Flows

Figure 2 portrays a household's financial flows. Some of these may be governed by contracts, external norms, or laws. For instance, a lease might specify an occupant's obligation to pay rent to the owners; a mortgage, the owners' obligation to lenders;<sup>45</sup> and a labor contract, the rights and duties of a domestic worker (such as Cheri).

As in a business firm, the residual financial flows in a household are the ones that remain unallocated after all the contracts, norms, and laws governing inflows and outflows have been honored. The value of owners' "equity" in the household is the discounted present value of these residuals. In most instances, ownership of a household has positive market value. The value might be negative, however, if the household premises were burdened with excessive mortgage debt, unfavorable leases, and confiscatory property taxes.

### 3. Ownership: An Amalgamation of Control and Financial Residuals

The owner of a household, like the owner of any enterprise, typically has *both* the power to make residual control decisions *and* the right to receive residual financial flows.<sup>46</sup> Scholars of enterprise argue that this pairing of control powers with financial stakes sharpens incentives for prudent management.<sup>47</sup>

To illustrate, suppose that the roof over the sitcom household had begun to leak, an

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<sup>45</sup> Like a bondholder of a business corporation, a mortgagee may use covenants and security interests to protect itself against household policies that would jeopardize repayment of the debt. A basic strategy of many mortgage lenders is to ensure that the equity owners have stakes sufficiently large to deter them from pursuing overly risky projects. Absent government-subsidized mortgage insurance, the combined loan-to-value ratios of first and second mortgages therefore rarely exceed 90%. Otherwise, as loan-to-value ratios escalate, mortgage lenders (and their insurers) have to be increasingly active in monitoring the behavior of mortgagors.

<sup>46</sup> Additional complexities arise when the ownership of a household premises is divided among owners of present and future interests. For instance, three cotenants might lease a unit in an apartment building from a landlord who retains ownership of the reversion – the interest that will become possessory at the end of the leasehold. To simplify the exposition, I restrict my analysis to ownership of a currently possessory interest — in this instance, to the lease held by the three cotenants. Subject to contractual and common law constraints designed to protect the landlord from tenant opportunism ("waste" is the legal term), the three tenants in fact have residual control rights and residual financial claims during the term of the leasehold. For example, if they could make a profit by subleasing one of the bedrooms to a fourth person who had not signed the primary lease, their ownership shares in the lease would determine how they would split that surplus.

<sup>47</sup> Theorists of business organization agree that it generally is efficient to bestow residual rights of control on the residual claimant. See, e.g., Henry Hansmann, *The Ownership of Enterprise* 11-12 (1996); Paul Milgrom & John Roberts, *supra* note \_\_\_, at 289-93; Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 *J.L. & Econ.* 395, \_\_\_-\_\_\_ (1983).

eventuality not covered by contract among the occupants. If the owners of the household had residual control powers, they could decide how to repair the roof and also how to pay for it out of household assets. If the roof repair would increase the occupancy value of the space by an amount greater than the repair would cost, the owners' residual would increase in value. If the roof repair would not be cost-effective, on the other hand, the value of the residual would drop. Someone who bears the financial consequences of a decision is likely to deliberate more carefully than someone who does not bear those consequences. If Mom and Dad were to have the residual financial claim to the sitcom household, it therefore also would be wise to empower them alone to decide on the roof repair.

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

Bestowing on the owner of a household both residual control powers and residual financial claims thus tends to improve the quality of household decisions. This proposition, however, leaves open the issue of which of the parties involved in a household should serve as its owner.

### 1. The Various Patrons Who Might Own a Household

Like any enterprise, a household is associated with a variety of "patrons" (to borrow a term of Henry Hansmann's).<sup>48</sup> As Figure 2 depicts, a household's chief patrons are its occupants, its providers of equity capital, its lenders of debt capital, and the other outsiders with which it trades. Those jointly involved in an enterprise have an interest in allocating ownership rights to the patron who values them the most.<sup>49</sup> This assignment reduces the costs of obtaining whatever factor of production that particular patron provides to the household. More importantly, allocating ownership to the most efficient owner reduces the total transaction costs of governing the enterprise. If not granted ownership rights, the supplier of the factor in question would insist on being protected with contractual guarantees that would be both costly to draft and cumbersome to administer. Selecting a governance system for a household thus is a positive-sum game: all patrons, including nonowners, can benefit from an arrangement that maximizes household surplus by reducing total governance costs.<sup>50</sup>

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<sup>48</sup> Hansmann uses "patron" to describe any party who transacts with a business firm. Hansmann, *supra* note \_\_\_, at 12.

<sup>49</sup> Splitting ownership rights among two or more patrons generally is inadvisable. For example, if suppliers of both labor and capital were to share the ownership of a household, transaction costs would escalate because both the number and the heterogeneity of the decisionmakers would increase. See *infra* text at notes \_\_-\_\_. But cf. Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* 238-74 (1995) (arguing that an employee with firm-specific human capital merits sharing in the ownership of a corporation).

<sup>50</sup> In Hansmann's terms, this is the "lowest-cost assignment of ownership." See Hansmann, *supra* note \_\_\_, at 21-22.

Of the various patrons of a household, outside suppliers and customers are the least plausible candidates to serve as owners. Because they usually are not knowledgeable about household conditions, they are poorly qualified to make residual control decisions. In addition, unlike providers of capital, they typically can protect themselves by means of simple express contracts. For instance, a disgruntled provider of ephemeral services can resort to the self-help measure of refusing additional service, and a provider of a durable good or permanent physical improvement can insist on being paid in advance.

Occupants, however, are facially plausible candidates to serve as the owners of a household. Unlike outsiders, occupants typically do have detailed knowledge of the enterprise because they provide most household labor and consume most household production. If occupants indeed were to own a household, they conceivably could raise all the capital they needed through either loans or retained earnings.<sup>51</sup> In the sitcom household, for example, the five occupants might raise needed funds by borrowing from a bank, credit-card company, mortgage lender, or one of their own number (perhaps Granny, if she were to have sufficient savings).

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

Anecdotal evidence suggests that, in practice, a household's patrons typically arrange to confer ownership on its suppliers of equity capital, not on its occupants. In the sitcom household, Mom and Dad thus have powers of residual control and rights to residual financial flows, while Junior, Granny, and Cheri do not. Why this pattern? The literature on the ownership of enterprise suggests four reasons for this result. In order of increasing complexity and weightiness, the four are these:

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

The providers of a household's equity capital are likely to be less numerous than its occupants. The sitcom household, for instance, has five occupants, but only two suppliers of equity. Two people can make decisions more easily than can five. Although these particular numbers are artifacts of the hypothetical case, available data indicate that the owners of, say, a single-family house rarely exceed two, while the number of occupants commonly is greater than that.<sup>52</sup> A study in Iowa in 1954-64, for example, found that in over 95% of real estate transfers

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<sup>51</sup> Scholars of business organization have analyzed the analogous possibility of a worker-owned business firm that borrows all needed capital. See, e.g., Hansmann, *supra* note \_\_\_\_, at 75-77.

<sup>52</sup> In a decennial census the Census Bureau tallies only the permanent residents of a household, not the household's owners.

to persons, the deed named either a single individual or a married couple as the grantee.<sup>53</sup> By empowering its equity contributors to govern, a household can keep decision costs down without forgoing the economies of scale in household production and consumption that are achievable when occupants are numerous.

Equity investors in a household also are likely to turn over less frequently than its occupants.<sup>54</sup> Au pairs such as Cheri come and go. Junior and Granny also might not stay for long. If an occupant's ownership rights were contingent on continued occupancy, an occupant about to depart would take a shortsighted view of household decisions. Cheri, for example, would have little interest in a long-lasting roof repair. This problem of limited time-horizons would be eliminated if departing occupants could transfer their ownership rights to successors (or sell them back to the other occupants). That solution, however, would increase occupants' transaction costs of entering and exiting a household. A revolving door of owners also would confuse and confound vendees, mortgage lenders, tax collectors, and other outsiders who need assurances about the state of the current title to a household premises. By adding to transaction costs, occupant ownership thus would disadvantage all of a household's patrons.

b. Owners of capital tend to be superior risk bearers

A supplier of capital typically can bear risk better than can a consumer or a supplier of labor. In particular, a person can diversify a holding of financial capital more easily than his own human capital. The occupants of a household therefore commonly are poor candidates to bear the downside risks of household operations, as they would have to if they were serve as its residual claimants. For example, if neither Granny nor Cheri had much in the way of savings, they might be overly cautious about taking on more household debt to finance the replacement of the leaking roof. In this instance, Mom and Dad, the sole equity investors, probably have deeper pockets and more diversified financial portfolios. If so, their risk preferences would not so greatly influence their evaluation of the roof situation.<sup>55</sup>

c. The interests of suppliers of capital are more homogeneous than the interests

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<sup>53</sup> About 40% of the deeds named single grantees, and about 55% named only a husband and wife. Computed from data presented in N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 *Iowa L. Rev.* 582, 607, 617 (1966). See also Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 *Wis. L. Rev.* 334, 398 n.204 (citing other studies of incidence of co-ownership, but not reporting exact numbers of co-owners). [check Sternlieb on ownership of tenements]

<sup>54</sup> If occupants indeed were a household's owners, however, they likely would move in and out somewhat less frequently.

<sup>55</sup> Hansmann regards risk-bearing considerations as a relevant, but often exaggerated, influence on ownership forms. See Hansmann, *supra* note \_\_, at 44-45, 57.

of occupants

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

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

In addition, homogeneity of ownership interests facilitates the calculation of shares of ownership. Capital contributions are especially easy to value. Although some account may have to be made of the time at which a contributor provided capital, figuring out the shares of a household's equity capital is likely to require no more than simple mathematical calculations. This is not true in the case of labor or consumer interests. For example, if labor were to be the residual claimant in the sitcom household, the occupants might wrangle over the fractional interests that, say, Granny and Cheri should get. They might turn to a simple rule such as one-occupant/one-share, but that would fail to correlate shares with either contributions made or interests at stake.

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

Suppliers of capital to a household are especially vulnerable to opportunism by other patrons. In a liberal society, a household worker who feels exploited can exit with most or all of his personal human capital in tow.<sup>56</sup> Suppliers of risk capital, by contrast, turn over a long-lived asset that opportunistic household managers can expropriate and expose to unduly high risks. Oliver Williamson has argued that providers of risk capital to a business firm typically cannot readily negotiate adequately protective contractual provisions from the firm's other patrons.<sup>57</sup> In light of this special vulnerability, the patrons of a household enterprise similarly are likely to conclude that their cost-minimizing approach is to give ownership rights to suppliers of risk capital.

Suppose, for example, the sitcom household were to be owned by its occupants and were

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<sup>56</sup> Just as an industrial worker may have firm-specific human capital (see Blair, *supra* note \_\_\_, at 238-74), a household worker may have household-specific human capital. To that extent, an occupant may indeed be vulnerable to opportunism by others.

<sup>57</sup> See Oliver Williamson, *Corporate Governance*, 93 *Yale L.J.* 1197, 1210 (1984).

to raise all its capital by means of loans from outsiders. To finance the roof repair, the owners might turn to a bank. Because the owners would not have invested any equity capital in their house, the bank likely would be highly skittish about making the loan. Because prior lenders to the household would have senior liens on household assets, the bank would have little or no security if the owners were either to squander the loan proceeds on a foolish repair project or to divert the sum to another purpose, such as purchases of lottery tickets.<sup>58</sup> The bank, of course, could take defensive measures. It might make its own appraisal of the cost-effectiveness of the proposed roof repair project, condition the disbursement of loan installments on the submission of evidence of actual repair work, and so on.<sup>59</sup> Those precautions, however, would give rise to redundant transaction costs. Not only would the owners of the household have to appraise the merits of a proposed roof repair, but so would their lender. By contrast, if the owners of the household were to have an equity stake that would be jeopardized if the household were to waste the funds, the bank would not need to monitor the situation so closely.

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For all these reasons, in the ordinary household the least-cost approach is to confer ownership on providers of risk capital. To summarize and highlight the points just made, I return to the hypothetical commune on a farm in Vermont. There are twelve communards, nine of them impecunious and three of them trust-fund kids willing to provide capital to the enterprise. In this idealistic setting the twelve might refuse to let the three trust-fund kids put up the entire down payment and take title to the farm in their three names. Instead, the twelve might prefer that all of them be grantees, and that the three provide the down payment by means of loans secured by mortgages. Under this arrangement, the twelve might envision working together on the farm, consuming some of its produce, selling surplus produce to outsiders, and applying any net income to service the mortgage debt owed to their three rich associates. If the communards later were to need additional capital, they might imagine obtaining it from either retained earnings or further loans from the trust-fund kids.<sup>60</sup>

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<sup>58</sup> Especially if not personally liable for the debt, the residual claimant of an enterprise that is fully leveraged may be tempted to invest in an overly risky project because the owner reaps all gain if the project is successful but bears none of the loss if it fails.

<sup>59</sup> On the agency costs of 100% debt financing in the corporate context, see Hansmann., *supra* note \_\_\_, at 53-56; Roberta Romano, *Foundations of Corporation Law* 119-120 (1993) (noting, at 120, that “we do not see 100 percent debt-financed firms”).

<sup>60</sup> The financing of Israeli kibbutzim is worthy of more intensive study. (The leading study of the kibbutz, Melford E. Spiro, *Kibbutz: Venture in Utopia* (Rev. ed. 1970), does not discuss finance. But check J. Weisman, *The Kibbutz: Israel's Collective Settlement*, 1 *Israel L. Rev.* 99 (1966).) Because a kibbutz is committed to democratic governance by member-occupants, its members are unable to grant residual control decisions to its financiers. To raise capital a kibbutz thus is likely to depend on a combination of retained earnings and loans from special government supported banks. On the latter, see Joel Brinkley, *Kibbutzim, Israel's Utopias, Develop a Flaw: Debt,*

The arguments presented above indicate why a household governance structure of this sort is unlikely to endure. Twelve cannot decide nearly as quickly as three. In some contexts, the impecunious will be overly cautious about new projects. When three of the owners are lenders and nine are not, there will be a potentially divisive heterogeneity of interests on some issues. Finally and most seriously, as time passes the three trust fund kids are likely to find themselves victims of opportunism by the majority. With little equity at stake, the nine might be lax about maintaining the commune's buildings, keeping troublemakers out, paying the property taxes, and so on. The three trust fund kids thus eventually might condition their additional infusions of capital on their obtaining more residual rights of control. In fact, most experiments with communal ownership of extended households succumb within a few years to some form of creeping capitalism.<sup>61</sup> A capital-controlled household, by contrast, is an ownership form that has the potential to endure. It outlasts more idealistic alternatives mainly because it has inherent transactional advantages, not because of contingent acculturated biases that exist in a society with a market economy.

### III. General Attributes of Households

Just as an entrepreneur can select among various forms of business organizations – a sole proprietorship, a limited partnership, a close corporation, and so on – an individual can choose among a variety of household forms. Especially in a liberal society, where the market for household forms is most competitive, the household arrangements that survive can be presumed to be efficient—that is, to minimize the sum of members' (1) transactions costs, and (2) deadweight losses arising from failures to exploit potential gains from trade.<sup>62</sup> This Part briefly reviews some basic features of households observed in all historical periods and discusses why these features indeed might be efficiency enhancing. The next Part addresses changes in the forms of households over time.

#### A. A Household Economy Mainly Relies on Gift Exchange

When hiring, say, food preparation services from an outsider, a household typically engages in a simultaneous bilateral exchange. For example, housemates likely would pay cash on delivery to a home deliverer of hot pizza. What is striking about most internal household economies, however, is the relative absence of explicit bilateral exchanges, especially ones involving transfers of money. A live-in servant who provides cooking services of course may have explicit contract

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N.Y. Times, Mar. 5, 1989, at A14.

<sup>61</sup> See Benjamin Zablocki, *Alienation and Charisma: A Study of Contemporary American Communes* 76-77, 148-51 (1980); Ellickson, *Property in Land*, supra note \_\_, at 1359-60.

<sup>62</sup> For a more guarded discussion of the inferences to be made from the survivorship of an ownership form, see Hansmann, supra note \_\_, at 22-23.

rights to receive room, board, and wages. But everyday experience suggests that it is vanishingly rare for a household consisting only of kin to pay wages to an adult occupant for performing specific tasks such as cooking meals, mowing the lawn, or protesting the house's property tax assessment.<sup>63</sup>

Even members of a household consisting of nonkin are likely to frown upon using cash to reward household production. Suppose, for instance, that two graduate students intend to live together during the upcoming academic year. During the prior summer one of them incurs the entire burden of finding an appropriate apartment to lease. How should the other roommate later reward this extraordinary contribution? A cash payment surely would be unusual. The benefitted student's typical response would be to even up accounts by making an equally valuable return gift — for instance, by bearing the burden of handling setup arrangements for utility services to the shared apartment.<sup>64</sup> As this example suggests, in most households, especially small ones, most acts of household labor are delivered as unilateral gifts. One occupant cooks, the other does the dishes. Although housemates occasionally may discuss how to share household chores, the terms of much of this coordination are likely to be unspoken.

A household economy based on gift-exchange is unlikely to endure, however, unless it delivers to all members some share of the household surplus. Each member therefore is likely to keep a rough mental account of who has contributed and received what.<sup>65</sup> (In a family household, of course, many gifts, especially ones from parents to children, may be given altruistically, with little expectation of future repayment.) In a successful household, explicit reference to perceived imbalances in internal gift exchange may be regarded as inappropriate because they signal a lack of trust. Nevertheless, a member who receives too little from the household economy eventually can be expected to respond through escalating self-help measures. As his grievances deepen, his informal remedies may progress from gentle reminders, to conspicuous refusals to perform customary duties, to threats of exit, and finally to actual exodus from the household.<sup>66</sup> A grievant's ease of responding to a housemate's transgressions enhances levels of cooperation within a household.

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<sup>63</sup> Some parents do pay children to perform household chores, perhaps partly to prepare them for work experiences outside the household.

<sup>64</sup> Cf. Robert C. Ellickson, *Order Without Law* 61-62, 78, 234-36 (1991) (describing preference of neighbors in rural Shasta County, California, to use in-kind gifts, not money, to compensate one another).

<sup>65</sup> Cf. Ellickson, *Order Without Law*, *supra* note \_\_\_, at 55-56 (discussing mental accounting of interneighbor debts).

<sup>66</sup> Cf. Ellickson, *Order Without Law*, *supra* note \_\_\_, at 56-64 (on neighbors' application of escalating self-help sanctions to control deviants).

Why are household economies so little commodified?<sup>67</sup> The first and main reason is that gift exchange is administratively cheaper than a system of explicit bilateral contracts.<sup>68</sup> Household members confident that their gift exchange system will be mutually advantageous are able to avoid the hassle of negotiating and enforcing agreements over particular contributions. How much is sweeping out the garage worth? How well was the job done? These sorts of questions may arise in a household based on gift exchange because members may find it desirable to keep rough mental accounts. But the transaction costs of keeping those accounts are far less than the costs of bargaining out in advance the terms of a garage-cleaning deal and later administering that contract. In a household where members generally trust one another and where all members receive some share of the surplus, a garage cleaning may be initiated unilaterally, without any prior negotiation among housemates.

A second reason bilateral transactions are disfavored within households is that money (a handy medium for bilateral exchange) symbolizes a lack of intimacy. For example, law and norms permit gifts of babies and sexual favors, but forbid their sale.<sup>69</sup> A well-socialized dinner guest arrives bearing the gift of a bottle of wine, not proffering a twenty-dollar bill. Cash is the medium of exchange appropriate for persons who operate at arms length. Gifts are the medium of exchange appropriate for intimates. By engaging in daily gift exchanges, household members not only reduce their transaction costs but also signal their mutual trust.<sup>70</sup>

#### B. Most Households Are Kinship-Based

In all societies in all historical periods, occupants of households typically have been related

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<sup>67</sup> While avoidance of cash payments for labor also may reduce income-tax liabilities, the prevalence of gift exchange in households predated the advent of the income tax.

<sup>68</sup> Dagan & Heller, *supra* note \_\_\_, at 582-90, suggest default rules to control how co-owners incur financial obligations to one another on a piecemeal basis. For example, “[e]very commoner is liable to the others for the fair market value of every use calculated pro rata (that is, according to ownership share).” *Id.* at 584. They recognize, however, that co-owners in practice are likely only to adjust mental accounts, and not to even up matters day-by-day by means of cash transfers among themselves. See *id.* at 585.

<sup>69</sup> See Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849 (1987).

<sup>70</sup> See Ellickson, *Order Without Law*, *supra* note \_\_\_, at 234-35. Feminist scholars who urge monetary compensation for household work appear to recognize this point. See, e.g., Susan Moller Okin, *Justice, Gender, and the Family* 180-81 (1989) (opposing cash compensation for particular household tasks, but advocating that each spouse receive half of any paycheck received for work outside the household); Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* 161-66 (1995) (urging that governments compensate contributors of household work) [check].

by marriage or kinship. This was so in Mesopotamia and the rest of the ancient Near East.<sup>71</sup> In Europe it has been true since the beginning of the historical record.<sup>72</sup> Kinship-based households also have been predominant in Japan and Ghana.<sup>73</sup> Census data confirm that the contemporary United States is a land of family households. In 1994, of Americans aged 15 or older, 81% lived with a spouse or other relatives and 12% lived alone.<sup>74</sup> The remainder, a mere 7%, were occupants of multiperson households in which no members were related to one another. When a household is co-owned, the owners also are highly likely to be close relatives. William Hines's study of land records in Iowa in 1954-64 found that in over 90% of the cases in which there was a grant to two or more individuals as co-owners, a husband and wife were the only grantees.<sup>75</sup>

Why are so many households kinship-based?<sup>76</sup> A primary reason is that innate kinship altruism prompts a caring attitude toward close family members and the household is an unrivaled setting for the provision of that care. Relatedly, innate kinship altruism fosters trust. Trust is the expectation that another person will act cooperatively, instead of opportunistically, in a situation where both options are available.<sup>77</sup> A household setting is rife with possibilities for an opportunist. A bad apple can abuse the common space, pilfer personal property, neglect household duties, and divulge secrets about the personal lives of housemates. Someone who lives with an opportunist

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

<sup>72</sup> See David Herlihy, *Medieval Households* (1985); *Household and Family in Past Time* (Peter Laslett ed., 1972).

<sup>73</sup> Chie Nakane, *An Interpretation of the Size and Structure of the Household in Japan over Three Centuries*, in *Household and Family in Past Time*, supra note \_\_\_\_, at 517; Jack Goody, *The Evolution of the Household*, in *Household and Family in Past Time*, supra note \_\_\_\_, at 100.

<sup>74</sup> *Statistical Abstract 1996*, at 56. See also Becker, supra note \_\_\_\_, at 46 (reporting that in the United States in 1970, an astounding 89% of household members were either heads of households or spouses or children of those heads).

<sup>75</sup> Computed from data presented in N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 *Iowa L. Rev.* 582, 607, 617 (1966). Many spouses also share checking and savings accounts. See N. William Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 *Minn. L. Rev.* 509, 526-27, 574 (1970) (reporting that, among Iowa married couples responding to questionnaire, 89% of checking accounts and 81% of savings accounts were held in joint tenancy (and none in tenancy in common)).

<sup>76</sup> See generally David D. Haddock & Daniel D. Polsby, *Family As a Rational Classification*, 74 *Wash. U. L.Q.* 15 (1996) [check].

<sup>77</sup> For a review of social-scientific definitions of trust, see Erik Luna, *Transparent Policing*, 85 *Iowa L. Rev.* 1107, 1159 n.205 (2000). On the general topic, see, e.g., James S. Coleman, *Foundations of Social Theory* 91-116 (1990); Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (1995).

therefore must either bear high losses or incur high monitoring costs. A far better strategy is to live with someone one can trust (and to exit the household if that trust ever were to evaporate).

Trust among housemates increases the amount of household surplus. Gift exchange, the source of many of the household's advantages as an economic unit, cannot thrive in its absence. In particular, trust enables occupants of a household to engage in productive activities that are extremely difficult to monitor, for example, infant and toddler care. For this reason, family farms tend to predominate in the production of crops for which supervision of field workers is difficult.<sup>78</sup>

As Robert Pollak ably explains, family ties help foster trust for a number of reasons.<sup>79</sup> First, as mentioned, biologists hypothesize the existence of an evolved altruism toward kin — that is, the persons whose gene pool one shares.<sup>80</sup> Second, expulsion from a kinship network is particularly costly because that network is irreplaceable. Because of its uniqueness, the kinship game is a long-term game played until death, and the long shadow of its future helps induce cooperative play at present. Third and relatedly, information about one's kin is apt to be unusually complete, a reality that tends to deter a person from acting in a way that would tarnish his reputation with kin. Fourth and finally, in most societies prevailing social norms support loyalty to kin.<sup>81</sup>

### C. Housemates Who Are Not Kin Tend to Be Linked in Social Networks

Who, other than kinfolk, can someone shopping for a new household most trust? A plausible strategy is to give preference to persons with whom one has shared, or will share, a social circle. Past contacts are valuable because they reveal information about trustworthiness. The prospect of future interactions is valuable because, by extending the expected length of the relationship beyond the life of the household itself, it lessens the risk of opportunism during the household's final months. When housemates belong to the same social circle, flying the coop without paying one's share of the final phone bill can readily be punished with negative gossip and

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<sup>78</sup> See Pollak, *Families and Households*, supra note \_\_\_, at 591-93. [See also Allen and Lueck?]

<sup>79</sup> See Pollak, *Families and Households*, supra note \_\_\_, at 585-88 (1985). Pollak also notes some disadvantages of kinship-based households. The multiplex nature of kinship ties poses risks that conflict will be imported into the household from an external strand of the kinship relationship, for example, a sibling rivalry. Members who are added to a household mainly for kinship reasons are not likely to possess the labor skills the household most needs, and may make the household expand to beyond its most efficient size. See *id.* at 587-88.

<sup>80</sup> See generally Becker, supra note \_\_\_, at 277-306 (discussing altruism within the family).

<sup>81</sup> These same four factors explain the predominance of households containing closely related kin (e.g., parents and children), as opposed to more distantly related ones (second cousins).

other informal social sanctions. Besides these benefits, sharing a household with a friend also promises to deepen the friendship, something valued for its own sake.

As a result, a law student seeking a roommate is likely to prefer living with a classmate. A study of the housing arrangements of the 559 Yale Law students living off campus in 1997-98 found that 29% of them were rooming with at least one other schoolmate (and implies that most of the others were living alone).<sup>82</sup> Law students who live together can anticipate benefitting from better networking during their educations and perhaps during their professional careers after graduation. They also can anticipate more efficient household operation.

Housemates can be expected to live with persons like themselves. Even apart from the benefits of a shared external social network, homogeneity facilitates decisionmaking because members' assessments of alternatives are more likely to jibe. When occupants have similar tastes, they can more readily agree on what television shows to watch, what newspaper to subscribe to, how to stock the refrigerator, and what friends to invite to dinner. Relatedly, when owners have similar discount rates, they will find it easier to decide what capital improvements to make. As a result, housemates and homeowners both can be expected to sort out by social class.<sup>83</sup> Too much homogeneity in housemates' human capital, however, can be disadvantageous. A household's surplus is greater when its members have specialized and complementary talents in household production.

The main disadvantage of living with friends is loss of privacy. A young person on the lookout for a marriage partner, for example, might fear that information about prior romantic entanglements would be revealed by housemates to other friends. Those who highly value their privacy therefore can be expected to live alone, or, if they cannot afford to do that, to live with relative strangers solely to exploit economies of scale in the provision of shelter.<sup>84</sup> Decisions on living arrangements thus reveal tastes for privacy, and as such operate as signals in the marriage market. To signal availability for marriage, a twenty-something's best choice usually is to live alone; next best, in a household of relative strangers; third, in a household of friends; and, finally and worst

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<sup>82</sup> Masato Hayakawa, A Study of Housing Patterns of Yale Law School Students 17 (1999) (unpublished paper) (on file with author). Hayakawa did not investigate, however, how many were cohabiting with persons other than fellow Yale Law students.

<sup>83</sup> Cf. Becker, *supra* note \_\_, at 108-34 (discussing "assortive mating" that tends to pair partners of like quality).

<sup>84</sup> In prime neighborhoods of New York City, where apartments are unusually expensive, about two dozens companies specialize in helping total strangers pair up as roommates. See Dennis Hevesi, Making Roommates of Perfect Strangers, N.Y. Times, Aug. 20, 2000, § 11, at 1. In sociological terms, in a household of relative strangers relationships are *simplex*, as opposed to *multiplex*. Because trust levels tend to lower in a simplex household, the scope of its internal economy is apt to be less ambitious than that of a multiplex household.

of all, with parents.<sup>85</sup>

#### D. Dwellings Tend to Be Owner-Occupied

Since ancient times (with rare exceptions such as the Communist collectivizations), the owners of a single-family house commonly have been drawn from among the house's occupants.<sup>86</sup> In the United States in 1997, 68% of the occupied housing stock consisted of single-family dwellings, detached or attached. Of these dwellings, 84% were owner-occupied.<sup>87</sup> Indeed, owner-occupants inhabit 20% of the dwelling units in residential structures containing 2 to 4 units.<sup>88</sup> Moreover, when a dwelling unit of any type is rented, it typically is occupied by the primary tenant (that is, the owner of the leasehold) and not by some subsequent sublessee. In this limited sense, the ordinary leasehold itself involves a form of owner-occupancy.

Owner-occupancy has some disadvantages. For a poor family in particular, investing in homeownership ties up capital in a relatively illiquid and undiversified form.<sup>89</sup> Why then is owner-occupancy so common? Evolutionary psychology may play a role. If members of the species *homo sapiens* are inherently territorial, owner-occupancy has the advantage of providing maximum security of possession.

More importantly, perhaps, owner-occupancy tends to reduce the transaction costs of governing a household. The absentee owner of a rented house runs the risks that the occupying tenants will abuse the built-in appliances, fail to repair leaks before water damage occurs, and so on. An absentee owner can prevent these acts of waste (the legal term for acts that unreasonably reduce the value of the owner's residual claim), but only by incurring monitoring costs. For several reasons, monitoring costs tend to fall when owners themselves are among the occupants.<sup>90</sup> First, because the occupying owners typically displace some non-owning occupants, there are fewer individuals present in the dwelling who are indifferent to the value of the residual claim. Second, when owners occupy, their costs of gathering information and administering informal sanctions on occupants are much reduced. In the sitcom household, for example, Mom and Dad can readily keep an eye on Junior, Granny, and Cheri. Scholars of business enterprise have argued that the

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<sup>85</sup> Cf. Eric A. Posner, *Law and Informal Norms* 70-72 (2000) (on signaling during courtship).

<sup>86</sup> See Ellickson & Thorland, *supra* note \_\_\_, at 337-38 n.80.

<sup>87</sup> Statistical Abstract 1998, at 729.

<sup>88</sup> *Id.*

<sup>89</sup> See Hansmann, *supra* note \_\_\_, at 201-02.

<sup>90</sup> Cf. Hansmann, *supra* note \_\_\_, at 66-119 (discussing pros and cons of employee ownership of enterprise (and emphasizing advantages of homogeneity of owners' interests)).

family farm endures for crops for which absentee owners cannot readily monitor the quality of farm work.<sup>91</sup> The owner-occupied family house tends to predominate in the suburbs for the same reason. In suburbia one of the chief crops to be managed is the grass on the front lawn. Homeownership typically is the organizational form that best controls the crabgrass.

Governance is not necessarily cheapest, however, when all occupants have ownership shares. Governance costs rise exponentially with the number of owners. As noted above, few American single-family dwellings are owned by more than two individuals. Similarly, a large multi-family residential structure typically is more efficiently managed by a single landlord than by unit owners acting through a condominium or cooperative association. The owners of individual units in a multifamily building not only are numerous, but also have heterogeneous interests when the repair of a specific common area would particularly benefit the owners of nearby units.<sup>92</sup>

#### E. Most Households Are Tiny

Even in medieval times, nuclear households averaging no more 5 or 6 members predominated in Northwestern Europe.<sup>93</sup> Today in no nation are households of ten or more commonplace.<sup>94</sup> Households in the United States at the turn of the twenty-first century are smaller than those in most other nations. In 1998, 85% of the U.S. population lived in multi-person family households.<sup>95</sup> These family households on average had 3.2 occupants; a mere 2% of them contained seven or more persons.<sup>96</sup> In 1998, another 5% of the populace (13 million people) resided in multiperson nonfamily households. These held 2.4 occupants on average (and hence a

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<sup>91</sup> See Hansmann, *supra* note \_\_\_\_, at 47; Allen & Leuck.

<sup>92</sup> See Hansmann, *supra* note \_\_\_\_, at 195-223 (criticizing tax subsidies and threats of rent control that lead to excessive occupant-ownership of multifamily buildings).

<sup>93</sup> See, e.g., Barbara A. Hanawalt, *The Ties that Bound: Peasant Families in Medieval England* 5, 103-04 (1986); David Herlihy, *Medieval Households* 62-72 (1985) (reporting results of early ninth century survey of rural lands in St. Germain, where the median household size was six).

<sup>94</sup> Gary Becker has conveniently assembled data from over a dozen surveys of household composition in different societies in different eras. See Becker, *supra* note \_\_\_\_, at 46-47. Among these, the United States in 1970 had the smallest average household size (3.11 members), and India in 1970-71 had the largest (6.64). The Indian survey also reported the highest percentage of households with ten or more members: 16%. On trends in the sizes of households over time, see *infra* text at notes \_\_\_\_-\_\_\_\_.

<sup>95</sup> Unless otherwise indicated, the data in this paragraph are drawn from Statistical Abstract 1999, at 60-62.

<sup>96</sup> Household size in the United States does not vary much by state. In 1996, the average number of persons per household (including single-person households) varied from a low of 2.49 in Colorado to a high of 3.08 in neighboring Utah. Statistical Abstract 1999, at 63.

median and mode of 2 persons). Of the persons in multiperson nonfamily households, 89% lived in twos or threes, and only about 0.5% lived in a household of seven or more.<sup>97</sup> Thus multiperson nonfamily households tend to be even smaller than family households. In 1998, the remaining 10% of the U.S. population — over two-thirds of those not residing in a family household — lived alone. The propensity to live alone increases sharply with age. Of those aged 20 to 24, 6% had no housemates, compared to 31% of those over age 64.<sup>98</sup>

#### F. Summary

In this Part, I have argued that the observed attributes of households contribute to their survival as organizational forms. Gift exchange among trusting individuals is cheaper than explicit bargains. By clustering together in groups linked by kinship or other close social ties, individuals are better able to operate a gift-exchange economy. Owner-occupied housing is common because it lessens the separation between the contributors of equity capital and occupants who contribute labor. By keeping the numbers of both owners and occupants small — typically in the low single digits — household members both strengthen the ties that bind them together and also simplify their decisionmaking.

### IV. A Theory of the Scale and Scope of a Household Economy

Over the course of the past three millennia the number of occupants in an average household generally has fallen. In addition, for any given household size, members have tended to shift toward acquiring more goods and services through external trade, and away from internal production. It is thought that most ancient households were relatively large and autarkic (self-sufficient); occupants were likely to grow much of their own food, make much of their own clothing, and erect their own buildings. By contrast, a twenty-first-century household consisting only of two urban professional DINKs (double income, no kids) is likely to obtain all of these essentials through cash transactions with outsiders. This Part develops a theory of the factors that influence the scale and scope of household activities, and illuminates the theory with examples from history.

#### A. Static Analysis: The Choice Between Internal Production and External Trade

Why don't we all live in one all-enveloping household? Or, conversely, all in one-person households? This question is analogous to one that Ronald Coase famously asked about the

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<sup>97</sup> These figures do not include persons living in “group quarters.” On those arrangements, see *supra* note 1 and *infra* text at notes \_\_\_\_-\_\_\_\_.

<sup>98</sup> Statistical Abstract 1999, at 57.

organization of the business firm.<sup>99</sup> The underlying issue, in both contexts, is the location of the optimal boundary between a multiperson enterprise and the world beyond it.

Coase hypothesized that a firm's managers would compare the relative efficiency of internal production and external trade, and then choose the more cost-effective option. Like a firm, a household repeatedly faces "make or buy" decisions.<sup>100</sup> The two DINKs, for example, every evening must decide whether to prepare their own meal or instead phone a pizza delivery service or go out to a restaurant.<sup>101</sup> Which course of action is more efficient depends on a combination of two factors. The first is the relative cheapness of production at home and on the outside. The other is the relative administrative cheapness of arranging for provision from these alternative sources. Managers of an household have an incentive to choose the option that minimizes the sum of transaction costs and deadweight losses (that is, the gains missed from failures to exploit cheaper sources of supply). While labor cannot possibly be as specialized within a household as it is within the economy at large, household gift exchanges tend to be administratively cheaper than arms-length transactions with outsiders.

The members of a household can be expected to use their voices to urge cost-justified reforms of household economic policies. When a household mismanages its make-or-buy decisions, it risks losing members to less dysfunctional households. To survive these competitive pressures in a liberal society, an enduring household thus can be expected to have an internal economy of roughly optimal scale and scope.

### 1. Advantages of Bigger Households

Increasing the size and scope of a household economy can give rise to both efficiencies and inefficiencies. What are the potential efficiencies?<sup>102</sup> First, a large household can secure economies of scale in consumption. As the cliché goes, two can live more cheaply than one. Some household services are pure public goods, that is, provide benefits that are entirely noncongestible. Heat from a furnace, security from an alarm system, the pleasing sight of a well-painted exterior, amicable relations with a neighboring household – all are examples. Other household goods and services, although not pure public goods, promise efficiencies of scale because they are seldom congestible

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<sup>99</sup> See Ronald H. Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937), reprinted in R.H. Coase, *The Firm, the Market, and the Law* 33 (1988). See also Oliver Williamson, *Markets and Hierarchies*, etc.

<sup>100</sup> For prescient recognition of this point, see Margaret G. Reid, *The Economics of Household Production* 219-23 (1934).

<sup>101</sup> See Figure 2.

<sup>102</sup> See Angus Deaton & Christina Paxson, *Economies of Scale, Household Size, and the Demand for Food*, 106 *J. Pol. Econ.* 897 (1998) [check].

in practice: the dining room, the clothes dryer, basic telephone service (at least in a home without a teenager).

Second, economies of scale and scope also may be available on the production side. Team production may be superior to solo efforts. A second pair of hands eases the task of moving a sofa or making a Christmas tree plumb. More important, an increase in household size enables members to specialize in their roles in household production.<sup>103</sup> Persons with complementary skills may pair up partly to exploit this advantage. And, after a household has been formed, members can make specialized investments in human capital. One occupant may learn how to clean the oven; another, how to prune the shrubs. These considerations have importantly influenced the evolution of households since the dawn of history. Because of economies in production, households have tended to be larger in agricultural societies than in hunter-gatherer societies.<sup>104</sup> Lastly, in contexts where it is true that “the more, the merrier,” an increase in size may improve the quality of a household’s internal social life.

Third, the larger a household, the better it can spread risks among its occupants. Historically, the multiperson household has served as a key venue for the provision of social insurance. Through a system of reciprocal gift exchange, occupants can provide care to those among them who are temporarily suffering from disease, injury, or other disability.<sup>105</sup> Insurance against a long-term disability also is possible, especially in a household fueled by kinship altruism. Social insurance, however, also may be obtainable from sources beyond the household, such as extended families, religious organizations, insurance companies, and states. According to the theory advanced here, household members tend to provide this insurance internally only when they can do so more cost-effectively than outsiders can provide it.

## 2. Disadvantages of Bigger Households

Given all these potential advantages of size, why aren’t there more large households, particularly among nonkin?

First, in any type of commons, governance becomes more difficult as the number of occupants and owners increases. The more housemates one has, the greater the risk that one of

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<sup>103</sup> See Becker, *supra* note \_\_, at 30-53, 57-64.

<sup>104</sup> Burton Pasternak

<sup>105</sup> For examples of these systems at work, see, e.g., Kate Mertes, *The English Noble Household 1250-1600: Good Governance and Politic Rule* 73-74 (1988) (on English’s lords’ systems of social insurance for elderly servants within their households); Stefan Dercon & Pramila Krishnan, *In Sickness and in Health: Risk Sharing within Households in Rural Ethiopia*, 108 *J. Pol. Econ.* 688 (2000).

them will play the hi-fi too loud, take too much from the refrigerator, monopolize the television set, or shirk on dishwashing. Housemates, of course, can control these antisocial acts by means of contracts, norms, and other social controls. When a household is small, its members can rely on kinship and reciprocal altruism to reduce their costs of monitoring each other.<sup>106</sup> This provides an advantage over market production. However, holdout and freerider problems increase, usually exponentially, as the number of co-occupants rises and the strength of their kinship and reciprocal altruism wanes. As a household grows larger, the sum of its costs of internal governance costs and losses from “tragedies of the commons” eventually exceeds the gains members obtain from having a micro-economy based on gift exchange.

Second, an occupant’s autonomy dips with every new addition a household. Living with others forces compromise. A person in a single has total control over the music played, the food served, the guests invited. A person with housemates does not.

Third, personal privacy diminishes as a household grows. Information about one’s sexual partners, medical problems, and eccentric tastes is more likely to spread when one has more housemates.

### 3. Small Households Predominate, Larger Intentional Communities Usually Fail

In the contemporary United States most participants in the market for households apparently perceive that these disefficiencies of household scale quickly exceed the countervailing efficiencies.<sup>107</sup> For many, even a household of two is too large. As noted, two-thirds of the Americans who don’t live in family households choose to live alone.<sup>108</sup> And only 5% of family households include a second family (typically, one whose members are related to the household head).<sup>109</sup> In the late nineteenth century, perhaps as many as quarter of U.S. households included either boarders or live-in servants unrelated to the household’s head; by the late twentieth century few households included these sorts of non-intimates.<sup>110</sup>

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<sup>106</sup> Luis Locay, *Economic Development and the Division of Production Between Households and Markets*, 98 J. Pol. Econ. 965, 967 (1990).

<sup>107</sup> For an analysis of why there are many large business enterprises but few large households, see Becker, *supra* note \_\_, at 51-53. Becker stresses that firms are more capital intensive than households are. I would give more weight to the intensity of individuals’ preferences for autonomy and privacy at home, compared to the workplace.

<sup>108</sup> See *supra* note \_\_ and accompanying text.

<sup>109</sup> Statistical Abstract 1999, at 60.

<sup>110</sup> See, e.g., Edward T. Pryor, Jr., *Rhode Island Family Structure: 1875 and 1960*, in *Household and Family in Past Time*, *supra* note \_\_, at 571,586 (reporting Rhode Island households with one or more nonrelatives declined from 24% to 2% between 1875 and 1960).

The nuclear household, despite its prevalence, has long been the target of radical reformers. In the nineteenth-century, for example, Fourier, Marx, and others argued that household was a venue for the oppression of women and anticipated that communal living might free women from their straits.<sup>111</sup> Utopias, such as those envisaged by Plato, Thomas More, and B.F. Skinner, typically are portrayed as settlements where dozens or even hundreds of unrelated adults share meals and reside in collectively governed housing.<sup>112</sup>

Indeed, idealists skeptical of traditional households have created a wide variety of “intentional communities,” a disproportionate fraction of them in the United States.<sup>113</sup> In general, history indicates that it is difficult to sustain a large household where many nonkin share both shelter and meals, especially without a highly homogenous membership and a strong unifying ideology. Most Woodstock Era communes perished quickly. In two of the most successful communal forms — the kibbutz and the Hutterite community — insiders regularly speak of “crises” that are putting them close to extinction. When children are present, communards who share meals commonly agree to allow each family unit to control a private dwelling. The kibbutzniks learned through experience, for example, that most parents prefer family dwellings because they want to concentrate their child-rearing efforts on their own children, rather than on children more generally.<sup>114</sup> Leaders of the “co-housing” movement, which took root in the 1990s, recognize this reality. They typically advocate establishment of settlements where each family owns its own

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<sup>111</sup> See Jackson, *Crabgrass Frontier*, *supra* note \_\_\_, at 51.

<sup>112</sup> Plato proposed that Guardians share dwellings, storehouses, wives, and a modest food allotment. Plato, *The Republic*, Bk. 3, 416d-e, Bk. 4, 419-420c. John Noyes’s Oneida Community of 1848-79 involved common dining (but private bedrooms); see William M. Kephart, *The Family, Society, and the Individual* 121-41 (1977). [Cite More [and Bellamy?].] Skinner envisioned nearly 1,000 persons sharing a common eating room and dwelling in “personal rooms” located within a complex of buildings governed by a six-person “Board of Planners.” B.F. Skinner, *Walden Two* 18-20, 40-44, 48 (1976) (1948). See also Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *Yale L.J.* 1073, 1198-1205 (1994) (describing the “cooperative housekeeping” movement of the post-Civil War period, whose participants aspired to create metahouseholds). On utopian thought, see generally Krishan Kuman, *Utopia and Anti-Utopia in Modern Times* (1987); Frank E. Manuel & Fritzie Manuel, *Utopian Thought in the Western World* (1979). The enduring appeal of utopian alternatives to the conventional household hints that humans have an evolved psychological yearning for a return to the conditions of the hunter-gatherer band. Like a sweet tooth, this yearning can prompt maladaptive decision-making under contemporary conditions.

<sup>113</sup> See Ellickson, *Property in Land*, *supra* note \_\_\_, at 1344-62; For reports of how residents of these settlements view themselves, visit the Intentional Communities Website at [www.ic.org/](http://www.ic.org/). In the most ambitious of these ventures a resident who works outside the settlement is expected to put all earnings into the common pot. As in a marriage in a community-property state, human capital thus is owned collectively.

<sup>114</sup> Becker, *supra* note \_\_\_, at 44-45.

dwelling, but all the families co-own and share the use of a central dining facility.<sup>115</sup> The common spaces of these hybrids might be termed *semi-households*.

A “group quarters” (to use the Census Bureau’s label)<sup>116</sup> is another intriguing hybrid. Examples are dormitories, fraternities and sororities, and abodes for members of religious orders.<sup>117</sup> Group quarters exploit efficiencies of scale in the production of food, shelter, and social activities, but at the price of major sacrifices in autonomy and privacy. A consensual group quarters thus disproportionately attracts those who are young and impecunious. Because a group quarters tends to be unsuitable for child-rearing, its residents also are likely to be both single and childless. Indeed, in a group quarters whose layout affords scant privacy, residents are unlikely to be active participants in the marriage market.<sup>118</sup> A group quarters can be designed, however, to be more attractive to young singles. For example, a dormitory may offer a university student a private, lockable, bedroom; a bathroom shared with only a few hallmates; and a dormwide dining facility.

## B. Dynamic Analysis of Households: The Effects of Demographic Changes, New Technologies, and Accretions of Social Capital

### 1. The General Trend Toward Smaller and Less Autarkic Households

Households have been becoming smaller. Many scholars envisage that extended-family households were common in the earliest historical times, especially in rural areas.<sup>119</sup> In medieval Europe, however, most French and English peasants were living in nuclear households whose

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<sup>115</sup> See Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 *J. Land Use & Envtl. L.* 3 (1999); Linton Weeks, *Co-Housing: The Challenge of Building New Communities*, 9 *Responsive Community* 58 (No. 3, Summer 1999).

<sup>116</sup> See *supra* note 1.

<sup>117</sup> There also are illiberal group quarters, such as prisons and mental institutions for the involuntarily committed.

<sup>118</sup> See *supra* text at notes \_\_\_-\_\_\_.

<sup>119</sup> See Ellickson & Thorland, *supra* note \_\_\_, at 354-55 (citing sources on household sizes in ancient Mesopotamia, Israel, and Greece). Partly because the evidence is thin, this vision is contested. Compare, e.g. I.M. Diakonoff, *The Structure of Near Eastern Society Before the Middle of the 2d Millennium B.C.*, 3 *Oikumene* 7, 42-43 (1982) (arguing that ancient man knew only communal property), with J.N. Postgate, *Early Mesopotamia: Society and Economy at the Dawn of History* 91-93 (1992) (stating that, at least in cities, Mesopotamian households rarely included more than one conjugal unit).

number of inhabitants averaged on the order of 6 and seldom exceeded 10.<sup>120</sup> Peter Laslett found that in 1600-1900, household size in England and Wales remained relatively constant, with an average of 4.75 members.<sup>121</sup> By 1961, however, it had dropped to 3.04.<sup>122</sup> Average household size fell by almost half in Sweden during the twentieth century alone.<sup>123</sup> The average size of a U.S. household fell from 5.79 in 1790, to 4.76 in 1900, to 2.62 in 1998.<sup>124</sup>

The scope of productive activities within a household of a given size also has tended to narrow over time. Homer portrays Odysseus's home in Ithaca as relatively autarkic.<sup>125</sup> Even by Hellenic times, however, Athenian households were less self-sufficient and more involved in trade.<sup>126</sup> By the same token early nineteenth-century American frontier households were self-reliant to a degree almost unimaginable today. Tocqueville offered the portrait of a pioneer nuclear-family household whose members had cleared their own land, built their own log house, and hewn their own furniture.<sup>127</sup> (But even Tocqueville's prototypical householders had books and

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<sup>120</sup> See supra note \_\_\_\_; Peter Laslett, *The World We Have Lost* \_\_\_\_ (1965). Prior to Laslett's pioneering work, most historians had supposed that extended-family households had been the norm in Europe prior to the nineteenth century. Laslett adduced evidence that the nuclear household in fact had predominated in Europe in medieval times. See Peter Laslett, Introduction: The History of the Family, in *Household and Family in Past Time 1* (Peter Laslett & Richard Wall eds., 1972). Laslett subsequently restricted the scope of this thesis to northwestern Europe. See Peter Laslett, Family and Household as Work Group and Kin Group: Areas of Traditional Europe Compared, in *Family Forms in Historic Europe* 513 (Richard Wall, J. Robin & Peter Laslett eds., 1983). See generally David I. Kertzer, Household History and Sociological Theory, 17 *Annual Rev. Sociol.* 155 (1991) (reviewing historians' debate over trends in household size).

<sup>121</sup> Peter Laslett, Mean Household Size in England Since the Sixteenth Century, in *Household and Family in Past Time*, supra note \_\_\_\_, at 125, 138.

<sup>122</sup> *Id.* at 138.

<sup>123</sup> See Orvar Lofgren, Family and Household: Images and Realities: Cultural Change in Swedish Society, in *Households: Comparative and Historical Studies of the Domestic Group* 446, 466 (Robert McC. Netting et al. eds., 1984) (reporting that average household size in Sweden plummeted from 4.56 persons in 1890 to 2.4 persons in 1976).

<sup>124</sup> The figures for 1790 and 1900 are from 1 *Historical Statistics of the United States: Colonial Times to 1970*, at 41 (1975); the figure for 1998 is from *Statistical Abstract 1999*, at 60. Relatedly, the percentage of American households containing seven or more persons fell from 36% in 1790, to 20% in 1900, to 1% in 1998, and the percentage of containing just a single member rose 4% in 1790, to 5% in 1900, to 26% in 1998. See the two sources just cited, at p. 42 and p.61 respectively.

<sup>125</sup> [Cite]

<sup>126</sup> See infra text at notes \_\_\_\_-\_\_\_\_.

<sup>127</sup> Alexis de Tocqueville, *Democracy in America* 731-33 (J.P. Mayer ed. 1988) (1840).

kitchenware — items that they presumably had acquired by trade with outsiders, not internal production.)

## 2. Causes of the Trend Away from Household Production

Why have households been becoming smaller and less autarkic? Demographic changes, such as increasing life expectancies, have affected the size and scope of household economies. In addition, changes in the economic, political, and social environment in which a household is imbedded can affect the relative efficiency of internal production and outside trade. As technologies advance, social capital accumulates, and the rule of law spreads, trade with outsiders becomes more advantageous than it was previously. Finally, tastes for more private living arrangements tend to come to the fore as a nation becomes more prosperous.

### a. Demographic changes

Demographic changes account for much of the drop in household size during the twentieth century. Because life expectancies have jumped by 20-25 years, parents now live for many more years after their children are able to depart from the familial nest. In addition, women now bear fewer children, partly because pregnancy has become easier to control. Households' planning decisions themselves may partially account for some of these demographic changes. For example, an urban couple, knowing that children tend to be more useful on a farm than in a city, may decide to have fewer of them.

### b. Technological changes affecting household and extrahousehold production

Economic development tends to shift productive activity out of the household and into the market.<sup>128</sup> According to one estimate, in 1930 household output in the United States equaled 73% of the output of the external market sector. By 1985, the figure had fallen to 28%.<sup>129</sup> Drops such as these result from changes both in the production possibilities in the two sectors and in the transaction costs of trade.

New technologies that aid within-household production usually reduce the optimal scale of dwelling arrangements. Until the past few centuries, the laboriousness of keeping a fire going encouraged a large group to eat together. In the twenty-first century, the availability of the inexpensive microwave oven promotes smaller household sizes. The purchase of a clothes washer and vacuum cleaner may be cheaper than hiring a live-in servant. The availability of new hardware,

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<sup>128</sup> See Reid, *supra* note \_\_\_; Luis Locay, *Economic Development and the Division of Production Between Households and Markets*, 98 *J. Pol. Econ.* 965 (1990).

<sup>129</sup> John Devereux & Luis Locay, *Specialization, Household Production, and the Measurement of Economic Growth*, 82 *Am. Econ. Rev.* 399, 402 (Pap. & Proc. 1992).

however, does not inevitably make households smaller. The house of the future conceivably may feature a dedicated media room wired with elaborate electronic gadgetry. Scale efficiencies in the provision of these sorts of high-cost amenities would put upward pressure on household size.

Technological innovations also tend to reduce the scope of a household economy. Economic development leads to greater specialization of labor, including in sectors that produce what households consume. A household conceivably could adapt by becoming larger, which would allow for greater diversity in occupants' skills. In a economy of specialists, however, amateurish householders are apt to respond by hiring outside experts to supply more of the goods and services the household consumes. In 1850, a household was likely to build its own privy; in 2000, few homeowners had a comparative advantage in building their own master bathrooms. As farming skills have become more specialized, householders increasingly have found that it is cheaper to buy food at a supermarket than to grow it at home. In 1800, when public schooling was in its infancy, the home was an economical site for teaching and apprenticeship training. Home-schooling has become less common with the advent of specialized teachers and advanced educational technologies. As a final example, the rise of insurance companies and state social insurance programs has diminished the household's traditional role in spreading risks of disability.<sup>130</sup>

New technologies also can offer substitutes for the social experience of cohabitation. When two friends can instantly communicate by cell phone and e-mail, they have less reason to live together.

c. Societal changes that affect the ease of trade

As the transaction costs of engaging in trade with outsiders drop, the scale and scope of a household economy tends to narrow. Changes in the social and legal environment are especially likely to influence the ease of trade. In a culture where social capital is plentiful, for example, householders are better able to trust outsiders to keep their promises. Conversely, where social capital is scarce, households are forced to be more autarkic.<sup>131</sup> Therefore one would expect household production to be relatively more important in the economy of Southern Italy than that of Northern Italy, where civil society and institutions are more supportive of trade.<sup>132</sup> Similarly, the rise of a state that brings order and the rule of law to a wide territory makes it easier for householders to deal with non-intimates. Apart from demographic influences, societies where households are large tend to be ones where trust is mostly limited to kinship networks. In a nation

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<sup>130</sup> On these last two examples see Becker, *supra* note \_\_\_\_, at 347-49.

<sup>131</sup> See Pollak, *Families and Households*, *supra* note \_\_\_\_, at 593-94.

<sup>132</sup> On the inward-looking nature of Southern Italian households, see Edward C. Banfield, *The Moral Basis of a Backward Society* (1958); Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (1993).

— such as the contemporary United States — where households are unusually small, household denizens tend to be relatively trusting of outsiders.<sup>133</sup>

Examples from ancient and medieval history illustrate the influence of cultural change on the household economy. The Ancient Greek household tended to become much less autarkic between the Homeric and Hellenic eras, as the development of cities and specialized trades shifted the comparative advantage away from household production and toward trading with outsiders. Aristotle's and Xenophon's descriptions, written in the fourth century B.C., offer glimpses of the Hellenic *oikos*, a rather different institution than the Homeric one that preceded it.<sup>134</sup> The evolving *polis* had a variety of comparative institutional advantages over the household. Because its scale was larger, the polis could provide a larger umbrella of security (for which there are scale economies), and also the public works (such as a marketplace) and public services that help support trade. Compared to Homeric times, a household now could obtain many of its goods and services through trading with non-household members. Households generally became smaller and typically contained (at least according to Xenophon) husband-wife teams at their cores.

In a leading history of the evolution of cohabitation arrangements, David Herlihy contrasts the households of classical antiquity with those that followed. Herlihy stresses that households were highly diverse in ancient times. Partly on account of polygamy and (especially) slavery, some of these classical households contained scores or hundreds of persons. With the demise of slavery after the fall of the Roman Empire, family farms came to predominate. These were mostly managed by smaller and more nuclear households.<sup>135</sup>

Kate Mertes provides an intriguing account of lay noble households in rural England in 1250-1600.<sup>136</sup> These were among the largest households in history. A manor rarely had fewer than 15 occupants, and might have up to 500. Occupants included the immediate family of the noble, some friends and retainers (heavily involved in entertaining), and a multitude of hired servants. A noble household's staff typically produced many of the goods and services its occupants consumed, including communal meals, defense against marauders, religious ceremonies,

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<sup>133</sup> See Nancy R. Buchan, Rachel T.A. Croson & Robyn M. Dawes, *Who's with Me? Direct and Indirect Trust and Reciprocity in China, Japan, Korea, and the United States* (unpublished paper) (reporting results of laboratory experiments that indicate that Americans are relatively trusting).

<sup>134</sup> See Booth, *supra* note \_\_, at 34-93; Cheryl Anne Cox, *Household Interests: Property, Marriage Strategies, and Family Dynamics in Ancient Athens* (1998).

<sup>135</sup> David Herlihy, *Medieval Households* 58-59 (1985).

<sup>136</sup> Kate Mertes, *The English Noble Household 1250-1600: Good Governance and Politic Rule* (1988).

arbitration of disputes, and education.<sup>137</sup> Specialization of labor increased with size. The largest noble households were formally bureaucratized. The resident noble would issue “ordinances” to govern the conduct of occupants, and hire stewards to supervise household operations. Yet even these huge households were far from autarkic. Their financial records reveal incessant purchases of wines, foodstuffs, and other supplies and services from outside vendors.

English nobles adapted the size and scope of their household economies to changes going on around them.<sup>138</sup> The average number of occupants in an earl’s household rose from around 35 in 1250 to a peak of about 200 by 1450.<sup>139</sup> Mertes attributes this to nobles’ increased ability to administer a feudal domain from a central place, and to statutory changes that made a household appointment a noble’s preferred method of compensating a loyal follower. In addition, says Mertes, “England’s political instability and lack of centralized control in the years between 1399 and 1485 must have contributed to the development of the household in the fifteenth century.”<sup>140</sup> After 1485, the noble household became a less suitable venue for patronage, and the King, Parliament, and royal courts gradually became increasingly efficient alternative sources of defense, adjudication, and other public goods. As England stabilized, noble householders could trade more readily with outsiders. Over the course of the next centuries the size and scope of earls’ household economies shrank steadily.<sup>141</sup>

d. Increased demand for privacy

Households have become smaller for another reason. The richer people are, the more likely they are to choose an atomized living arrangement. In economic terms, privacy and autonomy appear to be “superior goods” – that is, items for which expressed demand increases disproportionately with wealth. To support this proposition, I describe changes in the housing choices of Yale Law School students and of elderly Americans.<sup>142</sup>

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<sup>137</sup> “Undoubtedly children in the [noble] household received as their main education the whole process of socialization into the household, in learning to survive as servants and among their peers in such a way as to prepare them for life as heads, or as members, of households.” Mertes, *supra* note \_\_\_, at 175.

<sup>138</sup> Mertes, *supra* note \_\_\_, at 184-193.

<sup>139</sup> Mertes, *supra* note \_\_\_, at 185-87.

<sup>140</sup> *Id.*, at 186-87.

<sup>141</sup> See *id.*, graph at 218.

<sup>142</sup> A third example: as wealth increases, children tend to depart from the parental home at a younger age. See Richard W. Johnson & Julie DaVanzo, *Economic and Cultural Influences on the Decision to Leave Home in Peninsular Malaysia*, 35 *Demography* 97 (1998); Leslie A. Whittington & E. Elizabeth Peters, *Economic Incentives for Financial and Residential Independence*, 33 *Demography* 82 (1996).

When originally completed in 1930, about 80% of the beds in the dormitory rooms in the Sterling Law Buildings at the Yale Law School were in either double or triples. These typically were laid out in suites, each of which included a large common room that adjoined a tiny private bedroom for each occupant. The initial design thus secured some efficiencies of scale in the provision of shelter, along with a modicum of student privacy and autonomy. In the 1990s, when the Law School decided to totally remodel these dormitory spaces, staff members interviewed law students about their preferences. The interviewed students all stated that they preferred single rooms, even though they knew that this meant that fewer rooms could be provided and that per capita fees would have to rise. When the Yale Law School's remodeled dormitories opened in 2000, all student rooms had been transformed into true singles, many of them located near lounges and kitchens shared with hallmates.<sup>143</sup> By 2000 then, a majority of Yale Law students, both on and off campus, were living alone.<sup>144</sup> In the 1950's and early 1960's, by contrast, when Yale Law students on average were a bit younger and the nation was less wealthy, most were residing in doubles and triples.<sup>145</sup>

Similarly, over the course of the twentieth century elderly people increasingly have resided in small households. In 1900, 77% of retired, noninstitutionalized men over age 65 were living with a child or other family member (in addition to, or other than, their wives). By 1990, the percentage had plummeted to 20%.<sup>146</sup> In 1998, of Americans age 65 or over who were not living with a spouse, 68% were living alone.<sup>147</sup> Dora Costa has investigated whether this change was driven more by increased demand (seniors' preference for privacy and autonomy) or by reduced supply (less generosity on the part of children).<sup>148</sup> She concludes that the evidence favors the demand-side explanation. Once one of the poorest groups in American society, the elderly have prospered as a result of retirement programs, old-age assistance, and the general increase in national wealth.

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<sup>143</sup> Interview with Associate Dean Mike K. Thompson, Yale Law School, Aug. 17, 2000.

<sup>144</sup> On the living arrangements of off-campus Yale Law students in 1998, see *supra* note \_\_\_ and accompanying text.

<sup>145</sup> In 1957-58, about half of Yale Law students were living in law school dormitories. Hayakawa, *supra* note \_\_\_, at 34. Eighty percent of these were in doubles and triples. Off-campus cohabiting arrangements then surely would have added an increment large enough to achieve a majority..

<sup>146</sup> See Dora L. Costa, *The Evolution of Retirement: An American Economic History, 1880-1990*, at 108, 130 (1998).

<sup>147</sup> See *Statistical Abstract 1999*, at 57; Ellen A. Kramarow, *The Elderly Who Live Alone in the United States: Historical Perspectives on Household Change*, 32 *Demography* 335 (1995).

<sup>148</sup> Costa, *supra* note \_\_\_, at 114-30. "Increases in income have always been associated with an increased demand for the privacy and autonomy provided by separate living arrangements. Rising incomes therefore contributed enormously to the increase of the well-being among the elderly." *Id.*, at 128.

Able to afford a wider range of housing choices, a widow or widower typically elects to live singly.<sup>149</sup>

## V. RULES FOR A HOUSEHOLD IN MIDGAME

This Part turns to positive analysis of the social control systems that operate within households. Even in an informal setting like a home, individuals who repeatedly interact have rules to govern their interactions. Commonly unarticulated, these household rules control the stuff of everyday life.

In any arena of social control the first-order decisions involve the selection of controlling agents: In this setting, who is to provide the rules? Who is to enforce them? As Lisa Bernstein has demonstrated in another context, household members' choices for midgame may not be the same as in endgame.<sup>150</sup> In midgame, when a household is generating and distributing enough surplus to satisfy all occupants and owners, members anticipate that their relationship in the household will persist indefinitely. Under these conditions, household members are likely to formulate their own rules and to use self-help measures to enforce them. To invoke Bernstein's phrase, they will strive to have rules and remedies that are "relationship preserving." Endgame commences when members have come to anticipate that some or all of them are about to exit from the arrangement. In endgame, the legal rules governing co-ownership become increasingly important. This Part first discusses the various sources that may provide rules for a household, and then addresses the nature of the substantive and procedural rules likely to be operative in midgame. The rules that apply in endgame — in particular, the law of the household — are the subject of the next Part.

### A. Sources and Enforcers of Midgame Rules

Legal centralism, traditionally the perspective of legal scholars, assumes that individuals look primarily to the legal system to determine their entitlements. Increasingly, however, legal scholars have come to recognize that in many contexts other constraints may be more influential than law. In prior work I asserted that the overall system of social control is an amalgam of rules emanating from five interrelated sources: personal ethics (including internalized norms), contracts,

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<sup>149</sup> In Japan, where housing is more expensive and there is less extrafamily support for the aged, extended-family households are more common than they are in the United States. S. Philip Morgan & Kiyosi Hiroshima, *The Persistence of Extended Family Residence in Japan: Anachronism or Alternative Strategy?*, 48 *Am. Sociological Rev.* 269 (1983).

<sup>150</sup> Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 *U. Pa. L. Rev.* 1765 (1996).

diffusely enforced social norms, organizational rules, and law.<sup>151</sup> While all five sorts of rules may come to bear in the household setting, I mainly focus on the interplay between contracts among housemates, norms that govern household behavior, and (potentially) applicable law.<sup>152</sup>

### 1. The Minor Role of the Legal System in Midgame

Members of an ongoing household are unlikely to look to the legal system either for rules to govern their internal affairs or for enforcement efforts.<sup>153</sup> It is a staple of empirical legal scholarship that low-stakes disputes among individuals with continuing relationships tend to be resolved beyond the shadow of the law.<sup>154</sup> Learning legal rules requires consultation with legal experts. Learning a household's self-generated rules, by contrast, requires little more than keeping one's ears open at the dinner table. Moreover, legal enforcement is far slower and more costly than more decentralized forms of enforcement. In midgame, housemates have ongoing relations (and indeed commonly share enduring ties based on family or friendship). These relationships provide ready future opportunities to sanction a rulebreaker through self-help. If Desi were to breach an obligation to wash the dishes, Lucy could respond tit-for-tat by snubbing him, chewing him out, or refusing to wash his dirty laundry. Looming in the background is Lucy's power of exit if Desi were to continue to misbehave. For a workaday dispute involving small stakes, self-help plainly is far cheaper and faster than seeking relief through the legal system.<sup>155</sup> Resort to law is so

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<sup>151</sup> See Order Without Law, *supra* note \_\_\_, at 123-36. Commonly the agent that makes a rule also is the agent that enforces it; for example, state bureaucracies enforce law (that is, state-made rules), and an individual enforces the rules of personal ethics on himself. But hybrid systems of social control also are common. For example, housemates might use an express contract to create rules, and rely on other controlling agents — perhaps external gossip networks, or the state — to enforce that contract. See *id.*

<sup>152</sup> Cf. Eric Posner, *supra* note \_\_\_, at 72-78 (describing self-help actions by marriage partners, their family members, and the community, that may create entitlements within a marriage). [check]

<sup>153</sup> On the bodies of law potentially applicable to intrahousehold disputes, see *infra* text accompanying notes \_\_\_-\_\_\_. Bodies of law that govern relations between an individual and the state — especially tax and welfare policies — of course may affect both how households are composed and the internal rules they adopt. For example, if the value of household labor were counted as imputed income under the Internal Revenue Code, members would have a greater incentive than they do now to contract out household work. For a useful review of the numerous consequences of American governments' disinclinations to equate household work with paid work, see Katherine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 *Nw. U.L. Rev.* 1 (1996).

<sup>154</sup> See sources cited in Order Without Law, *supra* note \_\_\_, at 141-47, 256-57.

<sup>155</sup> A pertinent study is Vilhelm Aubert, "Some Social Functions of Legislation," 10 *Acta Sociologica* 98 (1967), discussed in Order Without Law, *supra* note \_\_\_, at 141-42. Aubert found that

expensive that a civil lawsuit between members of a household in midgame is vanishingly rare (absent any prospect of collecting from a third party, such as a liability insurance company).<sup>156</sup>

For their part, judges are strongly inclined to let housemates work out their problems on their own. Most notably, courts typically decline to reach the merits of a domestic complaint filed by one spouse against the other while the marriage still is in midgame — that is, before the two have begun to live separately or have initiated divorce proceedings.<sup>157</sup> Given the complexity of the exchange relationships in an ongoing marriage, judges understandably are wary of adjudicating a small part of it, particularly when their work may quickly be undone through self-help responses

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no lawsuits had been brought under the Norwegian Housemaid Law of 1948 during the first two years it had been in effect because housemaids continued to rely on their ability to exit from the household to curb employer abuse.

Other scholars envision a greater role for law within the household. See Pollak in JEP at 597 (implying that, because household governance contracts necessarily are largely incomplete, there is a case for the active involvement of courts or other external institutions in supervising these status relationships) [check]; Reva Siegel, *Home as Work*, at 1215-16 (anticipating that the law's conferral on wives of property rights in household labor would have far-reaching practical consequences for household operations).

<sup>156</sup> Although hornbooks note that a co-owner can petition for an accounting while the relationship is ongoing (see, e.g., Stoebuck & Whitman at § 5.9) few appellate cases involve such actions. But cf. *Sampson v. Swartzbaugh*, 54 P.2d 73 (Cal. Ct. App. 1936) (action by wife against husband and lessee to cancel husband's lease of co-owned real estate). On possibilities of tort litigation between family members, see Homer H. Clark, Jr., *Domestic Relations* §§ 10.1-10.2 (2d ed. 1988).

<sup>157</sup> See *Kilgrow v. Kilgrow*, 107 So.2d 885 (Ala. 1958) (refusing to adjudicate suit between cohabiting spouses over where their seven-year-old child should attend school); *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953) (rejecting, for reasons of public policy, suit by wife for support payments from husband who lived with her); *Garlock v. Garlock*, 18 N.E.2d 521 (1939) (declining to enforce husband's written promise to provide specific level of financial support to wife, who court implied was still living with him) [check lower court opinion]. Cf. *Balfour v. Balfour*, [1919] 2 K.B. 571, 579 (C.A. 1919) (declining to hear wife's contractual claim for monthly allowance against husband distantly stationed in Nepal): “[E]ach house is a domain into which the King's writ does not run and to which his officers do not seek to be admitted.”; *Miller v. Miller*, 35 N.W. 464 (Iowa 1887) (refusing to enforce husband's written promise to provide support, but failing to state whether the parties still were cohabiting). Outliers include *Miller v. Miller*, 30 N.W.2d 509 (Mich. 1948) (granting wife support payments, on ground of extreme cruelty, against cohabiting husband); and *Wilcox v. Wilcox*, 98 Cal. Rptr. 319 (Cal. Ct. App. 1971) (recognizing husband's right to sue to recover control of community property funds from (cohabiting?) wife). See generally Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 Cal. L. Rev. 204, 232-37 (1982). [and check] Reva Siegel, *Modernization*, Geo. L. J. at 2187-94.

within the marriage.<sup>158</sup> . . .

The judicial reluctance to intervene in midgame household affairs is part of a larger pattern. A liberal legal system, devoted as it is to the autonomy of the individual and family, typically gives housemates wide berth. Each household is presumptively free to choose not only its own menus for meals and rites of religion, but also its membership roster and internal rules.<sup>159</sup> Candidates for elective office in the United States do not propose legislation directly regulating how housemates are chosen, bedrooms allocated, household chores assigned.<sup>160</sup> Indeed, a state intrusion into internal household affairs might be held to be an unconstitutional restriction on freedom of association.<sup>161</sup> The Supreme Court has been especially protective of family-based households, particularly when legal authorities have sought to regulate marital and parent-child relations.<sup>162</sup> Households consisting solely of nonkin also have received some, albeit less robust, constitutional protection.<sup>163</sup>

There are, however, significant exceptions to lawmakers' general hands-off policy. Paternalism and an interest in internalizing externalities, for example, both may motivate liberal law makers and enforcers to intervene into the operations of an ongoing household. Legal authorities thus are willing to limit the amount of interpersonal violence and physical oppression occurring

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<sup>158</sup> This persistent judicial policy of refusing to intervene in disputes between cohabiting spouses has been much criticized. See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Ref. 835 (1985); Note, *Litigation Between Husband and Wife*, 79 Harv. L. Rev. 1650 (1966).

<sup>159</sup> Accord, Dagan & Heller, *supra* note \_\_\_, at 596 (as long as exit is available and third-party interests are not jeopardized).

<sup>160</sup> Note exemption of housemate selection from Fair Housing Laws. See Karst.

<sup>161</sup> See generally Kenneth Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

<sup>162</sup> See, e.g., *Griswold v. Connecticut*; *Toxel v. Granville*, 530 U.S. 57 (2000) (application of statute to override mother's control of grandparents' visitation rights held to violate mother's rights to substantive due process); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating, as violation of substantive due process, ordinance provision that prevented grandmother from bringing two grandsons who were not brothers into her household).

<sup>163</sup> Compare *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding, against wide-ranging constitutional attack, ordinance that limited composition of a non-family household to a maximum of two adults), with *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980) (striking down, as violation of state constitutional provision, ordinance that limited creation of households of more than four unrelated persons). Arguments in favor of greater legal solicitude toward family households are arrayed in David D. Haddock & Daniel D. Polsby, *Family As a Rational Classification*, 74 Wash. U. L.Q. 15 (1996).

within a household, thereby helping to ensure an effective right of exit.<sup>164</sup> Similarly, the state acts to prevent the abuse and neglect of children (and other household members who lack capacity) and to assure the provision of their education.<sup>165</sup> Moreover, the general principle of household autonomy also does not shield a household activity that is, say, a nuisance to neighbors or a preparation for an external criminal act.<sup>166</sup> . . .

## 2. Explicit Intrahousehold Contracts

Everyday experience suggests that members of a household (especially when a subsequent marriage is not in a prospect) are highly unlikely to sign a written contract to govern the issues they will confront in midgame.<sup>167</sup> The potential benefits of a written contract include articulation of midgame rights and duties with greater specificity, customization of external norms or default legal rules to the specific situation, and easier proof of obligations in the event of an endgame dispute. Why then are written household contracts relatively rare?<sup>168</sup> One barrier is the complexity of the situation: typically cohabitation or co-ownership involves an exchange relationship that would persist over a period of many months if not years, with exchanges contemplated on numerous overlapping dimensions. Compared, say, to a discrete bilateral exchange, the transaction costs of writing and enforcing a detailed deal are high. As noted above, the time-tested strategy for securing a cooperative living arrangement is not an elaborate ex ante contract, but rather living and owning with housemates one can trust -- notably kin or others who share a close and continuing

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<sup>164</sup> See generally Developments in the Law — Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498 (1993). Many legal regimes also have sought to prevent cruelty to household animals (and, where slavery was permitted, to household slaves).

<sup>165</sup> See generally Peter David Brandon, State Intervention in Imperfect Families, 13 Rationality & Soc'y 285 (2001). One conception is that the state tries to assure that the rules of a household containing minor children, incompetent adults, pets, or other helpless members are the rules that would exist if those members were not lacking in capacity. See Gary S. Becker & Kevin M. Murphy, The Family and the State, 31 J.L. & Econ. 1 (1988).

<sup>166</sup> See, e.g., *People v. Wheeler*, 106 Cal. Rptr. 260 (Cal. Ct. App. 1972) (authorizing correction of unsanitary conditions in commune that posed risk of epidemic).

<sup>167</sup> Accord Lewis, *supra* note \_\_, at 392. Some variant of the statute of frauds conceivably might bar judicial enforcement of an oral contract. See, e.g., Minn. Stat. §§ 513.075 (1998) (court can enforce cohabitation agreement between an unmarried man and woman only if it is in writing and only after termination of the relationship); but cf. *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980) (allowing ex-cohabitant to pursue recovery based on oral contract, but not on implied contract theory); but see *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (permitting ex-cohabitant to proceed on both express oral contract and implied contract theories).

<sup>168</sup> For insightful exploration of this issue in the family setting, see Carl E. Schneider & Margaret F. Brinig, *An Invitation to Family Law* 427-75 (2d ed. 2000).

social network.<sup>169</sup> In this setting, a housemate who pushes for a written contract expresses a lack of trust in the others, a feeling that then may be reciprocated. For most housemates, the expected costs of a written contract apparently exceed its expected benefits. It is notable that major legal formbooks (including ones for amateurs) -- which include forms for leases, mortgages, sales contracts, and so on -- do not include suggested forms to govern relations among either the co-occupants or co-owners of a household.<sup>170</sup> Written contracts among housemates can be expected to be more common in low-trust settings, for example, in households involving persons who are socially distant, unusually numerous, or involuntarily present.<sup>171</sup> A contract therefore is more likely among those entering a cohousing arrangement, or among relative strangers buying a vacation condo together, than among two law-student roommates.

Oral contracts among housemates, by contrast, are commonplace. Particularly in the beginning of their relationship, household members typically converse about how spaces are to be shared, chores performed, and bills paid. Those conversations then are reflected in ongoing practices — the evolving “custom of the household.” These obligations, in midgame, are either self-enforced by means of self-discipline and enforced by other household members through self-help measures. Informal contracting within a household thus is routine; what is unusual is a written contract, or resort to the legal system for contract enforcement.

### 3. Hierarchical Households

Some households employ a more structured approach to internal governance. This is particularly likely when members are numerous, unequal in social status, and unrelated by kinship. Examples previously encountered include the English noble household, intentional communities, and dormitories and other group quarters. The traditional extended-family household ruled by a *pater familias* also was explicitly hierarchical.

In contrast to decentralized arrangements typical of an intimate household, a formally hierarchical household assigns some rulemaking, adjudicative, and enforcement functions to a subset of authoritative specialists within it. Authority may be concentrated in a single person, such as the law-giver (*kurios*) in a Homeric household, who was constrained by social norms to

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<sup>169</sup> See supra text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>170</sup> [Sources]

<sup>171</sup> An antenuptial agreement, similarly, betrays a distrust about whether the upcoming marriage will endure. Although it is frequently stated that antenuptial agreements have become more common, the data to support that proposition appear to be entirely anecdotal. See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. Rev. 65, 143 n.244 (1998). Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 Stan. L. Rev. 887, 891 (1997).

promote a shared sense of affectionate belonging (*philia*).<sup>172</sup> This leader may delegate power to special agents. For instance, in the fifteenth century an English lord of a large household typically employed a steward to enforce the lord's bylaws (sometimes by expelling a miscreant).<sup>173</sup> In a household committed to equality a multiperson committee is apt to hold sway — for instance, the designated elders who govern a Hutterite community, or perhaps the democratically elected board of directors of a cohousing development.<sup>174</sup>

Hierarchical governance of a household potentially has a variety of advantages. These include relative clarity of formal rules (such as a English noble household's written bylaws), and specialization of labor in internal social control functions. In addition, like a state, a household is likely to have ongoing "foreign relations" with outsiders. As a household grows in size, its effectiveness on this front may be enhanced by the designation of a single representative credibly authorized to negotiate on its behalf. This may help explain the prominence of the heads of the Homeric household, the English noble household, and some traditional extended-family households (think Don Corleone).

The disadvantages of hierarchy in a household include the administrative costs of maintaining the formal structure and the rigidity and alienation that bureaucratization can bring. In a liberal society, freedom to exit limits how much specialized household bureaucrats can oppress occupants and owners. As a result, a hierarchical governance structure can be expected to endure the rigors of the market for households only when it serves to augment members' net shares in the household surplus.<sup>175</sup> As Henry Maine famously observed, the broad historical trend is to define

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<sup>172</sup> On the Homeric household, see generally William James Booth, *Households: On the Moral Architecture of the Economy* 15-34 (1993). On the relatively hierarchical households in earliest historical periods elsewhere, see sources cited in Robert C. Ellickson, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 *Chi.-Kent L. Rev.* 321, 355-57 (1995).

Why did these hierarchical households supplant the relatively egalitarian governance structures of hunter-gatherer bands? The advent of agriculture and permanent housing likely made a centrally planned household economy more advantageous. In addition, chattel and debt slaves, which also appear in the earliest historical periods, required hierarchical supervision.

<sup>173</sup> See Mertes, *supra* note \_\_\_\_, and *supra* text accompanying notes \_\_\_\_-\_\_\_\_. Compare the English system, mentioned *supra* note \_\_\_\_, of putting management of co-owned property in the hands of a small number of trustees.

<sup>174</sup> On governance of Hutterite communities, see Ellickson, *Property in Land*, *supra* note \_\_\_\_, at 1347. Compare *id.* at 1348 (discussing the governance of a kibbutz, which is far more participatory).

<sup>175</sup> Much of Gary Becker's work on the "family" assumes that a household is governed by a single "loving head" who altruistically strives to maximize the welfare of all members. See, e.g., Gary S. Becker, *A Theory of Social Interactions*, 82 *J. Pol. Econ.* 1063, 1074-83 (1974). As Becker realizes, this is implausible even for many kinship-based households. See Becker & Murphy, *supra*

legal obligations and rights increasingly at the level of the individual and less at the level of the household and family. The rise of smaller, more fluid households, and relative decline of the larger, hierarchical ones, lies at the base of this transformation.

#### 4. Social Norms

In midgame, a small household is not likely to resort much to the three types of rules just discussed — law, written contracts, and explicit organizational rules. Its governing rules instead are likely to be norms — informal, inchoate, and in flux. As a household ages, unwritten and largely unspoken “customs of the household” emerge.<sup>176</sup> Despite the inertia that supports continued adherence to past practice, these customs remain open to adjustment. Housemates may agree orally (or even occasionally in writing) to change their ways. However, the complexity of the strands of exchange within a household makes complete oral contracting difficult. As a result, household custom is as likely to evolve through the unilateral initiation of new practices by particular members. For example, a member’s informal entitlement to a particular seat on the new family room sofa is more likely to arise from a pattern of use than from conversation.

A particular household’s customs are influenced by external (ambient) social norms. In particular, community norms governing gender roles are likely to influence that allocation of household tasks. Household members then supplement or supplant these external social practices with specially tailored customs of their own. A household’s norms, whether ambient or home-specific, mostly are informally enforced. A household member may use a self-help sanction — a kind word, a withheld service — to reward or punish another. In addition, a member may internalize the custom of his household and enforce it on himself, perhaps by feeling a warm glow after compliance or guilt after deviance. In some instances, outsiders may employ informal sanctions to enforce household norms, particularly ambient ones. Neighbors, for instance, may use gossip or the frequency of social invitations to reward good landscaping or to punish inadequate child supervision. Like lawmakers, however, external normmakers in a liberal society are likely to give household members wide berth to structure internal rules, especially when those rules do not jeopardize the interests of outsiders or helpless insiders.<sup>177</sup>

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note \_\_ at 4-5. In a non-kinship based household, the assumption of an altruistic head unrealistically assumes away attention to alternative institutions for household governance. Becker’s “Rotten Kid Theorem” (id. at 1080) can be interpreted instead simply as a prediction that social controls will develop within a household to eliminate uncooperative behavior. While Becker assumes a benevolent dictator accomplishes this result, more decentralized mechanisms may achieve it as well.

<sup>176</sup> Cf. Rajiv Sethi & E. Somanathan, *The Evolution of Social Norms in Common Property Resource Use*, 86 *Am. Econ. Rev.* 766 (1996) (analyzing role of norms in commonses larger than the household).

<sup>177</sup> See Alan Wolfe, *One Nation, After All* (1998) (describing broad tolerance of most Americans toward others’ modes of living); but cf. Richard H. McAdams, *The Origin, Development,*

## B. Substantive Rules for Midgame

Household rules, whatever their source, come in two main types: substantive and procedural.<sup>178</sup> Substantive rules govern the use of, entry into, and transfer of, the household premises.<sup>179</sup> These rules are basically designed to prevent excess grabbing and nuisance behavior, and to encourage the supply of inputs that efficiently complement the household economy. Procedural rules govern how a household makes decisions — for example, how it adopts new rules, adjudicates the application of a rule to a given incident, and decides to admit a new member or expel an old one. I now present some grounded hypotheses, potentially testable through empirical study, about the nature of these rules in a household's midgame. A starting and overarching hypothesis, in this close-knit setting, is that housemates shape their rules to maximize the aggregate surplus available for distribution to household members.<sup>180</sup>

### 1. Internalizing Externalities: Enforcement of Rules of Conduct, or Privatization?

To maximize the surplus it can offer members, a household's substantive rules basically strive to make the private product of a member's actions or inactions equal to the product for all household members. In asocial contexts, the appropriate overarching substantive rule is that a member should act as he would if he were the sole owner-occupant of the premises.<sup>181</sup> Under that condition, all externalities from behavior would be internalized. Housemates thus are likely to impose negative sanctions on someone who hogs the television set or tracks dirt into the living room, and to reward a member who fixes a toilet leak or brings warmth to household interactions.

Privatization of portions of the household is an alternative to creation and enforcement of rules of conduct. A standard antidote to potential tragedies of a commons is to shift particular spaces or objects from common to individual ownership.<sup>182</sup> When a housemate has complete control of a particular bedroom, for example, the costs of any shirking in maintenance are largely internalized to the shirker. Although the topic appears not yet to have become the subject of

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and Regulation of Norms, 96 Mich. L. Rev. 338, 412-19 (1997) (on the possibility of "nosy norms").

<sup>178</sup> See Order Without Law, *supra* note \_\_\_, at 132-36, for a more complex taxonomy of rules. Remedial rules, for example, govern the nature and magnitude of sanctions to be applied by enforcers.

<sup>179</sup> These are the basic entitlements of a fee simple landowner. See *supra* text at note \_\_\_.

<sup>180</sup> This is an application of the hypothesis of welfare-maximizing norms developed in Order Without Law, *supra* note \_\_\_, at 167-83.

<sup>181</sup> Richard A. Posner, *Economic Analysis of Law* §3.10, p.83 (5<sup>th</sup> ed. 1998).

<sup>182</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev. Pap. & Proc.* 347 (1967).

systematic empirical study, it is apparent that members of a household indeed do tend to privatize significant portions of their common domain. Customary individual property rights may evolve not only in private rooms but also in portions of the public rooms of a dwelling. A member may “have” a particular bookshelf, closet, parking space, or chair.<sup>183</sup> Graduate students who share an apartment typically treat items of movable property individually brought to it — clothes, sports equipment, books, special foods and drinks — as still owned by the person who brought them.<sup>184</sup>

Privatization of course is a two-edged sword. While it ameliorates externality problems that arise with common property, it also sacrifices the benefits of common habitation, such as risk-spreading, economies in production and consumption, and the social benefits of communal interactions.<sup>185</sup> In general, the larger and less kin-based a household, the greater the difficulty of achieving social control within it by means of the informal enforcement of substantive norms. The privatization of particular spaces therefore is likely to be more pronounced in a dormitory or co-housing community than in a small family household.<sup>186</sup>

## 2. Rewarding Suppliers of Inputs

Putting labor or money into a household is analogous to generating a positive externality. As discussed previously, to attract and retain owners and occupants, a liberal household must assure each member a surplus of benefits over costs. Household rules governing flows of benefits are shaped by this imperative. Providers of valuable inputs thus typically are rewarded by rules that confer on them greater entitlements to use household spaces, consume meals and other household services, and receive financial payments. The housemate who pays the largest share of the rent, for example, may be entitled to occupy the best bedroom. Household rules also are likely to assign tasks in a manner that exploits pre-existing differences in members’ human capital and enables development of specialized skills.

## C. Procedural Rules: How Household Members Make Decisions

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<sup>183</sup> Cf. Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* 244-54 (1961) (on the informal privatization of public spaces in asylums).

<sup>184</sup> For an account of a kibbutz’s failed experiment with collective clothing, see Melford E. Spiro, *Kibbutz: Venture in Utopia* 21-22 (rev. ed. 1970).

<sup>185</sup> See Robert C. Ellickson, *Property in Land*, 1315, 1332-62 (1993).

<sup>186</sup> In the most privatized of the intentional communities, such as Israeli *moshavim* and Amish settlements, families own separate houses and farmsteads. Even in the most collectivized ones, such as Hutterite settlements and *kibbutzim* of the Artzi federation, families have separate bedrooms and at least semi-private sitting rooms. See *id.* at 1346-48 & n.150.

Small clusters of trusting people typically interact informally.<sup>187</sup> Debate around the dinner table is not structured according to Roberts Rules of Order. When an potentially divisive issue arises in an intimate household, its members are to muddle through to a consensus solution.

Nonetheless, on closer examination, even members of a small household are likely to be found to be honoring an array of procedural rules. The most fundamental of these rules are “constitutional.”<sup>188</sup> These identify the members who are empowered to decide issues of a particular stripe. Lower-level procedural rules shape how the relevant decisionmakers resolve the issues that fall within their jurisdiction. These procedures tend to vary according to the characteristics of the issue at hand. For example, a decision that perpetuates ongoing household practices can be reached more simply than a decision that would result in a break from the past.

### 1. Constitutional Rules: The Special Decision-Making Powers of Owners

As Part II discussed, the “owners” of a household typically are its providers of risk capital — the suppliers least able to protect themselves against opportunism by other household patrons. As a inducement for their capital contributions, housemates typically grant owners not only residual financial flows, but also residual rights of control. The upshot is that the constitutional rules of a household can be expected to give owners special — indeed ultimately exclusive — power to decide on projects that affect the capital value of the household premises. To revert to a prior example, Mom and Dad (the owners of the sitcom house) can decide whether its roof is to be repaired, regardless of what Junior, Granny, and Cheri (the nonowning occupants) think. If the decision, by contrast, were what movie the five should go to see, however, Mom and Dad would not have a special say.<sup>189</sup>

### 2. Procedures for Making Household Decisions, Routine and Extraordinary

A ministerial decision — that is, the application of established policy to a simple and familiar problem — does not warrant collective deliberation. To reduce their governance costs, household members therefore can be expected to authorize each member to act unilaterally when the action would merely perpetuate the household’s traditions.<sup>190</sup> An occupant who is preparing dinner need not consult with the other housemates about the time of the meal if the food will be

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<sup>187</sup> As a household becomes larger and more impersonal, an explicit governance structure is more likely to emerge. See supra text accompanying notes \_\_\_-\_\_\_ [on hierarchical households].

<sup>188</sup> Compare Elinor Ostrom, *Governing the Commons* 52-54 (1990) (offering a somewhat different taxonomy of the rules used by commoners).

<sup>189</sup> See supra text accompanying notes \_\_\_-\_\_\_.

<sup>190</sup> It follows that more meetings tend to be held in a household too recently established to have a rich stock of traditions.

served at the usual hour. A dinner invitation to a familiar guest may be extended unilaterally (while a dinner invitation to an unusual guest must be cleared with other housemates in advance). If a dwelling has several owners, each one of them can unilaterally pay the property taxes and expect appropriate reimbursement from the others.

In situations where household members' past practices do not provide a clear guide, either because a problem is new or the factual context is complex, a household's procedural norms can be expected to call for some form of collective decisionmaking. Co-owners' norms thus may require them to consult with one another about a discretionary repair, such as whether to paint the dwelling's exterior and, if so, in what color. Procedural norms are especially likely to call for collective discussion if a proposed course of action would unsettle either the household's traditional social dynamics or shared physical spaces. Thus, a decision to admit or expel an owner or permanent occupant typically would call for extraordinary household deliberations, as would a decision on a capital improvement to the dwelling. Note that in both these sorts of instances a household's constitutional norms can be expected to confer ultimate power on owners because the outcomes would affect the residual value of the premises.

When members of a multiperson household do make an extraordinary decision, are they more to decide by majority vote, by consensus (i.e., unanimity), or by some other method?<sup>191</sup> Dagan and Heller argue that majority rule is the normatively appropriate decision rule for members of a "liberal commons" (including, they imply, ordinary co-owners).<sup>192</sup> I disagree. In the typical intimate household, consensus among the relevant decisionmakers seems a superior procedure.<sup>193</sup> Consensus, better than majority rule, helps assure that the debate over a proposed measure will educate proponents about the concerns of those who are inclined to oppose it. Consensus therefore is the decision rule that best cements the trust of those whose interests are sacrificed. Moreover, members may value social solidarity in its own right, and a policy of seeking consensus plausibly promises to generate that public good.<sup>194</sup>

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<sup>191</sup> Majority vote and consensus are the main two alternatives considered in Dagan & Heller, *supra* note \_\_, at 590-96 (discussing commoners' rules of self-governance).

<sup>192</sup> They would require unanimity only for decisions that are purely redistributive. See Dagan & Heller, *supra* note \_\_, at 592-93. I agree that unanimity is appropriate in such instances. See Robert C. Ellickson, *Cities and Homeowners Associations*, 130 Pa. L. Rev. \_\_, \_\_-\_\_ (1982).

<sup>193</sup> See *infra* text at notes \_\_-\_\_, applauding French law, which requires unanimity for co-owner decisions, except when the number of co-owners is large. On French law, see Dagan & Heller, *supra* note \_\_, at 615 n.254.

<sup>194</sup> A leading study found that residents of intentional communities in the urban United States identified living in a "consensual community" as their most prominent goal. Benjamin Zablocki, *Alienation and Charisma: A Study of Contemporary American Communes 200-01* (1980). See generally Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in *Nomos XVII: Due Process* (J. Roland Pennock & John W. Chapman eds., 1977) [check].

The basic downside of seeking unanimity, of course, is that it may cause paralysis. When too many individuals have veto power a tragedy of the anticommons may result.<sup>195</sup> For several reasons, however, intimate households are implausible settings for anticommons tragedies. First, a housemate is unlikely to hold out solely for strategic reasons in hope of obtaining some sort of side compensation from the frustrated majority. Intimates typically can detect, and punish in future interactions, any one of their number who attempts this ploy. Second, there is little risk that those disadvantaged by a measure will scotch it even though the measure helps the remaining housemates by a greater amount. To maximize aggregate household surplus over the long run, intimates who interact repeatedly and along many dimensions have a strong incentive to achieve patterns of compromise in exactly these sorts of situations. In a well-functioning household, a member who relents for the overall good of the group later will be informally compensated when other decisions come before the house. A pattern of “give and take” is best for all. If the norms of a liberal household were to fail to render such a long run reciprocity of advantage to all members, those who were systematically disadvantaged would start heading for the exits.

Indeed I hypothesize that the co-owners of most households intuitively understand these arguments and in fact prefer to operate by consensus. To my knowledge no social scientist has systematically surveyed actual co-owner’s governance practices.<sup>196</sup> I cite in the margin, however, scraps of anecdotal evidence that support the notion that closely knit co-owners operate by consensus.<sup>197</sup> Anticommons difficulties of course arise as housemates become more numerous, heterogeneous, and thinly connected. A first procedural reform is to continue to attempt to decide by consensus during initial discussions, with a fallback, after impasse, to some sort of supermajority voting rule in the second stage of decisionmaking. This two-stage procedure is used in several contexts where members number in the dozens, for example, in modern co-housing developments and traditional village commonses.<sup>198</sup> The advantage, to repeat, of going through the effort to seek consensus is the respect that procedure inherently confers on dissenting voices. In the least intimate settings, where anticommons pathologies are gravest, majority (or supermajority) rule is likely to be the order of the day, perhaps combined with some form of representative democracy.

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<sup>195</sup> See generally Heller, *supra* note \_\_\_\_.

<sup>196</sup> But cf. Zablocki, *supra* note \_\_\_\_, at 210-37 (describing specific intentional communities, with occasional reference to their decisionmaking procedures).

<sup>197</sup> As noted previously, since 1966 I have co-owned with old college friends a vacation house in rural Vermont. At the outset, there were four of us (holding as tenants in common); now, after buyouts, two of us remain. From the start we have proceeded by consensus. See also Lewis [Quicksand], *supra* note \_\_\_\_, at 388-89.

<sup>198</sup> See Fenster, *supra* note \_\_\_\_, at 29-30, 34-35, 43-44 (describing decision-making procedures at three co-housing projects); [check] Margaret A. McKean, Success on the Commons: Comparative Examination of Institutions for Common Property Management, 4 *J. Theoretical Pol.* 247, 260-61 (1992).

Members of a condominium development, for example, typically elect members of a board of directors to manage their common areas.<sup>199</sup>

## VI. RULES FOR A HOUSEHOLD IN ENDGAME: OF CO-OWNERSHIP LAW

When any human relationship nears its end, the involved parties tend to become more opportunistic. Since their future interactions will be fewer, each knows that an aggrieved party will be less able to administer self-help punishments. In endgame, then, housemates are both more likely to encounter problems with one another and also to look to external sources for rules and procedures to resolve their disputes.<sup>200</sup> One possible source is the legal system. Although more important than in midgame, law remains less important thereafter than one might suppose. In practice, co-owners and other members of a household are highly likely to wind up their affairs without the use of lawyers.

Whatever source of rules housemates use, their endgame rules are apt to differ in some respects from the relationship-preserving rules they employ in midgame.<sup>201</sup> What special issues arise in endgame? What informal norms might housemates apply to resolve them? What rules and procedures does the legal system offer? The following discussion of these issues includes a critical evaluation of the law of co-ownership, the body of law most pertinent to relations among housemates.

### A. Winding Up a Household: Substantive Issues to be Resolved

Civil society is rife with small molecules of human association. In addition to households, there are marriages, business partnerships and corporations, nonprofit organizations, and so on. When any one of these collectivities splits apart, its members confront two basic tasks. First, they must close the books, that is, seek to collect outstanding debts owed to the group and resolve pending claims against the collectivity.<sup>202</sup> Second, members must divide up the joint assets that remain after the books have been closed. This involves several steps: (1) the separation of the property at hand into the items that are owned collectively and the items that belong individually to particular members; (2) the determination of members' ownership shares in the collective assets;

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<sup>199</sup> But even in a condominium association, the unanimous consent of members still is required for certain decisions, such as raw redistributions of ownership shares. See *supra* note \_\_\_\_.

<sup>200</sup> In practice, many household dissolutions are partial, for example, when one of several co-owners transfers his interest. To simplify the discussion, I ignore these intermediate cases.

<sup>201</sup> See Bernstein, *supra* note \_\_\_\_.

<sup>202</sup> Among the possible creditors is a member who disproportionately shouldered the administrative burdens of handling the group's dissolution.

and (3) the division and distribution of the collective assets to individual members according to their shares. These tasks may give rise to disputes, which members need substantive and procedural rules to resolve.

Apart from the special case of divorce, in endgame household members are highly likely to succeed in dividing their assets without much difficulty.<sup>203</sup> Lawyers are rarely brought in to help housemates decide whether the stereo set was an individual or group asset. Litigation over the calculation of ownership shares also seems to be surprisingly rare. In most households these seem to be determined at time of acquisition according to initial contributions of risk capital (or according to inheritance).<sup>204</sup> Subsequent capital infusions, which potentially would create complications, perhaps either may be pro rata by ownership share, or, if not pro rata, accompanied by an express readjustment of ownership percentages. At any rate, there appears to be little litigation over these issues.

The decisional law suggests that housemates are most likely to disagree about how to close their books. Disputes in endgame are most likely to arise over alleged outstanding imbalances in the ongoing gift exchanges among household insiders. (Express executory contracts with outsiders are unlikely to be a source of difficulty. Usually it is plain that the collectivity should pay its debts to the telephone company, the mortgage lender, and the housepainter, and pursue the collection of the outstanding casualty claim against the home insurer.) At this point it is worth referring back to Figure 2 on page \_\_\_\_\_. Portrayed there are the flows of inputs and outputs from the various patrons of a household. In-kind flows to and from occupants, such as possession of the premises and work performed therein, are particularly problematic because they are harder to value than cash flows. As noted earlier, in a functioning household each member receives a positive net flow — a share in household surplus.<sup>205</sup> In practice a member is apt to receive this net surplus erratically, not in a uniform stream across time. When a household enters endgame (especially unexpectedly), some members are likely to be momentarily ahead (or behind) in their accounts. At time of dissolution, someone then on the short end may seek rectification.

The case law presents some standard scenarios. First, the other members may seek restitution from an occupant who took more than he gave. In the paradigm case one co-owner has occupied the entire premises without paying rent to the other owners.<sup>206</sup> Imagine, for instance, that although brothers Santino, Fredo, and Michael owned a Las Vegas penthouse as tenants-in-common, only Fredo had spent time in residence there. (Or, in a closely related variation, that

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<sup>203</sup> On the greater complexity of divorce, see *supra* text at notes \_\_\_\_-\_\_\_\_\_.

<sup>204</sup> See *supra* Part II.

<sup>205</sup> See *supra* text accompanying notes \_\_\_\_-\_\_\_\_\_.

<sup>206</sup> Another possible example, less evident in the case law, is the inveterate shirker on household tasks.

Fredo had rented the penthouse to Moe Green and pocketed Green's entire rent payments.) Second and conversely, when a household dissolves a particular occupant or owner who feels that he has done more than his share may seek to correct that imbalance. Here in the paradigm case one co-owner has unilaterally made repairs, replacements or permanent improvements to the household premises.<sup>207</sup> Imagine, for instance, that Scarlett single-handedly had added a new portico to the facade of Tara, the tidewater estate house she co-owned and co-occupied with her cousin Melanie. . . .

The complexity of these claims arises from the multidimensionality of gift exchanges within a household. To resolve a claim arising in a household's endgame, an adjudicator ideally would look not only at the imbalance in the single strand of the housemates' relationship that the claimant is highlighting, but at the global balance in all their strands of interaction. It may be true that Fredo occupied the Las Vegas penthouse rent-free, but he also may have been the only co-owner managing the penthouse and paying the attendant bills. While Scarlett may have unilaterally added the portico to Tara, she also may have shirked for years on the yard work that Melanie had expected her to perform. The rub is that the intimacy and complexity of household relationships makes it difficult for an outside adjudicator to obtain the evidence necessary to make a global assessment. . . .

Familial or friendship ties help reduce housemates' transaction costs both in midgame and endgame. These ties create a prospect of post-household interactions. That prospect casts a shadow back on the present and fosters trust. In midgame, the expectation of long-enduring ties helps housemates engage in long-term logrolling because they need not worry so much about opportunism in endgame in the event that surpluses then were to be temporarily out of balance. In addition, the prospect of future relations also deters opportunism during a household's windup negotiations. Housemates who are kinfolk or friends can anticipate that they will be able to work out endgame issues on their own without resort to a third party. That a third-party would have difficulty appropriately adjudicating these windup disputes provides yet another reason to live with family or friends. An *ex ante* choice to live with intimates allays the *ex post* need to engage a lawyer in endgame.

## B. Informal Dissolutions of Households

While a judge must sign off on the dissolution of a marriage, the co-owners of a household can terminate their arrangement without going to court. Everyday observation suggests that owners and occupants are highly unlikely to consult attorneys not only in midgame, but even when a household comes to its end. Roommates and co-owners usually are able to wind up their affairs on their own. Not only do housemates tend to be intimates who expect future interactions, but any

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<sup>207</sup> The analogy to the inveterate shirker mentioned in the prior footnote is the zealous care-provider.

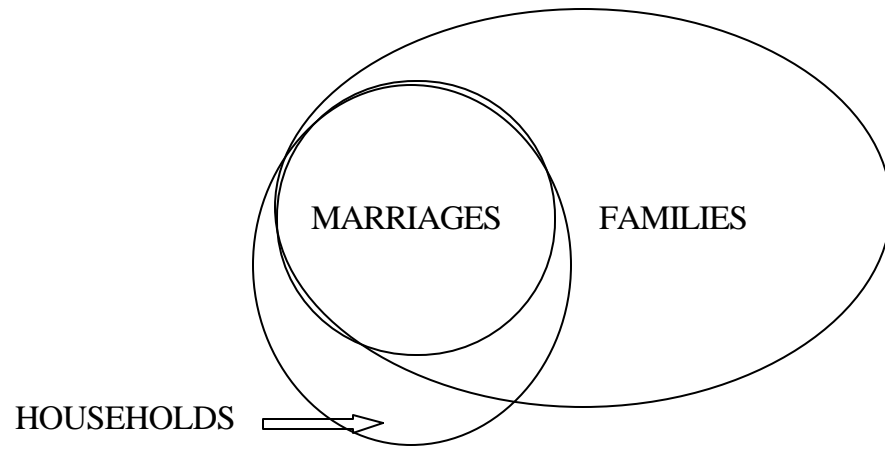
items in dispute among them are likely to involve only small stakes. Under these circumstances people seldom take their problems into the legal system.

Housemates who don't turn to lawyers and courts in endgame also are unlikely to bargain in the shadow of the law. Publishers of legal information for popular audiences offer materials on divorce, landlord-tenant law, wills, personal injury, and so on, but not on the law of co-ownership or on how to wind up a household. For instance, the legal dictionary on the website of Nolo Press, the leading American publisher of legal aids, does not include an entry for "partition" or for "co-ownership," and defines "winding up" as a process that occurs just before a "corporation or partnership" ceases to exist. . . .

### C. Formal Dissolutions of Households: The Law of Co-Ownership

Adhering to the *Numerus Clausus* principle, the American legal system forces the smallest molecules of human association into one or another of a small number of pigeonholes. When a household dissolves, the two of these most likely to come into play are marriage (that is, marital property) and concurrent co-ownership, with an outside possibility that the household structure will be pigeonholed as a partnership, trust, or corporation. For each of these various legal classifications, statutory law provides procedures and substantive rules for resolving endgame disputes. Because legal scholars tend to specialize in one pocket or another, there has been little work on the commonalities among, and distinctions between, these particularized bodies of endgame law. . . . [This subpart is still in the works.]

## VII. CONCLUSION [yet to be written]



**Figure 1: Overlaps Among Households, Marriages, and Families**

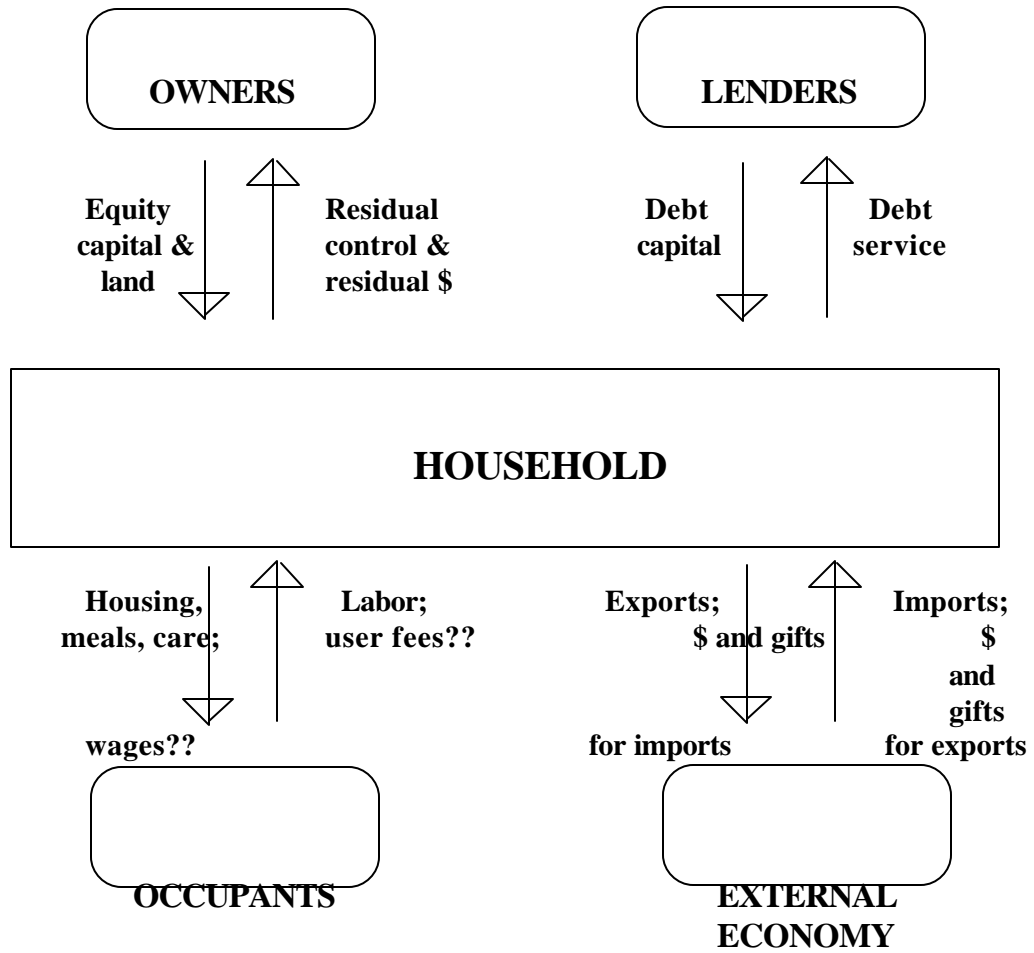


Figure 2: An Overview of the Household Economy