

The 100-Year Life and the New Family Law

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In this chapter, we explore the likely impact of increased life expectancy on family law. We focus primarily on family formation and structure, a core aspect of family law. Based on existing demographic trends, we predict that families will continue to function as the primary setting for intimacy and care for older adults, but increased longevity will likely have a profound impact on the shape of families. Although marriage continues to be the family form privileged by law, marriage rates are already declining, and fewer older adults forming new families will choose marriage. Instead, older adults increasingly are likely to prefer cohabitation or nonconjugal families of choice; many will also live in multigenerational families or live alone. The law currently does not support these nonmarital families. This chapter argues that lawmakers must consider both doctrinal and policy reforms to support individuals in following their preferences for intimacy in old age. To this end, we suggest general goals for law reform as well as specific proposals.

These reforms are critically important because, in our libertarian legal regime, families continue to bear the burden of providing the care most older adults will need. This burden falls disproportionately on low-income families and families of color, who face significant racial and income inequities and who are least likely to marry. As the proportion of older adults grows, the struggles of these families to provide care will increase. Thus, an important goal of family law reforms responding to increased life expectancy will be to support the formation and functioning of *all* families and to assist them in providing care to older family members. In this chapter, we focus on how the law can help older adults create the families they want. These reforms will support intimacy – however an older person defines it – and family caregiving.

At the outset, it is critical to consider just what “family law” might mean. In the early 1960s, Jacobus tenBroek observed that, although family law is neutrally applied regardless of income, there are actually two systems, one set of regulations that applies to the wealthy, who are able to opt out of default rules and have little political oversight, and one set that applies to the use of public funds and affects

lower-income families, who are subject to stringent monitoring by the state apparatus.¹ To be sure, most of the reforms we propose do not address the second system. On the other hand, our proposed reforms to family formation might help stem the growing inequity of family structures by facilitating the ability of lower-income adults to form legal families according to their values and preferences and by providing those families with benefits that marital families enjoy. In this way, adapting family law to the 100-year life can begin to break down the dual system of family law. In other work, we explore at length the many ways the government can directly assist family members across the income spectrum to provide care to older family members.²

2.1 FAMILY DEMOGRAPHIC TRENDS

Life expectancy is indeed increasing, such that 50 percent of children born today are predicted to live 100 years or more.³ But disparities exist; life expectancy varies by race, ethnicity, sex, and income, and this likely will continue. Hispanic older people have the longest life expectancy, followed by white and then Black adults.⁴ Women live longer than men, and high-income individuals live longer than those with low incomes.⁵ Disparities also exist in health outcomes. Black, Hispanic, and lower-income adults have poorer health outcomes than white and higher-income adults.⁶

Against this backdrop, an account of trends in family formation and structure assists us in forecasting the impact of increased longevity on family law. While

¹ Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status: Part I*, 16 STAN. L. REV. 257, 257–258 (1964).

² See Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred-Year Life*, 132 YALE L. J. 1691 (2023). As we argue, these reforms also must avoid the dual system of family law.

³ *The New Map of Life: 100 Years to Thrive*, STAN. CTR. ON LONGEVITY 2 (2021), https://longevity.stanford.edu/wp-content/uploads/2021/11/NMOL_report_FINAL-5.pdf.

⁴ Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2020*, 71 NAT'L VITAL STATS. REPS., No. 2 (Aug. 8, 2022), at 3 tbl.A (showing that Hispanic individuals who reach age sixty-five are expected to live another 21.4 years, as compared to 19.4 years for white individuals and eighteen years for Black individuals). The Census data on longevity do not report on Asian individuals. For a source that describes life expectancy at birth for Asian people and Pacific Islanders, see Off. of Minority Health, *Asian American Health*, US DEP'T OF HEALTH & HUM. SERVS. (Oct. 12, 2021), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=63>.

⁵ See Arias & Xu, *supra* note 4, at 3 tbl.A. For sources discussing the relationship between income and longevity, see Raj Chetty et al., *The Association between Income and Life Expectancy in the United States, 2001–2014*, 315 J. AM. MED. ASS'N 1750, 1754 fig. 2 (2016) (finding a 14.6-year gap in life expectancy between men at the bottom of the income distribution and men at the top and a 10.1-year difference for women and showing a steady increase in life expectancy with each incremental gain of income).

⁶ See Michael E. Martinez & Tainya C. Clarke, *Percentage of Adults in Fair or Poor Health, by Age Group and Race and Ethnicity: National Health Interview Survey, United States, 2019*, 70 MORBIDITY & MORTALITY WKLY. REP. 333, 333 (2021).

extrapolation from the present to the future is difficult, a large body of demographic data on families offers the best tools available to predict the challenges the law will face as life expectancy increases. The future of families is likely to build on several trends, described below.

2.2.1 *The Numbers*

Family structure and form are changing in ways that will likely affect the future of families as life expectancy increases. First, families are smaller today. Average household size and fertility rates have decreased, producing fewer children to care for aging parents.⁷ But most older adults have adult children; for those creating new families, these children are from earlier relationships.⁸

Second, in general, marriage rates have declined, and cohabitation rates have increased. The percentage of people who are not married has increased for all racial groups, although it has remained relatively stable for Asians.⁹ Correspondingly, the rate of cohabitation for all age groups and social classes is increasing, including those over the age of fifty; the cohabitation rate for those over the age of sixty-five tripled from 1996 to 2017, although the rate is far lower than that of younger adults.¹⁰ Unlike younger cohabiters, who typically marry or break up relatively quickly, older cohabiting relationships are relatively stable, lasting an average of ten years and usually ending with the death of one partner rather than a decision to separate.¹¹ However, despite the general increase in cohabitation rates for all groups, family structures increasingly are stratified by levels of education. College-educated couples are more likely to marry, and couples with less education are more likely to cohabit.¹² This stratification in family form is relatively new.

⁷ See Aaron O'Neill, *Total Fertility Rate in the United States from 1800 to 2020*, STATISTA (June 21, 2021), <https://www.statista.com/statistics/1033027/fertility-rate-us-1800-2020>.

⁸ See *First-Ever Census Bureau Report Highlights Growing Childless Older Adult Population*, US CENSUS BUREAU (Aug. 31, 2021), <https://www.census.gov/newsroom/press-releases/2021/child-less-older-adult-population.html> (80 percent of older adults have children).

⁹ USAFacts, *The State of American Households: Smaller, More Diverse and Unmarried*, US NEWS & WORLD REP. (Feb. 14, 2020), <https://www.usnews.com/news/elections/articles/2020-02-14/the-state-of-american-households-smaller-more-diverse-and-unmarried>.

¹⁰ Benjamin Gurrentz, *Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners*, US CENSUS BUREAU (Sep. 23, 2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html>.

¹¹ See Susan L. Brown & Matthew R. Wright, *Marriage, Cohabitation, and Divorce in Later Life*, 1 INNOVATION IN AGING 2, at 4 (2017).

¹² See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014); Richard V. Reeves & Christopher Pulliam, *Middle Class Marriage Is Declining, and Likely Deepening Inequality*, BROOKINGS INST. (Mar. 11, 2020), <https://www.brookings.edu/research/middle-class-marriage-is-declining-and-likely-deepening-inequality>.

In 1960, 72 percent of all adults were married, and these rates did not differ much by educational attainment.¹³

Third, divorce and remarriage are common. The divorce rate has flattened or declined for college-educated couples generally but is increasing for those aged fifty and above.¹⁴ Between 1990 and 2017, the divorce rate doubled for those aged fifty-five to sixty-four and tripled for those aged sixty-five and older,¹⁵ although the divorce rate of older adults is still below those of younger cohorts. Remarriage rates overall are decreasing, suggesting that divorced individuals may be more likely to enter informal unions than remarry.¹⁶ This is especially true for older adults, who are more likely to cohabit with a new partner than remarry.¹⁷

Finally, older adults are more likely to live in nondyadic families than in earlier times. Older adults increasingly live in multigenerational households, which include at least two adult generations, or grandparents and grandchildren who are younger than twenty-five.¹⁸ More than one-fifth of those over the age of sixty-five live in such a household.¹⁹ The trend toward multigenerational households is likely to continue as lives lengthen because aging parents both provide and need care. Living patterns for older adults are shifting in other ways too. Increasingly, older people live in informal groups that currently are not recognized as families. Nonconjugal congregating living has increased with a growing number of options, such as

¹³ See D'Vera Cohn et al., *Barely Half of U.S. Adults Are Married: A Record Low*, PEW RSCH. CTR. (Dec. 14, 2011), <https://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/>.

¹⁴ See Renee Stepler, *Led by Baby Boomers, Divorce Rates Climb for America's 50+ Population*, PEW RSCH. CTR. (Mar. 9, 2017), <https://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population>.

¹⁵ See *id.*; Colette Allred, *Age Variation in the Divorce Rate, 1990 & 2017*, BOWLING GREEN STATE UNIV. (2019), <https://www.bgsu.edu/ncfmr/resources/data/family-profiles/allred-age-variation-div-rate-fp-19-13.html>.

¹⁶ See Krista K. Payne, *Change in the U.S. Remarriage Rate, 2008 and 2016*, BOWLING GREEN STATE UNIV. (2018), <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCfMR/documents/FP/payne-change-remarriage-rate-fp-18-16.pdf>.

¹⁷ See Susan L. Brown, I-Fen Lin, Anna M. Hammersmith & Matthew R. Wright, *Repartnering Following Gray Divorce: The Roles of Resources and Constraints for Women and Men*, 56 DEMOGRAPHY 503, 513 figs. 1 & 2 (2019); Deborah Carr & Rebecca L. Utz, *Families in Later Life: A Decade in Review*, 82 J. MARRIAGE & FAM. 346, 351 (2020); Currentt, *supra* note 10; Renee Stepler, *Number of U.S. Adults Cohabiting with a Partner Continues to Rise, Especially among Those 50 and Older*, PEW RSCH. CTR. (Apr. 6, 2017), <https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older>.

¹⁸ See *Family Matters: Multigenerational Living Is on the Rise and Here to Stay*, GENERATIONS UNITED (2021), 1, 2, 7, <https://www.gu.org/app/uploads/2021/04/21-MG-Family-Report-WEB.pdf>.

¹⁹ See *id.*, at 8. Families of color and families with foreign-born members are more likely to live in multigenerational households than white families are.

intentional cohousing communities,²⁰ voluntary kin groups,²¹ and naturally occurring retirement communities; some of these family arrangements support aging-in-place, a goal of many seniors,²² and all promote ongoing social and emotional connections. Of course, many older people also live in nursing homes, assisted living, or continuing-care retirement communities.²³

Finally, the number of individuals, particularly seniors, living alone has increased. More than a quarter of Americans over the age of sixty live alone,²⁴ although many live near an adult child or other family member.²⁵ Women are more likely than men to live alone, while both African American men and women live alone at rates that are higher than those of white older adults.²⁶ The rates for LGBTQ+ seniors living alone are higher than for cisgender and heterosexual older adults,²⁷ a trend that is likely changing with greater societal acceptance of same-sex relationships.

2.1.2 *Implications of Increased Longevity for Family Formation and Structure*

These trends form a context for speculating about the impact of substantial increases in longevity on family formation and structure. Family relationships continue to be critically important as a source of intimacy and mutual care for this demographic group, and so, not surprisingly, older adults who have lost earlier family relationships to death, divorce, or dissolution are forming new families. As life expectancy increases, more older adults will be forming families later in life. But the goals of older adults in creating new families differ from those of their younger counterparts.

²⁰ See Melissa Stanton, *6 Creative Housing Options: The Choices for How and Where to Live as an Older Adult Are Growing*, AARP (July 2014), <https://www.aarp.org/livable-communities/info-2014/creative-age-friendly-housing-options.html>.

²¹ Dawn Braithwaite et al., *Constructing Family: A Typology of Voluntary Kin*, 27 J. SOC. & PERS. RELATIONSHIPS 388 (2010).

²² Joanne Binette & Kerri Vasold, 2018 *Home and Community Preferences: A National Survey of Adults Ages 18-Plus*, AARP (July 2019), <https://www.aarp.org/research/topics/community/info-2018/2018-home-community-preference.html>.

²³ See *Nursing Home Care*, CTRS. FOR DISEASE CONTROL (Dec. 15, 2022), <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm>.

²⁴ Jacob Ausubel, *Older People Are More Likely to Live Alone in the U.S. Than Elsewhere in the World*, PEW RSCH. CTR. (Mar. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/03/10/older-people-are-more-likely-to-live-alone-in-the-u-s-than-elsewhere-in-the-world>.

²⁵ See Janice Compton & Robert A. Pollak, *Proximity and Coresidence of Adult Children and Their Parents in the United States: Description and Correlates*, 91 ANNALS OF ECON. & STAT. 99 (2015); AARP, *Caregiving in the U.S.* (May 2020), 21, <https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf>.

²⁶ Ausubel, *supra* note 24 (explaining that 20 percent of older women, but only 10 percent of men, live alone); Rodney Brooks, *Old, Black and Alone: A Grim Forecast*, NEXT AVE. (Nov. 22, 2017), <https://www.nextavenue.org/old-black-alone-grim-forecast>.

²⁷ See Soon Kyu Choi & Ilan H. Meyer, *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, WILLIAMS INST. (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-Aug-2016.pdf>.

Older adults seldom form families for the purpose of having and rearing children, a primary function of families for younger people.

Perhaps partly for this reason, the demographic trends suggest that while most older adults today were once married, many may choose other family forms later in life. The appeal of marriage as a secure setting to raise children is less relevant as people age, and older adults may not want to assume the financial commitments that typically go with marriage. Even those who prefer marriage for religious or other reasons may vary in the extent of financial sharing and commitment they desire. Also, increasing numbers of older adults are living in multigenerational families. And a small but growing number of seniors are forming families of choice – informal, typically nonconjugal groups that provide intimacy or companionship and mutual care of dependency needs, the two core functions of families. Further, as we live longer lives, an increasing number will live alone; these individuals will need substitutes for family if they are to fulfill their need for care and intimacy.

A key implication of these demographic trends is that older adults are a varied group with diverse preferences for the family form that satisfies their needs later in life. In general, seniors who establish new families, either marital or nonmarital, will likely have varied expectations for the levels of commitment and financial sharing desired. Some may want to undertake a broad commitment, with financial sharing and other expectations typical of first marriages. But many more may want a relationship of intimacy and companionship without financial sharing or with sharing only for the duration of the relationship.

There is another distinctive feature of older adults forming new families. Many older persons who create new families have close bonds with children and other family members from earlier relationships, and they may want to continue to give priority to those bonds. In other families, however, filial bonds may have become attenuated over time, resulting in reduced feelings of obligation for both generations.

2.2 THE INADEQUACY OF CURRENT FAMILY LAW

Current family law doctrine is poorly suited to respond effectively to increased life expectancy against the backdrop of these trends. By privileging marriage and failing to recognize or protect other family forms, the law is likely to defeat the preferences of many individuals forming families later in life. This harm will fall disproportionately on low-income and Black older adults, who are least likely to choose marriage and whose families will struggle most with the burden of care. The privileging of marriage may also undermine the expectations of older adults in relation to adult children.

Marriage continues to be uniquely privileged as a family form, enjoying strong legal protection, financial advantages conferred by government, and enforcement of

financial obligations between spouses.²⁸ In general, legal marriage is tailored to the preferences and needs of younger individuals starting families, and it is designed to provide a stable, secure setting for raising children. It is not well suited to the needs of those entering marriage later in life. Thus, default rules presume long-term commitment and aim to protect dependent spouses and children by providing for the sharing of marital property and spousal support on divorce. Spouses also enjoy inheritance rights that cannot be altered unilaterally. The default rules for medical and other surrogate decision-making also favor a spouse over other family members. These rights and duties can be changed, but parties must affirmatively agree to opt out, and most couples do not. And some override rules, such as the doctrine of necessities, which benefits third-party creditors, are not subject to spousal agreement but are imposed by the state to ensure a level of basic support.

While some older couples may wish to assume the rights and duties of marriage, many older adults who might choose to marry later in life may not wish to undertake these legal obligations. Seniors often want their children, and not new spouses, to inherit their property, and many would not expect to be saddled with spousal support. Most would not want to divide marital property on divorce. Further, the priority of spouses as surrogate medical decision-makers may conform to the preferences of some older spouses in second marriages, but others may prefer a child, other relative, or friend to assume this role. The presumption of financial interdependence affecting eligibility for long-term care under Medicaid is yet another disincentive to marriage.

Current law is also problematic because it draws a sharp line between marital and nonmarital relationships; that is, parties either opt into marriage and all of its rights and responsibilities, or they choose nonmarital relationships, which carry no financial obligations or assumptions of sharing and no legal recognition of emotional and social connections. The evidence indicates that older adults across the income span increasingly choose nonmarital relationships. And while cohabiting couples can execute contracts to clarify their financial understandings and other documents to protect their emotional connection, very few couples do. Two individuals living together and fulfilling each other's intimacy and dependency needs also do not count as a legally recognized family for the purposes of government privileges or benefits. For example, regardless of their age, cohabitants will not qualify for family leave under federal law to care for an ill partner.²⁹ Nor, if the ill partner has children, will they typically qualify as the preferred decision-makers in the event of incapacity. While many older individuals will choose informal nonmarital unions, in part because they want more limited expectations of financial sharing and fewer mutual obligations than marriage, they will find that their relationships enjoy virtually no legal support or recognition.

²⁸ *United States v. Windsor*, 570 U.S. 744 (2013).

²⁹ 29 U.S.C. § 2612(a)(1) (2018).

Under current family law, individuals in nondyadic and nonconjugal family relationships, both multigenerational and age-based, also receive little or no recognition as families.³⁰ Individuals in these groups seldom formally execute contracts and are excluded from even the benefits afforded to cohabiting couples. Moreover, in some localities, these families of choice may be excluded from living in single-family residential zones under local ordinances. Multigenerational families cannot be explicitly excluded, but these groups may be subject to other zoning restrictions, and, generally, they receive little legal support or recognition, despite their valuable role in providing care across generations. These “new” family forms are likely to become more common for older individuals, but they currently function largely outside the protection of family law.

The upshot is that family law fails to support the interests of older adults because it is centered on marriage, a union that is of declining interest to older adults. Family relationships are important to the well-being of older adults, but many individuals who want to form new family relationships later in life do not want to assume these commitments and financial obligations. For these older adults, the relationships they choose receive little legal protection or recognition.

2.3 WHY LAW REFORM IS IMPORTANT

Families play a critically important role in satisfying individuals’ core needs for care and intimacy. Dependency needs vary across different life stages and are most acute in infancy and childhood and again in old age, when individuals’ ability to care for themselves often declines. In many other advanced countries, the government plays a major role in providing substantial support for dependency needs, but a libertarian presumption of self-sufficiency is embedded in American law and policy, resulting in a substantial burden on families to provide care and assistance. Families also fulfill the human need for intimacy and social connection. Much research supports that older persons who lose intimate connections show declines in both physical and psychological health.³¹ Family relationships, whether in conventional legal families or in families of choice, become ever more important as seniors are less able to actively cultivate social relationships outside of the family.³²

Many older individuals will experience illness and disability and need care and support, and all will need psychological support and human connection.

³⁰ An exception might be grandparents’ standing to seek visitation in most states, but this remains contested.

³¹ See Jialu L. Streeter, Sarah Raposo & Hsiao-Wen Liao, *The Importance of Social Relationships for Longevity*, STAN. CTR. ON LONGEVITY, <https://longevity.stanford.edu/sightlines-project-social-engagement-special-report>.

³² See *id.*

If individuals lack emotional or economic support, the state will bear an increased burden to fulfill these needs, which currently it fails to do. (Other chapters also address those failures.) While the 100-year life may prompt a larger governmental role in providing care and support for the aging population, strengthening legal support for families remains critical. Thus, society has an interest in facilitating family formation for older individuals and in supporting groups that fulfill family functions.

Attaining this goal will require a commitment to legal reforms that acknowledge and support the variety of family relationships that seniors are likely to choose. Many have criticized family law's privileging of marriage, an approach grounded in traditional assumptions about marital roles and commitment. It has long been recognized that this approach harms individuals in nonmarital families, particularly lower-income individuals, and also hurts single people. As we have shown, it is a particularly poor fit for the needs and preferences of older persons, both those who choose marriage and those who prefer other conjugal or nonconjugal family forms, as well as those who age alone.

2.4 AN AGENDA FOR REFORM

2.4.1 *Broad Goals of Reform*

A major goal of legal reform in response to the 100-year life will be to adopt a more pluralist and less libertarian family law that serves the interests of people across incomes, across races, and across the lifespan. The new family law would support a range of families, facilitating individuals' ability to create families adapted to their needs and desires efficiently and without undue effort. Flexibility will be needed to accommodate a range of preferences for financial sharing and other aspects of interdependency. Reforms can also offer assurance to older persons forming new families that their intentions toward members of earlier families, particularly children, will be legally protected.

At a broader policy level, individual fulfillment in old age as well as social welfare will depend on a fundamental shift toward a more active state role supporting individuals and families in fulfilling the critical role of providing care and facilitating human connection. A part of this reform is a regime in which nonmarital families receive the government privileges and benefits that marital families enjoy.

Recognition of, and support for, a broad range of families is particularly urgent for lower-income and Black families, who are unlikely to receive the benefits of marriage and who bear the greatest burden of care for older family members. As a result of a lifetime of inequity, older adults in these families are more likely than those in wealthier families to have health challenges requiring substantial care, and that care will usually be provided by family members. Not surprisingly, these family caregivers provide more hours of care than those in higher-income families and are

more likely to leave paid employment to provide care.³³ Moreover, low-income families often do not have the resources to supplement family care with paid caregivers, increasing the burden and stress on family caregivers.

In other work, we explore the caregiving needs of older adults in greater depth and argue that there is far more the state can, and should, do to support family caregiving.³⁴ In the following, we focus on reforms that allow older adults to form families, both marital and nonmarital, that meet their needs across income and class. The ultimate goal of these reforms is to provide the government benefits and support that marital families enjoy also to nonmarital families.³⁵

2.4.2 *Specific Family Law Reforms*

A range of family law reforms will usefully support older adults in realizing their goals for intimacy. While the need for reform is highlighted by the 100-year life, many reforms will benefit younger family members as well.

A key type of reform is the development of mechanisms that facilitate the more streamlined execution of parties' intentions regarding family formation, obligations, and expectations. Prenuptial agreements, cohabitation contracts, wills, powers of attorney, and medical directives are all helpful in allowing older individuals to determine the legal rights and duties that define their relationships. But, while creating documents that override default presumptions is usually not difficult, most individuals do not execute contracts or otherwise formalize their intentions, because it takes effort and expense to do so; low-income individuals particularly are unlikely to formalize their expectations for family relationships.

Rather than rely on individual initiatives, governments could take steps to facilitate formal expressions of intentions easily and cheaply. We have proposed elsewhere a two-part registration system that would go far toward achieving this goal. Our proposed system would allow cohabiting couples and other nonmarital groups to register their intentions to form families and to undertake mutual commitments and obligations that suit their needs ("family group registration") and also allow couples entering legal marriage to opt out of particular marital rights and obligations (the "marital menu").³⁶ Such a regime could be a key part of a pluralist family law that recognizes the wide variety of preferences regarding family form and functioning.

Individuals in nonmarital family groups may not want to assume the obligations of marriage (and nondyadic groups will not be eligible), but they may want to clarify

³³ See AARP, *supra* note 25, at 31.

³⁴ See Cahn et al., *supra* note 2.

³⁵ In short, a goal of reform should be to break down the boundary between tenBroek's two systems of family law and give low-income families access to the benefits of the first system. *Supra* note 1.

³⁶ Cahn et al., *supra* note 2.

expectations and assume some mutual family obligations and commitments. The proposed family group registration option would allow family groups to select obligations and benefits that could range from various kinds of financial sharing to surrogate decision-making to inheritance rights. A model of sorts exists in a Colorado law authorizing individuals in nonmarital relationships to register for “designated beneficiary” status. That option, limited to couples, allows each individual to decide on specific relationship rights and duties recognizing emotional connection and financial interdependence.³⁷ It could be adapted to facilitate the formation and recognition of a broader range of family groups.

The second part, a “marital menu,” would allow couples obtaining a marriage license to opt out of legal default rules providing for marital property, spousal support, spousal inheritance rights, medical proxies, and other obligations.³⁸ Effectively, the marital menu is a streamlined substitute for a premarital agreement, allowing couples to opt out of marital obligations efficiently and cheaply. For many older couples, particularly those with adult children, this reform would offer substantial benefits.

This proposal faces two challenges if it is to facilitate progress toward the important goal of serving the needs of older adults across the income span. First, a registration system will not be useful if people are not aware of it, or if it is viewed as too complex. Even more concerning, the system risks replicating inequity if only higher-income groups benefit from its services. Lower-income couples currently are less likely to formalize their relationships, and thus, it is important that registration be made inexpensive and accessible for all couples and groups. Providing information in locations and through channels that are likely to reach lower-income individuals is one means to assure awareness of opportunities for family formation across the income span.³⁹ This information should also increase awareness of the legal and social benefits of family formation, as well as of the availability of registration. The process must also be clear and straightforward, as any need for legal advice will serve as a deterrent.

This relates to the second challenge, which begins with the creation of the registration system but embodies an ambitious longer-term goal. Given that families provide a critically important function in providing care for a growing population of older adults, the law’s goal should be to extend to all registered families the legal benefits and government support that marital families enjoy. Tangible benefits may

³⁷ COLO. REV. STAT. § 15-22-105 (2020).

³⁸ Note that it would not affect state or federal public benefits that are associated with marriage; thus, for example, the couple would still be considered married for tax purposes.

³⁹ To make older adults aware of the options for family formation, informational material can be made available in physicians’ offices, Social Security offices, senior centers, and other locations frequented by older adults. Information could also be distributed with Medicare forms and in periodicals that target older adults, such as AARP publications.

encourage individuals to formalize family relationships, signaling their commitment and creating more stable settings for mutual intimacy and care in aging. Providing these couples with the support that married couples enjoy is good social policy and will benefit a broader range of individuals than current law could. Other families will benefit from marital privileges and benefits as well.

Lawmakers likely will be cautious in extending benefits and privileges to a broader range of families, perhaps fearing strategic behavior or a substantial fiscal burden. But strategic behavior seems less likely in this age cohort, and concern about the budgetary impact of these reforms is short-sighted in light of the financial and social value of care provided by family members. As a start, registration should trigger government recognition needed for the registered group to function as a family and provide support for family care that other families enjoy. For example, zoning regulation should define “family” broadly enough to include all families and allow land use that facilitates the needs of multigenerational families.⁴⁰ Regulations protecting family members in rental housing should also be broadly construed. Further, the protection given by the Family and Medical Leave Act could be extended to support a broader range of family and chosen family caregivers. Ultimately, government benefits that reinforce families and provide support for family care should be extended to all families.

Recognizing that registration may deter family formation, lawmakers might shift default rules to benefit established informal families and extend to them a limited set of benefits that go to other families. For older couples in long-term cohabiting relationships, for example, default rules recognizing emotional connections could apply. These default rules might include presumptions about surrogate healthcare decision-making and hospital visits while also ensuring protection of the interests of children from earlier relationships. There might also be some type of homestead exemption (perhaps a life estate) to ensure continuity in living arrangements at the death of a partner who owns the home. In multigenerational families, greater protection of the relationships of grandparents and grandchildren living together may be important.⁴¹

2.5 CONCLUDING THOUGHTS

The challenges posed by increased life expectancy cannot be resolved simply by recognizing a broad range of families and facilitating the ability of older adults to form families according to their needs and preferences – or even by extending the government benefits enjoyed by marital families to all families. We argue in other

⁴⁰ See Lisa Prevost, *The A.D.U. Experiment*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/realestate/the-adu-experiment.html>.

⁴¹ Elizabeth Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 219 U. CHI. LEGAL F. 225 (2004).

work that for older adults across the income span to live dignified and rewarding lives without unduly burdening their families, other reforms, including substantial government investments in family care and support, will be necessary. Changes to Social Security, tax law, Medicare, Medicaid, and other programs can provide support to low-income families and begin to address the race and class inequities that otherwise are likely to only be amplified as life expectancy increases.