

# Life Together: How Housing Laws Define America's Families

EMORY UNIVERSITY  
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*Frank S. Alexander\**



## Introduction

In recent years—and especially in the last state, local, and national political campaigns—two topics seem to be at the top of our cultural agenda: families and housing. Everyone seems to be speaking of families: the advancement of “family values,” the preservation of the autonomy and sanctity of the family, the relationships that count as creating a family. A great emphasis also exists on housing, with pride being felt in the fact that the rate of homeownership in America is now at a record high, given that roughly 68 percent of Americans now own the home in which they live.<sup>1</sup> President George W. Bush, in his most recent inaugural address, proclaimed a vision of a new “ownership” society, premised on his belief in the liberty of each family to own their own home.<sup>2</sup>

This emphasis on families and housing is intriguing, for there are many common threads in the provision of housing and in the promotion of family life. More than fifty years ago, Congress declared the “goal of a decent home and suitable living environment for every American family.”<sup>3</sup> We indeed have made great progress during this period in eliminating substandard housing and in making it possible for more and more families, across the spectrum of income, to own their own homes. Pride in such progress, however, must be tempered with the truth that in the midst of this prosperity, we have more than two million individuals who live without any shelter whatsoever.<sup>4</sup> These are citizens whose “home” is their car, the overpass under which they huddle at night or, if they are so fortunate, the night shelter that gives them a mattress at 6:00 p.m. on the condition that they leave at 6:00 a.m. Though homeownership rates may now be high, we also are witnessing the highest recorded rates of residential foreclosures,<sup>5</sup> and the average family has less equity in their home than ever before.<sup>6</sup>

What is both intriguing and puzzling about the dual emphasis on families and housing is not the importance of each but rather

the manner in which they have been tied together. Housing laws should focus on the production, maintenance, and ownership of residential units. Concerns having to do with our families, our lives together, and our commitments to one another seem oddly out of place as we look at housing laws. Yet upon examination of the housing laws of the past 150 years, one sees something quite different, surprising, and troubling.

Our housing laws have been used—directly and indirectly, consciously and unconsciously—as vehicles for the definition and control of families, of articulating which relationships count in determining what a family is. If you have three sons and they all happen to share one large bedroom, you may well be in violation of a local building code. If you have a basement or garage apartment that is occupied by your grandparents as they age, there is a good chance that you are in violation of the law. If you elect to share a house with four college roommates, or one or two professional friends, you may find yourself facing the wrath of your neighbors and fighting eviction.

Housing laws have been used, and are being used, in ways that simply do not make sense. Instead of focusing on the creation of decent housing, some of the laws have been used to discriminate and to deny. Instead of creating places of hospitality, they breed hostility. Instead of providing support, they serve to segregate. It is much easier to build houses; it is much tougher to build families. During the past 150 years, we too often have let the building of houses become a vehicle for controlling families. Housing laws simply cannot and should not be a tool by which our society determines the essential nature of a family.

In the words of Deuteronomy, we must remember that the things we have are things we have been given, that we all inhabit

“flourishing cities you did not build,  
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### The Fields of Inquiry

There are myriad ways in which housing laws and policies, understood broadly, have a profound impact on the definition of American families. This overall project focuses on six primary fields of inquiry:

Homelessness	Restrictive Covenants
Public Housing	Housing and Building Codes
Federal Subsidies	Zoning and Fair Housing

The focus in this essay is on the latter three topics: restrictive covenants, housing and building codes, and zoning laws. There are certain topics that, though quite relevant to this thesis, are not included. The most obvious example is the history of discrimination in our housing laws on the basis of race, religion, and national origin. I excluded this subject not because it does not support the thesis but because it is simply too large a topic—one deserving of its own separate treatment. Moreover, it is addressed in part by separate constitutional and statutory provisions.<sup>7</sup> The primary focus is on the family—its definition and discrimination, its control and exclusion—in the context of housing laws.

Our social and cultural norms are oftentimes most poignantly demonstrated by how we treat those who have the least.<sup>8</sup> Although there may be strong disagreement about the number of individuals and families who are homeless in America on a given night this year,<sup>9</sup> there is widespread agreement that the numbers have increased dramatically in the past two decades.<sup>10</sup> Of the two to three million individuals who will be without housing at some point during this year, approximately 40 percent of them are families with children,<sup>11</sup> and more than 50 percent of homeless children are under the age of six.<sup>12</sup> As striking as this data is, what is key for our inquiry is the mismatch between the housing resources our society makes available to those who have the least and the families in need of help. In 2004, 32 percent of homeless families in the United States were denied shelter requests, and 81 percent of cities reported that their shelters turned away homeless families due to a lack of resources.<sup>13</sup> Why is this? The answer, at one very simple level, is that it is easier and cheaper to provide large numbers of shelter beds for adult males than for a mother and father with a fourteen-year-old son and a six-year-old daughter. In more than half of the cities in the United States, families are required to break apart and go to separate facilities in order to have shelter.<sup>14</sup> Boys over the age of ten are not commonly allowed in shelters where women are present, and fathers may be sent to shelters for single males.<sup>15</sup>

There is very little housing law that directly pertains to those who are homeless among us. There are government-assistance programs and local ordinances designed to keep the homeless out

of sight. What our housing policies reveal as they impact homeless families is that families at this level of income are a very low priority. We house individuals and make little effort to preserve, support, and nurture families on the streets. In every city there is a striking and moving exception to this—such as the Genesis Shelter here in Atlanta<sup>16</sup>—but the point is that such shelters are indeed exceptions.

### Restrictive Covenants

There is, at least in the human community, a prevailing and recurring tendency to hold conflicting attitudes—a strong desire to control the lives of our neighbors yet an insistence on being free from control by our neighborhoods. The law of restrictive covenants mirrors these social and cultural priorities and biases. The evolution of restrictive covenants from 1870 to the present took place in three key phases, each uniquely impacting the family. The first phase was control over the structure; the second phase was control over the uses of the structure or the activities permitted in the structure; and the third phase was control over the relationships of the occupants.

#### *Control over the Structure: The “First Class Residence” and Fear of Tenements and Apartments*

Lawyers and judges of the late nineteenth and early twentieth centuries drafted and interpreted restrictive covenants in a cultural milieu that found self-evident meaning in a restriction that permitted only “first-class dwelling-houses” on the property. For example, a 1922 restrictive covenant in Houston, Texas, identified as its purpose the creation of “a high class and exclusive residential and business community” and expressly prohibited apartment houses and duplexes.<sup>17</sup> In some jurisdictions, the social and economic class intended to be protected by a restrictive covenant was not necessarily identified in the express words of the covenant. Despite no such guiding language, however, the Missouri Supreme Court in 1910 nonetheless explained that the purpose of such restrictive covenants was “to insure the use of [the property] for high-class residence purposes.”

In New York City in the 1860s, a key focus of such restrictive covenants was on tenement housing, a widely perceived social and demographic condition attributed in significant measure to “a great tide of immigration [sic] [that] had swept into the lower wards of the city, crowding the tenements far beyond the limits of safety

and health.”<sup>19</sup> Legislation in 1867 in New York City defined a tenement house as a structure rented to more than three families living independently of each other, or more than two independent families living on the same floor.<sup>20</sup> The tenement houses of the nineteenth century were perceived as “nuisances,” places “occupied by persons of small means . . . crowded into insufficient space and deprived of many of the essentials to privacy, decency, and health.”<sup>21</sup>

With the emergence of new architectural forms of urban living arrangements, states with major urban areas had a difficult time deciding whether an express prohibition of “tenements” extended to flats or whether a prohibition of tenements and flats also applied to apartments.<sup>22</sup> The imprecision in terminology, and in reasoning, at times gave rise to results that are hard to reconcile. Some courts held that a prohibition of “flats” did not prohibit a duplex but did prohibit apartments.<sup>23</sup> Others held that a prohibition of tenements did not apply to apartments.<sup>24</sup> The Missouri Court of Appeals interpreted a limitation of “one dwelling on each lot” as barring the construction of a four-family flat.<sup>25</sup> The court wrote: “A house arranged for plural occupancy is much more likely to be used by several families, and to attract an unwelcome class of inhabitants into a restricted residence district.”<sup>26</sup> Underlying the majority of these structure-focused covenants was a normative assessment of the property being excluded.

#### *Control over Use: Borders, Lodgers, and Fraternities*

The second phase in restrictive covenants was to limit not just the physical nature of the structure but the use of the structure as well. For example, the majority of cases that addressed the possibility of a boarding house or a rooming house in the context of a residential covenant found such use to be prohibited.<sup>27</sup> Covenants were increasingly written to exclude expressly not just tenements, flats, and apartments but also commercial and business activities—such as the renting of rooms—that could occur in a residential structure.<sup>28</sup> These restrictive covenants also were drafted increasingly to prohibit fraternities and religious orders.<sup>29</sup> Although few persons openly will express disdain regarding group homes for children or adults with special needs, restrictive covenants are replete with express exclusions of them—a manifestation of “NIMBY” (“Not in My Back Yard”).<sup>30</sup> One of the curious features of many of these narrowly defined restrictive covenants was that they were almost invariably interpreted to permit one

unrelated person to reside with a family—a servant or domestic.<sup>31</sup> This allowance mirrored the cultural expectations of the higher economic classes, who sought the protections of the covenants.

As restrictive covenants became more specific in requiring that structures be used only by one family, this tightening down led inevitably into direct confrontations about the definition and meaning of family. When a set of individuals reside together in a single facility, having common meals in a single kitchen, sharing responsibilities for life, and possessing personal and emotional ties that bind beyond time and place, are they a family?

### *Control over Relationships*

By the early part of the twentieth century, covenants were drafted with express provisions that the property be limited to one structure occupied by not more than one family. This development concerns the third part of the story of restrictive covenants. Judicial decisions during this period began to use the language “single-family houses” as synonymous with restrictions regarding “a private residence” or “for resident purposes.”<sup>32</sup> This subtle yet significant shift of property and housing law into the role of defining the substantive relationships between people pressed these laws beyond their competency. Deciding what activities were prohibited proved to be easier than determining who was permitted.

“Single family” had a flexible meaning depending upon the context. For many purposes, the concept was interchangeable with “household”—the key terminology used by the United States Census and social demographers from the eighteenth to mid-twentieth centuries. A dictionary relied upon in a 1905 decision defined family as “persons collectively who live together in a house or under one head or manager: a household, including parents, children, and servants, and, as the case may be, lodgers or boarders.”<sup>33</sup>

This preference for a narrow conception of family for purposes of single-family, residential, restrictive covenants did not rest solely on the normative and cultural perspectives of members of the judiciary, though we do see trial courts in the middle of the twentieth century increasingly creating a definition of family as persons related by blood, marriage, or adoption.<sup>34</sup> The view that a “family” is a small set of individuals arranged around a nucleus—composed of father, mother, and children—was thrust into prominence by the work of the anthropologist George Peter Murdock, who coined the term “nuclear family” in 1949.<sup>35</sup>

In the aftermath of World War II, the covenants and the courts show marked preference for the “nuclear family,” while always protecting servants. This approach completely jettisoned the reliance in prior centuries on conceptions of households and dependency. Restrictive covenants that control the nature of structures in residential neighborhoods are often a guise for controlling the economic class of one’s neighbors. Restrictive covenants that determine the permissible activities of one’s neighbors are commonly a pretext for controlling our neighbor’s lives. When restrictive covenants define the family that can be one’s neighbor, they reach into the soul of our relationships and affect who we are as human beings. The attempts to define and to control our neighbor’s lives by defining families in narrow terms of blood, marriage, or adoption prove inadequate when confronted by families with foster children, dependent elderly people, or group homes of unrelated members with disabilities.

### *Housing and Building Codes*

Most of us think of housing and building codes as regulations dealing with the structural components of buildings: the walls, wiring, and plumbing. We think of things related to physical safety, which is indeed the primary function of such codes. There is one additional feature of such codes, however, that is puzzling for several reasons. From the time of their creation in the late nineteenth century, housing codes have established occupancy limits. Occupancy limits specify the minimum size of bedrooms or, conversely, the maximum number of persons who can reside in a housing unit. These occupancy limits are striking for three reasons. First, they carry the suggestion that they are based in sound engineering concepts or result from an empirical analysis of public health concerns. Neither assertion is true. Second, lacking a scientific basis in safety, occupancy limits instead reflect profound social and cultural biases about how a family “should” live. Third, our laws today continue to accord significant validity and deference to “restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”<sup>36</sup>

### *Cubic Space Limitations*

The first housing codes in the United States were adopted in the 1870s by San Francisco and New York City. In both instances, they were directed at the crowded housing conditions experienced

by racial and ethnic minorities in boarding houses and tenements. The San Francisco “Lodging House” ordinance of 1870 created a requirement that every facility provide at least 500 cubic feet of air space per person.<sup>37</sup> Certainly, some degree of genuine concern lay behind this ordinance about deplorable living conditions. The overwhelming motivation for this new rule, however, was the intense ethnic and cultural animosity reflected in the leadership of the Anti-Coolie Association, an organization opposed to the use of Chinese labor.<sup>38</sup>

During this same period of time, on the other side of the country, the city of New York was enacting its first set of ordinances dealing with tenement housing. In contrast to the San Francisco actions, the initiatives in New York City—though directed at the large numbers of recent immigrants—were justified in part by the emerging field of public health.<sup>39</sup> The tenement law specified a minimum of 600 cubic feet of air per person, beyond which the room was deemed overcrowded.<sup>40</sup> The public health support for such a standard was based on the conclusion (established by the epidemiology of the day) that inadequate ventilation created “atmospheric impurities” that spread disease.<sup>41</sup> With no further justifications, the first model housing code in 1910 adopted a minimum of 600 cubic feet of air for each adult and 400 cubic feet of air for each child under 12 living in one room.<sup>42</sup>

#### *Square Footage Limitations*

During the course of the twentieth century, the American Public Health Association (APHA) played a critical role in promulgating the occupancy standards that ultimately have become law. In 1950 the APHA recommended a minimum dwelling size of 400 square feet for one person and 1,150 square feet for a family of four.<sup>43</sup> What is most startling, at least in hindsight, is not that the APHA developed a specific recommendation but rather the basis for its recommendation. With a curious sense of reasoning, it explained that its analysis of the minimum areas needed for healthy activities was based on a survey of housing units and that its “figures closely approximate[d] actual practice in the high-income groups.”<sup>44</sup> Sixteen years later, in 1969, the APHA and the Public Health Service jointly published a model housing ordinance. With virtually no scientific explanation, the ordinance reduced the minimum requirements. This time, it recommended a minimum of 150 square feet per person, plus an additional 100 square feet for each additional person (or 450 square feet for a family of four).<sup>45</sup>

#### *Overcrowding and Maximum Occupancy*

Between 1900 and 1950, the general standard for overcrowding was perceived to be two persons per habitable room. In 1950 the overcrowding threshold was lowered to 1.5 persons per room and further reduced to 1.0 person per room in 1960.<sup>46</sup> Today, the Department of Housing and Urban Development suggests that a general standard of “two persons in a bedroom” is consistent with federal law.<sup>47</sup>

As we look at how housing laws and policies define America’s families, we are confronted with these two powerful standards—minimum floor area and maximum occupancy—designed to avoid overcrowding. In each instance, we are left hungry for the empirical or scientific justification for such standards. In the absence of an explanation, the standards may well reflect the values, customs, or prejudices of a dominant subclass of American culture.

What is most striking about a limit of two persons per bedroom is the lack of any correlation to the size of the bedroom. In many homes in different parts of the country, a custom exists of occupying a large room known as a “sleeping porch” where all of a family’s children, and frequently cousins as well, would sleep at night. Are we not missing some fundamental connections between the reality of people’s living arrangements and the ordinances that define overcrowding?

Ellen Pader—an anthropologist at the University of Massachusetts-Amherst—recently offered a profound critique of the way in which our culture has chosen to interpret this goal of safe and decent housing for every American family.<sup>48</sup> She related the story of two women sharing a room during their first night at college. Neither could fall asleep. Realizing that her roommate was still awake, the first student said, “I’m lonely and can’t sleep; I have never slept alone in a bed.” The other student responded, “I can’t sleep either; I’ve never shared a room before.” The story illustrates Pader’s core argument—that our minimum room sizes, coupled with our overcrowding standard, explicitly derive from “upper-class, English and Anglo-American definitions of reasonable” that are inconsistent with a broader conception of cultures and subcultures.

#### *Zoning*

The law of zoning is a twentieth-century development, authorized by legislatures and accepted by courts in the first quarter

of the century. Grounded in the inherent police powers of government, zoning laws originally were justified on the grounds of eliminating nuisances and minimizing conflicts in various forms of land use. By the middle of the twentieth century, however, zoning laws became the dominant vehicle for controlling forms of residential life.

### *Single-Family Zoning*

The early ordinance of the village of Euclid, Ohio, created a zoning category for single-family use and defined family as “any number of individuals living and cooking together on the premises as a single housekeeping unit.”<sup>50</sup> This definition of single-family residences” in terms of function rather than relationships continued to be the dominant approach across the country into the 1930s and 1940s. The most common test for determining whether individuals were living as a single housekeeping unit focused on the kitchen: a single kitchen and common meals suggested a single housekeeping unit.<sup>51</sup>

George Murdock’s term *nuclear family* was defined as a married man and woman along with their offspring. The emergence of this definition occurred at the same time that our housing laws—both restrictive covenants and residential zoning laws—shifted away from a functional definition of a household unit to a definition of a family as persons related by blood, marriage, or adoption. The earliest example of a zoning law following this approach is a 1945 ordinance of the Village of La Grange Park, Illinois.<sup>52</sup> This “blood, marriage, or adoption” test rapidly spread across the country and was offered as a standard zoning definition of a family in model legislation in 1953. By the 1960s and 1970s, most courts did not have to puzzle about the relationships that would “count” in defining a family because local ordinances made it very simple: you had to be related by blood, marriage, or adoption to be considered a family.<sup>54</sup>

This narrow nuclear definition of a family was not entirely exclusive, for local ordinances did permit occupancy by a small number of persons not related by blood or marriage.<sup>55</sup> Allowing one or two unrelated persons to live with a nuclear family was in some instances a recognition of economic circumstances, as when a ordinance included the possibility of not “more than two (2) boarders or lodgers.”<sup>56</sup> In other communities, it appears to have been recognition that nuclear families did indeed have at times “domestic servants” or “gratuitous guests” living with them.<sup>57</sup>

When relationships by blood, marriage, or adoption were entirely absent, zoning ordinances took a very restrictive approach by limiting housing occupancy to no more than two, three, or four “unrelated” individuals or by refusing to permit their occupancy altogether.<sup>58</sup>

We can only surmise the reasons for this profound shift in housing laws by adopting a narrow, mechanical definition of a family. Perhaps it was a reaction to judicial decisions that permitted groups of individuals (whether fraternities or religious orders) to live in single-family neighborhoods. Perhaps it was a mirror of cultural acceptance, as a normative proposition, of Murdock’s nuclear family. Perhaps, as some have suggested, it was a reaction to the open emergence in the 1960s of collectivist and communal lifestyles in which marriage was absent or incidental.<sup>59</sup> Whatever the motivation or justification, the consequences were profound. Four, five, six, or more individuals not related by blood, marriage, or adoption simply could not qualify as a “family” and live in a “single family” area, regardless of their personal, emotional, religious, or cultural commitments to one another.

### *Constitutional Boundaries of Zoning Family Relationships*

The use of housing laws to define families pushed against the outer boundaries of constitutional law. The United States Supreme Court examined the validity of single family zoning in two key decisions, *Village of Belle Terre v. Boraas*<sup>60</sup> and *Moore v. City of East Cleveland*.<sup>61</sup> In the tiny community of Belle Terre, the ordinance permitted no more than two persons unrelated by blood, marriage, or adoption to occupy a residence. A group of six students occupying a residence challenged the ordinance on constitutional grounds. Finding no violation of any fundamental rights, the court applied a deferential standard and held that the ordinance had a rational basis, thereby allowing it to stand.

Three years later, in *Moore v. City of East Cleveland*, the Supreme Court considered a local zoning ordinance that contained a very specific definition of a “family.” The ordinance recognized as an acceptable “family” only the head of the household, his or her spouse, their parents and unmarried children, and up to one set of married dependents with grandchildren. As a result, a grandmother could not lawfully occupy a residence with two grandsons who were first cousins. This time the Court chose not to apply such a deferential standard to a local zoning decision on the grounds that it was an “intrusive regulation of the family.” The concurrence by

two justices to the plurality opinion was forceful in its condemnation of what it termed the “cultural myopia of the arbitrary boundary” drawn by the ordinance.<sup>62</sup> “The line drawn by this ordinance displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society.”<sup>63</sup>

Both *Belle Terre* and *Moore* continue to be valid propositions of federal constitutional law. As summarized by a recent decision of the Michigan Court of Appeals, “[T]he right to live with one’s family is constitutionally protected [under *Moore*], but the right to live with any number of individuals who are not one’s ‘family’ is not [under *Belle Terre*].”<sup>64</sup>

Today, the Supreme Courts of California, New York, and New Jersey have invalidated narrow family definitions based upon provisions of their state constitutions.<sup>65</sup> The majority of states, however, regard as valid zoning ordinances that severely limit, or prohibit, persons not related by blood, marriage, or adoption from living together. It is thus entirely possible for a city to render it illegal, in its zoning laws, for an unmarried couple and a child to live in an area zoned for single-family use. In precisely such an instance, the Missouri Court of Appeals said that in order to be a family, “there must exist a commitment to a permanent relationship and a perceived reciprocal obligation to support and to care for each other.”<sup>66</sup> The consummate difficulty with such reasoning is the complete absence of a public or social discourse on the “perceived reciprocal obligation,” because the court made clear that it is the perception of the court—not the perception of the individuals in the relationship—which is the deciding factor.

#### *The Fair Housing Act and Familial Status*

Today, we continue to be willing to tolerate restrictions on who “counts” as American families, at least in the most economically privileged single-family areas. A popular version of zoning laws today does not create a maximum occupancy number when the individuals are related by blood, marriage, or adoption yet does impose a fixed limit on the number of unrelated individuals who can live together. Instead of admitting publicly that such limits on unrelated persons living together are nothing more than a social and cultural rejection of certain lifestyles, the proponents of these rules argue that local governments are free to adopt reasonable occupancy limits in order to protect health, safety, and welfare. The logical fallacy, of course, in these arguments is that there are no such occupancy limits for families related by blood,

marriage, or adoption. This situation suggests that either we do not care about the health and safety of families or that we simply do not want “non-nuclear” families residing in our preferred neighborhoods.

The Fair Housing Act Amendments of 1988 present precisely the context for revealing these hidden social biases in our housing laws. The amendments made it illegal, for the first time, to discriminate in the provision of housing on the basis of “familial status,”<sup>67</sup> which is defined as the presence of a child (under the age of 18) together with the legal guardian of the child or an adult having permissive custody of the child.<sup>68</sup> The conception of family protected by these 1988 amendments is thus much broader than the narrow biological tests of many jurisdictions. The amendments were necessary to address widespread discrimination, both in housing laws and in private-apartment leasing policies, against the presence of children. Apartments and housing available to adults only were common and justified by owners and landlords in the name of peace and quiet, reduction of costs and damages, and the prevention of harm to children. Even as it seeks to protect children from being victims of discrimination in housing, the Fair Housing Act says nothing about discrimination on the basis of marital status (or the lack thereof). The addition of familial status as a protected category does not extend to marital status.<sup>69</sup>

Further, the prohibition against discrimination on the basis of familial status contains a significant and powerful exception providing that the federal law does not “limit the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”<sup>70</sup> What constitutes a “reasonable occupancy limit” for purposes of this federal law is not clear, though the government has suggested that two persons per bedroom is reasonable.<sup>71</sup> Thus, when a local zoning ordinance elects to define a single family as persons related by genetics, marriage, or adoption—without limit as to their number—or a limited number of unrelated persons, it has not created a rule that falls within the Fair Housing Act exception for “reasonable occupancy limit.” Such a zoning ordinance “describes who may compose a family unit; it does not prescribe ‘the maximum number of occupants’ a dwelling unit may house.”<sup>72</sup>

We thus are forced to return to the housing and building codes and their definitions of minimum square footage and overcrowding conditions. As I have demonstrated, however, there is woefully little scientific basis for the current standards, which are justified

primarily in the name of economic privilege and social status. It remains clear, then, that housing laws continue to define American families based on implicit social norms.

### Conclusion

This inquiry into housing laws suggests both what we have done and what we need to do in the future. First, housing laws carry tremendous normative assumptions, resulting in tremendous normative consequences. Second, housing laws are not capable of bearing the weight of such profound social judgments. Third, housing laws should focus on function and use, not on relationships. Fourth, if there is to be a social and cultural judgment, enforced by laws, as to the relationships that “count” in deciding who lives in our neighborhoods, then let us present these moral convictions openly for debate and not hide them in our various housing laws.

Residential restrictive covenants may have arisen first out of a desire to separate homes and apartments from hotels and boarding houses, but they quickly emerged as tools to segregate by wealth and race. Occupancy standards originally were created to address health concerns of inner-city tenements, but they have remained on the books without empirical validation for more than a hundred years. For the past sixty years, zoning has been the dominant tool by which we define and control “single families,” and these laws have embraced the rubric of “blood, marriage, and adoption” as the talisman for what constitutes the family.

The vision of the American family, at least in housing laws, increasingly narrowed during the second half of the twentieth century. Conceptions of extended families, of friends taken in because they had no other place to go, of housing as sustenance to be shared, have been replaced by conceptions of exclusion, control, rejection, and denial. Reliance on a narrow concept of the nuclear family has come at great cost to the society at large and to specific subcultures in particular. The examples provided are but an indication of the need to explore this theme in related fields. As Emory Law professor Martha Albertson Fineman has so poignantly and powerfully argued in her recent work, *The Autonomy Myth: A Theory of Dependency*, “We need to rethink old paradigms, set aside the misleading discourses about personal versus public responsibility, and cast a skeptical eye on current renditions of the social myths of independence and self-sufficiency.”<sup>73</sup>

We should, for example, be ever mindful of the very concept of who counts as a living unit. From the birth of this country and its first census in 1790, until the census in 1950, we did not count “families.” Instead, we counted households, groups of individuals living as a dependent, single housekeeping unit.<sup>74</sup> It was not until the 1950 census that the definition emerged of a family as persons related by “blood, marriage, or adoption.”<sup>75</sup> As we rely upon this narrow definition, consider the fact that the most recent census data discloses that for the first time in American history, traditional families—husband, wife, and children—make up less than one-fourth of all households.<sup>76</sup>

The preservation of the family and the relationships that lie at the core of familial bonds is not to be achieved by trying to do indirectly what we are uncomfortable with doing directly or unable to do with accuracy. In the context of housing laws, the task should be to provide housing—housing that is described and defined according to use and activity, not according to genetics or custody. Living arrangements that are premised on the bonds we cherish will allow our society to affirm the presence of such bonds in relationships of blood, marriage, and adoption as well as in the case of relationships borne of simple commitment one to another. It is in this much broader vision that we indeed may pursue the ideal of safe, decent, and affordable housing for every family and treasure our lives together. The houses we inhabit are not solely the fruits of our labors, and the houses we build are not for us alone. As we work toward a dream of affordable housing for all families, let us always recall that we are given

“flourishing cities you did not build,  
houses filled with all kinds of good things you did not provide,  
wells you did not dig,  
and vineyards and olive groves you did not plant” (Deut. 6:10–12).



\*Frank Alexander is interim dean and professor of law at Emory Law School; the founder and codirector of the Emory University Law and Religion Program; and the director of the Project on Affordable Housing and Community Development. This essay represents the preliminary phase of a much-larger, multiyear project investigating the influences of housing laws on America’s families. Portions of this work have been undertaken as part of a project addressing the theme of “The Child in Law, Religion, and Society,” sponsored by the Center for the Study of Law and Religion, Emory University. I am indebted to numerous colleagues for excellent advice, guidance, and suggestions and to superb research assistance from Erin Bailey, Laurie-Ann Fallon, Katie Good, David Harris, Jesse Herman, and Eileen Hintz.

## Notes

<sup>1</sup>U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics: 2003, Table 15. Homeownership Rates for the United States, by Age of Householder and by Family Status, available at <http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t15.html> (last visited December 2, 2004).

<sup>2</sup>George W. Bush, Inaugural Address, January 20, 2005: “To give every American a stake in the promise and future of our country, we will bring the highest standards to our schools, and build an ownership society. We will widen the ownership of homes and businesses, retirement savings, and health insurance —preparing our people for the challenges of life in a free society.”

<sup>3</sup>Housing Act of 1949, Pub. L. No. 81–171, ch. 338, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 [2000]). Congress reaffirmed this goal in 1968, Pub. L. No. 90–448, 82 Stat. 476 (codified at 12 U.S.C. § 1701t (2000)).

<sup>4</sup>See Dennis P. Culhane et al., “Public Shelter Admission Rates in Philadelphia and New York City: The Implications of Turnover for Sheltered Population Counts,” 5 *Housing Policy Debate*, 107, 108 (1994) (summarizing various homelessness estimates).

<sup>5</sup>“Home Foreclosures Hit Record High,” Reuters, June 20, 2003, at <http://www.thehillpolitics.com/modules.php?op=modload&cname=News&file=article&sid=155>.

<sup>6</sup>Ruth Simon, “Home-Equity Loans Hit Record Levels,” *Wall Street Journal*, January 20, 2005, available at <http://www.azcentral.com>. Home-equity debt is now equal in aggregate volume to the total amount of credit card debt in the United States and is expected to surpass it shortly. SMR Research Corporation, “Summary: Home Equity Loans: 2005 Outlook,” at <http://www.smrresearch.com/heoutlook05.html> (last visited January 24, 2005).

<sup>7</sup>The overlap of racial discrimination with the control of family is most evident in the constitutional foundations of *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Civil Rights Act of 1866, 42 U.S.C. § 1982 (2000), and the enactment of the original Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2000).

<sup>8</sup>Matthew 25:40–45.

<sup>9</sup>In 2000, the Urban Institute concluded that 3.5 million persons were homeless at least once in a given year, of whom 1.35 million were children. See Martha R. Burt and Laudan Y. Aron, *America’s Homelessness II: Populations and Services*, Urban Institute, at <http://www.urban.org/url.cfm?ID=900344> (January 1, 2000) (presentation summarizing the 1996 National Survey of Homeless Assistance Providers and Clients).

<sup>10</sup>Culhane, *supra* note 4, at 109.

<sup>11</sup>U.S. Conference of Mayors, Hunger and Homelessness Survey 4, available at <http://www.usmayors.org/uscm/hungersurvey/2004/onlinereport/HungerAndHomelessness-Report2004.pdf> (December 2004).

<sup>12</sup>National Center on Family Homelessness, Homeless Children: America’s New Outcasts, available at [http://www.familyhomelessness.org/fact\\_outcasts.pdf](http://www.familyhomelessness.org/fact_outcasts.pdf) (last visited January 21, 2005).

<sup>13</sup>U.S. Conference of Mayors, *supra* note 11, at 4.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 70–72.

<sup>16</sup>See Genesis Shelter at <http://www.genesisshelter.com> (last visited January 22, 2005). Genesis Shelter’s vision is to enable the families of homeless newborns to move from homelessness to self-sufficiency by making a range of services available, including counseling, education, and child-development services. *Id.*

<sup>17</sup>The text of this covenant is found in *Pardo v. Southampton Civic Club*, 239 S.W.2d 141, 142–43 (Tex. Civ. App. 1951).

<sup>18</sup>*King v. St. Louis Union Trust Co.*, 226 Mo. 351, 354, 126 S.W. 415, 415–16 (1910).

<sup>19</sup>*Kitching v. Brown*, 180 N.Y. 414, 422, 73 N.E. 241, 243 (1905) (quoting an unidentified 1853 report of an association created out of philanthropic movements for tenement house reform).

<sup>20</sup>*Id.* at 420–21, 242–43.

<sup>21</sup>*Id.* at 425, 244.

<sup>22</sup>Compare *Lignot v. Jaekle*, 72 N.J. Eq. 233, 234, 65 A. 221, 222 (N.J. Ch. 1906) (finding that the only distinction “between an ‘apartment’ and a ‘flat’ is the amount of rent,” and restrictive covenant prohibited apartments), with *White v. Collins Bldg. & Constr. Co.*, 81 N.Y.S. 434, 437, 82 A.D. 1, 5 (N.Y. App. Div. 1903) (holding that “the modern apartment house is a building entirely distinct from what was then [in 1873] understood as a tenement house”).

<sup>23</sup>*Lignot*, 72 N.J. Eq. at 241–243, 65 A. at 224.

<sup>24</sup>*White*, 81 N.Y.S. at 437, 82 A.D. at 5.

<sup>25</sup>*Sanders v. Dixon*, 114 Mo. App. 229, 253, 89 S.W. 577, 585 (1905).

<sup>26</sup>*Id.* at 252, 584.

<sup>27</sup>See, e.g., *Hooker v. Alexander*, 129 Conn. 433, 437, 29 A.2d 308, 310 (1942) (“one-family dwelling-house” excludes rooming activities).

<sup>28</sup>See *Andrews v. Metro. Bldg. Co.*, 349 Mo. 927, 936, 163 S.W.2d 1024, 1030 (1942) (holding that a boarding house is a business and not permitted under restrictive covenant limiting use to residential purposes); but see *John Hancock Mut. Life Ins. Co. v. Davis*, 173 Ga. 443, 443, 160 S.E. 393, 393 (1931) (restriction to residential use does not bar a boarding house, even though apartments are expressly prohibited).

<sup>29</sup>See, e.g., *Seeley v. Phi Sigma Delta House Corp.*, 245 Mich. 252, 255, 222 N.W. 180, 181 (1928) (a fraternity is closer to a club than a family); *Cash v. Catholic Diocese of Kansas City-St. Joseph*, 414 S.W.2d 346, 349 (Mo. Ct. App. 1967) (a Roman Catholic convent could be described as a boarding house or sorority but not a family).

<sup>30</sup>Compare *Berger v. State*, 74 N.J. 206, 216, 364 A.2d 993, 998 (1976) (a group home for handicapped children is permitted under restrictive covenant for single-family dwellings) with *Shaver v. Hunter*, 626 S.W.2d 574, 578 (Tex. Ct. App. 1981) (“single-family dwelling” does not permit group home for handicapped).

<sup>31</sup>See *Simons v. Work of God Corp.*, 36 Ill. App. 2d 199, 207, 183 N.E.2d 729, 732 (1962) (the “fundamental unit is composed of a father, mother, children, and possibly others related by blood or marriage [servants excepted]”); *DeMund v. Lum*, 5 Haw. App. 336, 341, 690 P.2d 1316, 1320 (Haw. Ct. App. 1984) (restrictive covenant followed zoning definition of family, which included domestic servants); *Boston-Edison Protective Ass’n v. Paulist Fathers, Inc.*, 306 Mich. 253, 256, 10 N.W.2d 847, 848 (1943) (rejecting interpretation of “single-dwelling house” as requiring relationships of blood and marriage, as “this would prevent the owner of the property thus restricted from having a servant reside on the premises”).

<sup>32</sup>See, e.g., *Ward v. Prospect Manor Corp.*, 188 Wis. 534, 541, 206 N.W. 856, 859 (1926).

<sup>33</sup>*Robbins v. Bangor Ry. & Elec. Co.*, 100 Me. 496, 62 A. 136, 140 (1905) (quoting *Webster’s Dictionary*); see also *Liberty Nat’l Bank of Chic. v. Zimmerman*, 333 Ill. App. 94, 100, 77 N.E.2d 49, 52 (1947) (quoting *Webster’s Dictionary*, which defined family as “the collective body of persons who live in one house and under one head or manager”).

<sup>34</sup>See *Feely v. Birenbaum*, 554 S.W.2d 432, 434 (Mo. Ct. App. 1977) (trial court excluded persons not related by blood, marriage, or adoption from single-family residential neighborhood).

<sup>35</sup>George Peter Murdock, *Social Structure* 1 (1949).

<sup>36</sup>Fair Housing Act, 42 U.S.C. § 3607(b)(1) (2000).

<sup>37</sup>Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* 51 (1973).

<sup>38</sup>Id.

<sup>39</sup>The inspection of tenement housing fell under the purview of the board of health. See Tenement House Act, Laws 1879, chap. 504 (1879).

<sup>40</sup>Tenement House Act, Laws 1879, chap. 504, § 3 (1879). The act was amended in 1901 to allow for no less than 400 cubic feet of air to each adult, 200 cubic feet of air to each child under twelve years of age in one room, and no less than 600 cubic feet of air to each individual in an apartment. Tenement House Act, Laws 1901, chap. 334, § 112 (1901).

<sup>41</sup>See *Housing for Health: Papers Presented under the Auspices of the Committee on the Hygiene of Housing of the American Public Health Association* 191 app. (1914).

<sup>42</sup>Lawrence Veiller, *A Model Tenement House Law* 68, § 99 (1910). The requirement was again included in the model housing law, published in 1920. Id. at 229, §110 (2d ed. 1920).

<sup>43</sup>American Public Health Association, “Standards for Healthful Housing: Planning the Home for Occupancy” vi (1950). This report was derived in part from an earlier committee report distributed in 1939 titled “Basic Principles of Healthful Housing.” Id. at v. The earlier report was influenced by the 1935 British Housing Act on Overcrowding. See Ellen Pader, “Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land,” 19 *Journal of Architectural and Planning Research* 300, 310 (2002).

<sup>44</sup>Pader, supra note 43, at 311 (quoting American Public Health Association, “Standards for Healthful Housing: Planning the Home for Occupancy” [1950]).

<sup>45</sup>U.S. Department of Health, Education, and Welfare, APHA-PHS Recommended Housing Maintenance and Occupancy Ordinance § 8.01 (1969).

<sup>46</sup>Dowell Myers et al., “The Changing Problem of Overcrowded Housing,” 62 *Journal of the American Planning Association* 66, 68 (1996).

<sup>47</sup>Memorandum of Frank G. Keating, general counsel, Department of Housing and Urban Development (March 20, 1991), reprinted in 63 Fed. Reg. 70256 (December 18, 1998); U.S. Department of Housing and Urban Development, *Public Housing Occupancy Guidebook* 62 (June 2003).

<sup>48</sup>Pader, supra note 43, at 301.

<sup>49</sup>Id. at 305.

<sup>50</sup>Euclid Village Ordinance of 1922, reprinted in James Metzenbaum, *The Law of Zoning* 338 (1st ed. 1930).

<sup>51</sup>See *Neptune Park Association v. Steinberg*, 138 Conn. 357, 359–60, 84 A.2d 687, 689 (1951) (four families relying on cooking and eating facilities that were common to all was a single housekeeping unit); *Driscoll v. Brunner*, 64 N.Y.S.2d 161, 162 (N.Y. Sup. Ct. 1945) (a common kitchen and meals indicates a single housekeeping unit). Consistent with this reasoning, the presence of multiple kitchens in a housing unit became problematic. See *Baskin v. Zoning Board of Appeals*, 40 N.Y.2d 942, 358 N.E.2d 1037 (1976) (reversing a lower-court decision to deny a variance to add a second kitchen to a man who was building a residence in a single-family zone for himself, his son, and daughter-in-law); *Stafford v. Sands Point*, 102 N.Y.S.2d 910, 913–14

(N.Y. Sup. Ct. 1951) (the presence of two kitchens did not violate a single-family zoning ordinance that did not define family).

<sup>52</sup>*Wesemann v. Village of La Grange Park*, 407 Ill. 81, 85, 94 N.E.2d 904, 907 (1950) (citing a 1945 zoning ordinance definition of “family” as “[a]ny number of individuals related by blood, marriage or adoption, living and cooking together in the same premises as a single house-keeping unit, but not including more than two [2] boarders or lodgers”).

<sup>53</sup>National Institute of Municipal Law Officers, NIMLO Model Zoning Ordinance ch. 11 (1953) (defining “family” as “a single individual, doing his own cooking, and living upon the premises as a separate housekeeping unit, or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage, or other domestic bond as distinguished from a group occupying a board house, lodging house, club, fraternity or hotel”). A parallel approach was set forth in a 1966 model zoning ordinance. See Frederick Haigh Bair Jr. and Ernest R. Bartley, *The Text of a Model Zoning Ordinance with Commentary*, § 18 (3d ed. 1966) (defining “family” as “[o]ne or more persons occupying a single dwelling unit, provided that unless all members are related by blood or marriage, no such family shall contain over five persons”).

<sup>54</sup>See *Palo Alto Tenants’ Union v. Morgan*, 487 F.2d 883, 884 (9th Cir. 1973); *City of Newark v. Johnson*, 70 N.J. Super. 381, 385, 175 A.2d 500, 502 (Essex County Ct. 1961). Such mechanical deference to zoning ordinance definitions was not uniform, however, as a number of courts were reluctant to accept narrow definitions. *City of Des Plaines v. Trottnier*, 34 Ill. 2d 432, 433, 216 N.E.2d 116, 177 (1966); *Gabe Collins Realty Inc. v. Margate City*, 112 N.J. Super. 341, 342, 271 A.2d 430, 430 (N.J. Super. Ct. App. Div. 1970); *Marino v. Mayor and Council of Norwood*, 77 N.J. Super. 587, 592, 187 A.2d 217, 220 (N.J. Super. Ct. Law Div. 1963).

<sup>55</sup>See, e.g., *Palo Alto Tenants’ Union*, 487 F.2d at 884.

<sup>56</sup>1945 ordinance, quoted in *Wesemann*, 407 Ill. at 85, 94 N.E.2d at 907.

<sup>57</sup>See, e.g., *Trottnier*, 34 Ill. 2d at 434, 216 N.E.2d at 117 (ordinance defined a “family” as including “any domestic servants and not more than one gratuitous guest residing with said ‘family’ ”).

<sup>58</sup>*Marino*, 77 N.J. Super. at 592 187 A.2d at 220 (citing the zoning ordinance definition of “family” as “[a]ny number of individuals related by blood or marriage, and including servants, living together as a single housekeeping unit”); *Johnson*, 70 N.J. Super. at 385, 175 A.2d at 502 (ordinance recognized only occupants related by blood, marriage, or adoption).

<sup>59</sup>See Robert M. Anderson, *American Law of Zoning* § 9.30 (4th ed. 2004).

<sup>60</sup>*Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>61</sup>*Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

<sup>62</sup>Id. at 507.

<sup>63</sup>Id. at 507–508.

<sup>64</sup>*Citizens for Fair Housing v. City of E. Lansing*, No. 219767, 2001 WL 682491, at \*2 (Mich. Ct. App. Apr. 20, 2001).

<sup>65</sup>See *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 134, 610 P.2d 436, 442 (1980) (holding that ordinance limiting number of unrelated individuals residing together to five was in violation of the state constitutional right to privacy); *State v. Baker*, 81 N.J. 99, 113, 405 A.2d 368, 375 (1979) (“zoning regulations which attempt to limit residency based upon the number of unrelated individuals . . . cannot pass constitutional muster”); *McMinn v. Oyster Bay*, 66 N.Y.2d 544, 551, 488 N.E.2d 1240, 1244 (1985) (restrictive definition of family violated due process clause of state constitution).

<sup>66</sup>*City of Ladue v. Horn*, 720 S.W.2d 745, 748 (Mo. Ct. App. 1986).

<sup>67</sup>42 U.S.C. § 3604 (2000).

<sup>68</sup>42 U.S.C. § 3602(k) (2000).

<sup>69</sup>H. R. Rep. No. 100–711, at 23 (1988), reprinted in 1988 U.S.C.C.A.N. 2137, 2184. Discrimination against unmarried couples, if prohibited, is enforced under state law. See e.g., *Hoy v. Mercado*, 698 N.Y.S.2d 384, 385, 266 A.D.2d 803, 804 (N.Y. App. Div. 1999) (holding that discrimination by landlord against unmarried couple was not in violation of state law protecting marital status).

<sup>70</sup>42 U.S.C. § 3607(b)(1) (2000).

<sup>71</sup>U.S. Department of Housing and Urban Development, *Public Housing Occupancy Guidebook* 62 (June 2003).

<sup>72</sup>*City of Edmonds v. Oxford House*, 514 U.S. 725, 728 (1995).

<sup>73</sup>Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* 239 (2004).

<sup>74</sup>The earliest census dealt with the “head of household” without inquiry into the relationships of those living together. Jason G. Gauthier, U.S. Census Bureau, *Measuring America: The Decennial Censuses from 1790 to 2000*, at 6 (2002), available at <http://www.census.gov/prod/2002pubs/pol02marv-pt1.pdf>. Later, the concept of family was used, but it centered on the presence of a “common table,” not on biological bonds. *Id.* at 9–19.

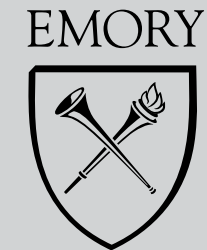
<sup>75</sup>*Id.* at 70 (Sept. 2002), available at <http://www.census.gov/prod/2002pubs/pol02marv-pt2.pdf>.

<sup>76</sup>Tavia Simmons and Grace O’Neill, U.S. Census Bureau, *Households and Families: 2000*, at 4 (September 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

# Life Together: How Housing Laws Define America's Families

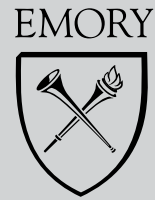
*Frank S. Alexander*

*Interim Dean and Professor of Law  
Founder and Codirector,  
Law and Religion Program  
Emory University*



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ASSISTANT TO THE UNIVERSITY SENATE

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