

FAMILY, LAW, AND COMMUNITY

SUPPORTING THE COVENANT

MARGARET F. BRINIG



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Family, Law, and Community

IN MEMORY OF STEVEN L. NOCK (1950–2008),
COAUTHOR, CONSULTANT EXTRAORDINAIRE, AND FRIEND,
AND WITH GRATITUDE TO HIS WIFE AND PARTNER IN LIFE,
DAPHNE G. SPAIN

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leave someone out. The same is true of my students, who consistently let me know when I'm too far off base.

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Introduction

On New Year's Eve of 2007, my middle daughter married on a beach on the island of Maui. This occasion would not be noteworthy outside the bride's and groom's groups of acquaintances except, perhaps, for some words the officiating clergyman included at the couple's request. The twenty-some of us who witnessed the ceremony (in dressy clothes and bare feet) vowed to support the new spouses in their marriage. Did our promises or the help we may give over time change the nature of the marriage, as opposed to simply adding participation (and noise) to the ceremony? Will the fact that this was a "destination wedding" only a small number could afford make a difference in the long run? That is, does being surrounded by a large community of family and friends matter? Does it matter who attends? That is, is it important, outside following social convention, to have parents and other kin at one's wedding?

This book will discuss the interplay of norms and families from a number of perspectives. It will tie theoretical and empirical observations to subjects of current law reform as varied as cohabitation, custody, grandparent visitation, payment for household work, and domestic violence. Relevant norms and what is called social capital affect family members' relationships with each other, that is, within the family community. They also govern the way outside communities interact with families, and social capital built within the family influences commercial and public relationships that do not directly involve families at all. Law reform, even from the

best of intentions, often misfires because norms and the impact of social capital are not considered.

My book *From Contract to Covenant: Beyond the Law and Economics of the Family* argued that family relationships can be distinguished from commercial contracts in several ways and that these distinguishing features fit more closely with a covenant paradigm than with contract analogies. The three characteristic traits mentioned in the introduction are permanence, unconditional love, and community involvement.

After its brief appearance in the introduction, the idea of community largely disappears from this earlier work except for the discussion of the legal requisites for entry to and exit from families in several chapters. Since completing the book, my writing agenda has substantially focused on the intersection of norms and family law and thus with the community part of the model. Perhaps because of the nature of the subject, I have been working on parts of this project with a family demographer, Steven Nock of the University of Virginia. This project will consequently have a more law and socioeconomics feel than did the first one.

One way I conceive of this book is in terms of types of capital, an economic concept for a produced asset that itself is used to produce wealth. The most obvious of these types is financial or physical capital like tools, noted as one of the factors of production by economists dating from Adam Smith.¹ During the twentieth century, Gary Becker and others of the Chicago School added to this the idea of human capital, mostly education and training, that makes labor more productive in the use of other factors.² More recently, social scientists have theorized that social capital, about which much of this book deals, itself enhances human capital.³ Social capital is described in terms of networks and trust (social relationships) that enhance efficiency by reducing transaction costs. This book will try to make the case for the way social capital is built in and defines families.

The first part of the book, called Norms, Families and Communities, will relate the development of community recognition (trust) to the permanence and unconditional love discussed in *From Contract to Covenant*, which postulates that unconditional love becomes rational only when relationships lose their exchange quality. The first requisite, therefore, is permanence (or at least a long-run time horizon as opposed to a short one). When permanence and unconditional love are both found in relationships, communities trust that they will perform desired functions of promoting intimacy and allowing children to flourish. When trust disappears in marriage, spouses are likely to seek divorce. The spouse filing

usually receives custody and with custody continues to have the community's trust. The noncustodial parent loses trust (now in two ways, from both the spouse and the community) and is likely to be depressed and to return to an exchange-based interaction with children. These themes of attaining outside trust and, therefore, normative status because the relationships generate internal trust, one of the manifestations of social capital, will be treated with examples from cohabitation, covenant marriage, interracial relationships (marriage and adoption), and child custody.

The second part of the book, called *The Boundaries of Family Communities*, deals with family law and the limits of community. How does community “shore up” relationships? What happens if there are too many rights accorded to individual family members? What happens if the family boundaries become more porous? The law and economics paradigms employed in this section will be Michael Heller’s “tragedy of the anticommons” as well as Fred McChesney, Jon Macey, and Henry Butler’s work on corporate stakeholders. This portion discusses how communities strengthen the family, but how giving people outside the immediate family “stakes” in family decision making weakens the family’s ability to function effectively. It further develops the concepts of trust and social capital as applied to family life.

The third part, called *Families, Mimetics, and Community*, considers the question of whether families in fact are “little commonwealths.” In other words, do families (small societies) function like larger communities? Chapter 5 begins with a discussion of what families with children try to maximize, concluding that trust and the ability to love unconditionally are at least as important as wealth accumulation and human capital. The chapter then turns to the ways this social capital is transmitted in families (through imitative behavior, or mimetics), dealing with the old nature/nurture debate and the role of peers. The final substantive chapter takes theories typically used to describe society- or economy-level behavior and applies these to families. Larger societies typically embrace something like “patriotism” or “nationalism” that celebrates membership. “Family name” may resemble nationalism. Members of some families may treat outsiders the same way Americans treat immigrants (if not hostilely, then with suspicion). The equivalent of nationalism in families may typically be a source of stability but may be a problem in “blended” or “reconstituted” families on remarriage or adoption. To the extent that related family members seem dissimilar, or alien, they may be singled out for different treatment. In particular, the chapter will consider whether family violence follows the

scapegoating pattern found in real societies like Salem, Massachusetts, or Hitler's Germany, or, perhaps, the more allegorical ones like the prophet Jonah's Nineveh or the mythological Oedipus's Athens. Does the change in spouses' feelings toward each other follow a similar progression? Practically speaking, certain patterns may predict the change in families from unconditional love to the comparisons and jealousy that precede family dysfunction, including not only violence but also dissolution. Assuming these predictive patterns, should legal or other steps be taken to prevent or halt the progression? What about patterns that predict good outcomes, like altruism in children? Topics in this part include marriages in distress, family violence, elder abuse, religion and fertility, and unconditional love.

Each of these parts will have applications to law as well as to social science. The first part's discussion of trust has direct relevance for the design of child custody rules (toward a standard replicating existing parental patterns and away from equal custody preferences) and kinship care, and for a preference for marriage as opposed to cohabitation (and perhaps an argument for civil union recognition). The second part suggests an alternative rationale for doctrines of parental autonomy, including the 2000 *Troxel* decision. With *Elk Grove v. Newdow*, we can explore not only why the federal courts shouldn't be involved in most family disputes but also how the presumption that parents act in their kids' best interests may be rebutted in divorce situations. In several places in the book, we discuss the difficult problems created by the poignant case of a Down syndrome child called *In re Phillip B.* The last chapter deals with mandatory domestic violence arrest policies, the federal Adoption and Safe Families Act, and various divorce reform strategies.

Law and economics scholars generally approach the concepts treated in this volume through their discussions of social norms, primarily using signaling and the self-enforcing mechanism of esteem (from self and others). While this book is generally consistent with this approach and builds upon it, the reader will see some differences. The literature of social norms generally presupposes a market and ideas of exchange, which may not translate well into family relationships. Further, in a very large proportion of families, there will always be children who are third parties affected by whatever adults do. Sometimes, in the language of contract law, children are direct beneficiaries of their parents' agreements, but many times they are important incidental beneficiaries who do not have the power themselves to enforce them. Sometimes, because of the importance of families to society, outsiders will seek to influence family law. For example, when an

Iowa judge allowed a same-sex couple to dissolve their relationship (even though Iowa did not then recognize same-sex marriage or civil union and had legislation saying they did not need to recognize such relationships), a group of third parties, including a state congressman and religious organizations, sought to challenge the judge's act.⁴ That is, family decisions have third-party effects not only on children but also on society at large. Children are beneficiaries of what their parents do because they imitate their parents and because of intergenerational transfer (which also occurs, of course, with financial capital and, perhaps, through assortative mating, human capital).

To return to the themes discussed in my earlier book, families differ from other relationships because they are more permanent and because society directly invests in them. There is also a role, as there may not be in commercial relationships, for mediating institutions such as voluntary associations. Religious organizations in particular have always been associated with families and apparently continue to play a big role. Religious schools seem to support better outcomes, especially for those living in the inner city.

PART I

Norms, Families, and Community

The Relationship between Trust and Community Recognition

This chapter begins the search for the links between family and community and will then move to the roles of trust and norms in human motivation in chapter 2. In particular, I will make the case here for why particular institutions, marriage and legal parenthood, have been accorded special status, and why others that seem factually close—cohabitation, step-parenting, and kinship care—have not. In economic terms, marriage and adoption (or legal parenthood) send strong signals both to the participants in them and to those on the outside looking at them. I will also provide theoretical evidence for maintaining the distinction, except perhaps for special subgroups in the community, and will further describe how the strong societal consensus surrounding these institutions may change and what role laws may play as opposed to social developments.

Legal communities recognize certain family relationships, accord them status, and privilege them above others. Recognizing someone as married or a legal parent, especially a custodial parent, serves as shorthand for automatic ascription of bundles of legal rights and duties as well as access to numerous financial rewards. Understandably, people who are unable to fit into a legal status but who undertake its obligations or pay its costs desire these rights and rewards. Increasingly, people who seem to functionally match marriage or parenthood claim the benefits, if not the obligations and costs as well.