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# TROXEL AND THE LIMITS OF COMMUNITY

Margaret F. Brinig\*

## I. INTRODUCTION

The *Troxel* grandparent-visitation case that frames this symposium,<sup>1</sup> the Washington statute included in *Troxel*, the mercifully completed odyssey of Cuban-born Elian Gonzalez,<sup>2</sup> and the “right to die” case of Hugh Finn<sup>3</sup> all illustrate both the fervor with which the broader community justifies its involvement with families and the extremes to which this involvement can spread. Using constitutional language, advocates point out the rights of extended family members to continue or strengthen ties to children, whether

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\* Professor of Law, University of Iowa College of Law. Special thanks to two excellent students whose writings provided much of the cross-cultural inspiration for this piece. They are Annette Tsinnajinnie Brown and Suhana Rai. Two others have done yeoman’s work as research assistants this year. They are Kevin McKeever and Alyson Jones. I also benefited greatly from the programs and informal discussions of the program on family violence, University of Virginia, and from my continuing discussions with Robert Ellickson, Linda Kerber and Steven Nock.

1. *Troxel v. Granville*, 530 U.S. 57 (2000).
2. *Gonzalez v. Reno*, 2000 WL 492102 (Fla. Cir. Ct. 2000)

3. In the late summer and early fall of 1998, the Washington, D.C. metropolitan area papers were full of reports concerning the “right-to-die” case of Hugh Finn, a former newscaster who had been severely injured in an automobile accident some years before. The Finn case surfaced to public attention when his wife Michele wished to authorize removal of nutrition and hydration tubes because, according to she and several doctors, he was in a persistent vegetative state and this was what he would have wanted. Hugh’s parents, Michele’s mother, and at least two of Hugh’s seven siblings unsuccessfully opposed Michele’s decision through the Virginia Supreme Court, stating that they felt Hugh was aware and trying to communicate. His parents said that they would take care of him if Michele felt she no longer could. *See, e.g.*, Vrooke A. Masters & Charles Babington, *Glendenning Faults Gilmore for His Role in Finn Case: Va. Right-to-Die Battle Viewed with “Dismay,”* WASH. POST, Oct. 6, 1998, at B1; Steve Twomey, *The Finns Deserve True Conservatives,* WASH. POST, Oct. 5, 1998, at B1. Eventually Virginia Governor James Gilmore and other state officials also intervened, though unsuccessfully, claiming that Hugh could not speak for himself and that Virginia legislation authorizing removal of life-support for persons in persistent vegetative states did not cover Finn’s case. *See id.* (quoting Maryland Governor Glendenning as saying that Gilmore “completely interfered with Hugh’s rights”). Virginia Delegate Robert G. Marshall reportedly said “Gilmore and I are butting into Michele Finn’s business, but he [Glendenning] wants to butt into Virginia’s business?” Masters & Babington, *supra*.

adult or minor. On the other side, parents and spouses claim their own rights not to have outsiders second-guess or interfere with their decisions.<sup>4</sup>

Though many writings about marriage and parenting extol the family's virtues as a building block of community and society, very few, especially in the legal context, look at the relationships from inside out.<sup>5</sup> My thesis here is that good family relationships very much need larger communities to begin them right, support them, and keep them strong. I will argue, however, that there are limits to the usefulness of outsider involvement—that empowering outsiders has its own costs. In legal terms, we reach these limits when multiple third party claimants assert rights to access spouses and children in ways that substantially conflict with the autonomy families need to function well, not primarily because of the substantive rights of parents or spouses, but because of their effect upon the ability to parent and to live within a functioning marriage.<sup>6</sup>

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4. This symposium will also consider Justice Stevens's point in his *Troxel* dissent that children's own independent rights to association with others who love them will necessarily be limited by cases like *Troxel*, a point I personally believe is well worth considering.

5. Familiar counterexamples include the social norms work of James Coleman, such as *APPROACHES TO SOCIAL THEORY* (1986); *SOCIAL THEORY AND SOCIAL POLICY, ESSAYS IN HONOR OF JAMES S. COLEMAN* (Aaze B. Sorenson & Seymour Spilerman eds., 1993); and the popular book by HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* (1996).

6. In practical terms, we all know of cases in which in-laws or grandparents have interfered and made family life intolerable. See, e.g., *Summerfield v. Pringle*, 144 P.2d 214 (Idaho 1943) (reporting that plaintiff in alienation of affections case alleged that her mother in law continuously and systematically sought to prejudice and poison the mind of her husband against her, and to alienate his affections from her by falsely telling him that the plaintiff was not good enough for him, and occupied a station in life beneath him); *Grubb v. Grubb*, 90 A.2d 175 (Md. 1952) (reporting that husband refused to be a referee between his mother, who lived with them, and his wife); *Fischer v. Fischer*, 34 A.2d 455, 457 (Md. 1943) (stating "A wife is entitled to a home which is under her control, and is justified in leaving if the husband permits his mother or other of his relatives to dominate the household, or if he insists on her living with relatives with whom her relations are unpleasant"); *Koch v. Koch*, 232 A.2d 157 (N.J. Super. Ct. App. Div. 1967) (finding that wife justifiably left marital home when she gave him the choice of living with her or his mother and he chose his mother); *Hafner v. Hafner*, 343 A.2d 166 (N.J. Super. Ct. Law Div. 1975) (following husband's heart attack, he stayed in his mother's home; plaintiff wife alleged that she was harassed and not permitted to see him; tort suit for intentional infliction of emotional distress barred by heartbalm statute); *Ziegenfus v. Ziegenfus*, 49 A.2d 275 (Pa. Super. Ct. 1946) (holding wife not guilty of desertion where husband required her to live with her mother-in-law); *Holloway v. Holloway*, 27 S.E.2d 457 (S.C. 1943) (holding same); *McIlwain v. McIlwain*, 212 S.E.2d 284 (Va. Ct. App. 1975) (finding, in a divorce action, that husband resented what he considered to be unwarranted intrusions by his mother-in-law upon his married life); the Sixties' recording hit "Mother-in-Law" (by Ronnie K. Doe "If she leaves us alone we would have a happy home/sent from down below/Mother-in Law"); and the recent grandparent-visitation conflict

The same analysis can proceed from a law-and-economics vantage point as well. Using a corporate analogy, investment in relationships will be more efficient if third party monitors have some residual claims to the benefits of the relationship. Further, social norms and conventions enhance relationships because they provide verbal and behavioral short cuts for us.<sup>7</sup> “Network externalities” enhance our undertakings in part because of this common language, and in part because they provide us a kind of insurance.<sup>8</sup> But at the limit is the specter of the outsider who controls the corporate board. Alternatively, we can visualize the kind of “tragedy of the anti-commons” proposed by Michigan law professor Michael Heller—if there are too many rights—holders in something, it (and usually Heller is speaking of property of some kind) can no longer be managed efficiently.<sup>9</sup> Thus, with families, outside involvement benefits everyone up to a point, the point at which the third party claims a legal right to be involved. At that point, for functional reasons, the balance tips, and the greater the right to intrude claimed, the more devastating it is to the family.

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of *Williams v. Williams*, 485 S.E.2d 651 (Va. Ct. App. 1998) (finding that couples’ analyst advised them to gain some psychological distance from the grandparents). Compare the alleged interference of these cases with that suffered at the hands of religious groups that forms the background of *O’Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986) and *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975). See generally JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS* 27 (1992) (listing as the first of nine psychological tasks that must be mastered to produce a happy marriage “To separate emotionally from the family of one’s childhood so as to invest fully in the marriage and, at the same time, to redefine the lines of connection with both families of origin.”).

7. My oldest daughter was recently stymied in her attempts to help her Indian-American best friend ‘Ritu’ when the friend’s mother died suddenly. Ritu’s family had been cut off from their Indian extended family because they were a “love match,” and Ritu, because thoroughly Americanized, did not know the appropriate burial rituals.

8. Think in terms also of the Korean kye, or rotating credit association, or the money other immigrants save to allow them to send back for relatives in the “old world.” They may be a funding device as well as insurance for bad times.

9. See Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCIENCE* 698 (1998); Michael A. Heller, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163 (1999); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621 (1998).

I, perhaps even more than Justice O’Connor in *Troxel*, am certainly not claiming that children are property (though that may be the way other commentators here treat the opinion). She wrote that “contrary to Justice Stevens’ accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that ‘children are so much chattel.’” *Troxel v. Granville*, 530 U.S. 57, 64 (2000).

## II. WAYS IN WHICH MARRIAGE AND PARENTS ENHANCE COMMUNITIES

We know, as legal and social science students of the family, that marriages and families are societies' essential building blocks.<sup>10</sup> Parenting is as important as marriage from society's and the child's perspective, and interference with it is a threat to be avoided. For example, the Supreme Court of Alabama, opining in *Kilgrow v. Kilgrow*,<sup>11</sup> a dispute between two parents over religious or public education for their child, noted that:

[I]ntervention, rather than preventing or healing a disruption, would quite likely serve as the spark to a smoldering fire. A mandatory court decree supporting the position of one parent against the other would hardly be a composing situation for the unsuccessful parent to be confronted with daily. One spouse could scarcely be expected to entertain a tender, affectionate regard for the other spouse who brings him or her under restraint. The judicial mind and conscience is repelled by the thought of disruption of the sacred marital relationship, and usually voices the hope that the breach may somehow be healed by mutual understanding between the parents themselves.

John Locke, in his *Second Treatise of Government*,<sup>12</sup> reveals that as a political matter, the "right to discipline" belongs not to parents, but to

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10. See JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE 1789 (Ch. III: Guardian and Ward):

Under whatever point of view the institution of marriage is considered, the utility of this noble contract is striking. It is the bond of society, the foundation of civilization . . . . Marriage, considered as a contract, has drawn women from the hardest and most humiliating servitude; it has distributed the mass of the community into distinct families; it has created a domestic magistracy; it has trained up citizens; it has extended the views of men to the future, through their affection for the rising generation; it has multiplied the social sympathies. In order to estimate all its benefits, it is only necessary to imagine, for a moment, what would be the condition of Man without the institution.

See also *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (stating that marriage "is an association for as noble a purpose as any involved in our prior decisions"); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (stating that marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"); See generally Lee E. Teitelbaum, *Placing the Family in Context*, 22 U.C. DAVIS. L. REV. 801 (1989) (stressing the role families play in communities).

11. 107 So. 2d 885, 889 (Ala. 1958).

12. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT Ch. VI. § 67 (1690):

children. As many of the papers in this symposium note, this theoretical allocation of limited<sup>13</sup> power, however, has thus far not mustered a majority of the Supreme Court.

### III. WAYS IN WHICH COMMUNITIES ENHANCE MARRIAGE AND PARENTING

#### A. Sources of Information About the Relationships

Our social networks educate us about our relationships. There is obviously a continuum between the proverbial locker room conversation about sexual exploits and the hopefully more useful things parents teach children about dispute resolution, childbearing and childrearing, and manners.<sup>14</sup> Much of this education goes on before we begin grownup relationships, but parents remain sources of support and guidance long after children become adults.<sup>15</sup> Grandparents and others in the wider community

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For, to speak properly of them, the first of these is rather the privilege of children, and duty of parents, than any prerogative of paternal power. The nourishment and education of their children is a charge so incumbent on parents for their children's good that nothing can absolve them from taking care of it. And though the power of commanding and chastising them go along with it, yet God hath woven into the principles of human nature such a tenderness for their offspring that there is little fear that parents should use their power with too much rigour; the excess is seldom on the severe side, the strong bias of nature drawing the other way.

13. *Id.* at Ch. VI, § 67. Compare JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE 1789 (Ch. III: Guardian and Ward):

This power of protection and of government, over individuals thought incapable to protect and to govern themselves, constitutes wardship, a kind of domestic magistracy, founded upon the manifest need of those who are submitted to it, and which ought to include all the powers necessary to the fulfillment of its object, and nothing more.

14. Much of this information is positive, but unfortunately it can be negative as well. Thus, patterns of child abuse are apparently frequently transmitted through the generations. For a few recent examples of the literature, see Jocelyn Brown et al., *A Longitudinal Analysis of Risk Factors for Child Maltreatment: Findings of a 17-Year Prospective Study of Officially Recorded and Self-Reported Child Abuse and Neglect*, 22 CHILD ABUSE & NEGLECT 1065 (1998); David DiLillo et al., *Linking Childhood Sexual Abuse and Abusing Parenting: The Mediating Role of Maternal Anger*, 24 CHILD ABUSE & NEGLECT 767 (2000); Jonathan V. Kotch et al., *Predicting Child Maltreatment in the First 4 Years of Life from Characteristics Assessed*, 23 CHILD ABUSE & NEGLECT 305 (1999). Some older accounts include ELIANA GIL, *OUTGROWING THE PAIN: A BOOK FOR AND ABOUT ADULTS ABUSED AS CHILDREN* (New York, 1988); ALICE MILLER, *THOU SHALT NOT BE AWARE: SOCIETY'S BETRAYAL OF THE CHILD* (1st ed. 1984).

15. In September, my post-graduate daughter called me wanting advice on how to approach a group for which she'd been asked to give a talk. Her current love interest is a

also provide cultural guidelines within which to pursue relationships, as well as experience about relationships that last. This type of help is particularly evident in African-American and first generation American communities.<sup>16</sup> Sometimes such information passing is more formalized. In some religious traditions and for those electing covenant marriage in Arizona and Louisiana, couples are required to attend marriage preparation classes. Sometimes clergy gives these, while other times, they are held by groups of engaged or married couples from the relevant tradition. Generally speaking, this more formalized community involvement is designed to continue during marriage as well.

### *B. Investment*

Historically, many families seeking to immigrate to this country have sent a potential high earner along first to establish himself (most often) and then pay for the others' passage.<sup>17</sup> Such investments by families can also be made by the wider community. In the business and corporate world, much has been made of the ability of new Asian immigrants to the United States to pool assets and earnings to establish an investment fund from which all members can draw.<sup>18</sup> Observers have credited much of the success of the small businesses run by first generation Asian Americans to such cooperative financial support (along, of course, with the tremendous industry of the individuals involved).<sup>19</sup>

### *C. Insurance*

Marriage often serves an insurance function.<sup>20</sup> If a marriage contains two potential labor force participants, one can work if the other becomes

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member of this group, and the topic she was considering could have alienated him.

16. For a recent fictional example, see NANCY RING, *WALKING ON WALNUTS* (1996), a memoir about a Jewish-American woman growing up and her extended family. Ms. Ring equated much of the information passing with stories and recipes, ways in which I certainly learned volumes from my grandmothers.

17. For a recent account, see FRANK MCCOURT, *'TIS* (1999).

18. For a fictional account, see AMY TAN, *THE JOY LUCK CLUB* (1989).

19. These financial institutions, and those in many other cultures, are reviewed extensively in Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996). They will be discussed at greater length in the law and economics of norms section of this paper.

20. Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225 (1998).

unemployed or unemployable. Historically, couples might have many children to insure that at least some of them could support their parents in old age or carry on the family name.<sup>21</sup> In day-to-day life, many parents will rely on each other's availability to do chauffeuring and other childcare tasks if a child gets ill or there is a "snow day" from school. One of my Indian-American students has told me that the wedding ring she wears, which is a wavy circlet in the Hindu tradition, signifies each spouse's duty not only to weather hard times but to help pull the other back to a more central path.<sup>22</sup>

Parents rely upon the wider community as well. From the frontier<sup>23</sup> or Amish family's shared barn building<sup>24</sup> to the 1960s "coffee klatches,"<sup>25</sup> other families, and especially other women, have long provided support for each other. Whether it was an additional hand in hard work, help when someone was sick, child-rearing advice, or just a shared recipe, the broader community has always taken an interest in strengthening the family. In a more organized vein, such insurance-type functions may be typical of job-sharing between two mothers (or two spouses) in the paid labor force.<sup>26</sup>

21. Hence the Chinese wedding blessing, "May You be the Mother of a Hundred Sons!"

22. Compare Ira Lupu, *Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994) (stating husbands and wives act to eliminate each others' worst childrearing practices).

23. Such shared tasks were generally a striking feature of the work of LAURA INGALLS WILDER, *LITTLE HOUSE BOOKS*. See also PRAIRIE VOICES: IOWA'S PIONEER WOMEN (Glenda Riley ed., 1996); HERB PLAMBECK, *IOWA'S HERITAGE OF PIONEER FAMILY FARMS* (1996-97); GLENDA RILEY, *THE FEMALE FRONTIER: A COMPARATIVE VIEW OF THE PRAIRIE AND THE PLAINS* 81 (1988); JANE SMILEY, *THE ALL TRUE ADVENTURES AND TRAVELS OF LIDDIE NEWTON* (1999).

24. See, e.g., the movie *WITNESS* (Paramount Pictures 1985).

25. Neighborhood women would apparently gather for coffee after getting their families off for the day and finishing their morning chores. My older friends tell me that these informal meetings settled many a family dispute and helped divide up work from picking up children at carpools to harvesting vegetable gardens.

26. A recent survey by the AFL-CIO noted that "nearly half of all women who are married or living with someone (46 percent) say they work a different schedule from their spouses or domestic partners. Among married women with young children, the figure rises to 51 percent." *Working Women Working Together*, at <http://www.aflcio.org/women/survey1.htm> (last visited Jan. 17, 2000). According to their Website, "[d]uring 1999, the AFL-CIO Working Women's Department hosted 5,000 group discussions in kitchens, workplaces, conference rooms and town halls around the country." In January 2000, the AFL-CIO followed up with a scientific survey of a large and nationally representative random sample of working women 18 and older." *Id.*



#### D. Dispute Resolution and Venting

When we've had rough days at the job, whether outside or inside the home, or at school, our families, and particularly our spouses and parents, provide helpful ears for our venting. Social science support for what may seem a common sense proposition is quite extensive. In fact, a recent paper<sup>27</sup> both reviews the literature and establishes a new point—even in marriages of more than fourteen years, relationship-specific support significantly predicted more stable and successful marriages, while friends in common and general personal support did not.<sup>28</sup>

Our children vent, too. They tell us (and especially their siblings) about fights on the playground, the teacher's or the "populars'"<sup>29</sup> latest classroom antics, and their distress at missing the last spot on the varsity team. If we have particularly close relationships with them, they may report to us the anguish of being date-raped or the sadness of breaking up with their girlfriend or boyfriend. Cultivating this close sharing with our children may be the most important thing we do<sup>30</sup> after donating our DNA. It of course means sharing (appropriately) some of our own mistakes and regrets and failures around the dinner table or in a rare moment of no distractions from phone, TV, or internet chatrooms.

Mutual support is at least part of what Milton C. Regan, Jr. celebrates in *Family Law and the Pursuit of Intimacy*.<sup>31</sup> One of the home qualities promoted by the "Separate Spheres" doctrine of the nineteenth century was the ability of the peaceful and clean home to cleanse the worker, tired and at least figuratively dirty from his day earning money.<sup>32</sup> Thus we complain to

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27. Chalandra M. Bryant & Rand D. Conger, *Marital Success and Domains of Social Support in Long-Term Relationships: Does the Influence of Network Members Ever End?* 61 J. MARRIAGE & FAM. 437 (1999).

28. *Id.* at 447. Not only did relationship-specific support show the strongest association with marital success for both husbands and wives; but also it was the only significant predictor.

29. My high school sophomore daughter says her class is divided among the "populars" and the "regulars." The "populars" are exclusive; the "regulars" (like her) are not. The "regulars" would like to be as admired by the young men in the class as the "populars," and are very concerned when the others have dates and they do not.

30. See JUDITH RICH HARRIS, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO* (1998) (reporting that peers, rather than parents, have the most important influence on children's success, once genetic endowments are taken into account).

31. MILTON C. REGAN, *FAMILY LAW AND THE RESULT OF INTIMACY* (1993).

32. See, e.g., CATHARINE E. BEECHER & HARRIET BEECHER STOWE, *THE AMERICAN WOMAN'S HOME* 17-20 (1869); MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865*, at 41 (1981).

our families about people and events from outside. We also use our families to resolve disputes we have with each other. When our parents teach us about how to forgive our siblings or our parents, or how to admit blame for our mistakes, we are better able to do the same with outsiders.

On a broader basis, communities can also function to resolve disputes, sometimes much more effectively than the civil or criminal justice system. Professor Lawrence Sherman has recently studied dispute resolution for juvenile offenders in New Zealand,<sup>33</sup> and reports that when the offender and his or her chosen supporters meet with the victim and supporters, true healing occurs.<sup>34</sup> A neutral third party, usually a police officer, asks both sides to report what happened. The offender almost always admits responsibility and the victim forgives. There is some direct restitution, which may come from the offender or his family and may be in kind rather than simply financial. At least in New Zealand, this process has been much more successful in lowering recidivism than has the public justice system.<sup>35</sup>

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Of course, as Linda Kerber reminds me (and I have written myself), the Separate Spheres doctrine produced all sorts of obstacles to women's progress. See, e.g., LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998); *WOMEN'S AMERICA: REFOCUSING THE PAST* (Linda K. Kerber & Jane Sherron DeHart eds., 5th ed. 2000); and particularly, June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 *TUL. L. REV.* 953, 967-73 (1991); Margaret F. Brinig, *Status, Contract and Covenant*, 79 *CORNELL L. REV.* 1573, 1579-84 (1994); Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 *J. AM. HIST.* 9, 20-21 (1988). For other critical accounts, see JEANNE BOYDSTON, *HOME & WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 140-41* (1990); CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 26-29* (1980); MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 191-93* (1986).

33. Lawrence W. Sherman, *Policing Domestic Violence: An Evidence Based Strategy*, 5 *VA. J. SOC. POL'Y & L.* (2001).

34. An example of restorative justice is Mike Kilen, *A Murder Victim's Son Remembers and Forgives: Davenport Case Takes an Odd Turn*, *DES MOINES REG.*, Feb. 13, 2000, at A1. See also John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control*, in *JUST BOYS DOING BUSINESS? MEN, MASCULINITIES, AND CRIME* 189, 192-96 (Tim Newburn & Elizabeth A. Stanko eds., 1994) (explaining that community group conferencing borrows in part from indigenous justice practices); Frederick W.M. McElrea, *The New Zealand Youth Court: A Model for Use with Adults*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 69 (Burt Galaway & Joe Hudson eds., 1996).

35. Sherman was earlier a leading advocate of mandatory arrest in domestic violence cases. See Lawrence W. Sherman & Douglas A. Smith, *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 *AMER. SOC. REV.* 680 (1992).

Such a practice has an older analog in the Native American peacemaker court. The Native American community began the Navajo Peacemaker Court in 1982 because the civil state courts were contrary to Navajo tradition.<sup>36</sup> In contrast, “one goes out of the courtroom with his tail up, and the other goes out with his tail down.”<sup>37</sup> Navajo philosophy centers around the concept of *hozhó*—everything is in its proper place and functioning in harmonious relationship to everything else,<sup>38</sup> and *K’ee*—all those positive virtues which constitute intense, diffuse, and enduring solidarity.<sup>39</sup> Traditional Indian justice involves the perpetrator and the victim directly “talking out” the problem, along with involving their family and clans. For example, in domestic violence situations, the Peacemaker Court would restore the victim to her former self—back into her state of *hozhó*, and the perpetrator, with the assistance of his family and clan, do the restoring.<sup>40</sup>

A pertinent question though is whether this system works for the Navajos because the Native American community is relatively small and homogeneous,<sup>41</sup> or whether it works because the community is personally involved in the justice system. The relationship between the dramatic New Zealand and Navajo nation findings on restorative justice and the much less positive ones done by Straus and Gelles on mandatory arrest<sup>42</sup> is that both involved the status—prior to and after the offense—of the offender in the community. When the extended family and friends are involved in the proceedings, the offender can maintain dignity and feelings of self-worth, feel supported, and explain his or her side of the story. He is much less likely to repeat the offense. More broadly speaking, the salutary results

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36. For a complete account, see Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 32-33 (1999).

37. Robert Yazzie, “*Life Comes from It*”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 178 & n.22 (1993).

38. James W. Zion & Elsie B. Zion, *Hozho’ Sokee’-Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 415 (1993).

39. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT’D & COMP. L. REV. 55, 76-77 (1997).

40. See Coker, *supra* note 36, at 45-46 (“First, the abuser or his family or both may agree to provide nalyeeh (reparations) in the form of money, goods, or personal services for the victim. Nalyeeh is a concrete recognition that the harm of battering is real] and that responsibility for it extends beyond the individual batterer.”).

41. A visiting colleague from New Zealand who specializes in Maori law reports less success as indigenous peoples move to cities. Interview with Andrew Erueti, Victoria University, Wellington (July 2000).

42. See, e.g., Murray Straus & Richard J. Gelles, *The Costs Of Family Violence*, 102 PUB. HEALTH REPORTS 638 (Nov./Dec. 1987).

occur precisely because the community becomes involved with the relationship.

The tribal court successes suggest an answer to the question whether community involvement will lessen given the growing rate of childlessness and smaller families generally. The tribal court results have nothing to do with the presence of children (and the New Zealand replications involve youthful offenders with no children.<sup>43</sup>) The community interest may not, therefore, exist primarily to benefit (and encourage the production of) children, and may be strong even for childless marriages.

Communities handle family conflicts in many ways that extend beyond the domestic violence setting. The current interest in community involvement with parenting can be demonstrated in the popularity of the book *It Takes a Village*.<sup>44</sup> Legislation of some states,<sup>45</sup> and the writing of some commentators,<sup>46</sup> suggest different divorce regimes for marriages without minor children. Others<sup>47</sup> suggest protection of the children of divorce by giving them the marital estate or some share in it. Some states extend parental support to include college education for children of divorce.<sup>48</sup> The "Open Adoption" movement<sup>49</sup> and the recent legislation

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43. See generally JOHN A. BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989); Sherman & Smith, *supra* note 35.

44. Clinton, *supra* note 5 (advocating community support for families to ensure children's well-being).

45. Virginia and Tennessee have different waiting periods for those divorcing on no-fault grounds with and without children. See TENN. CODE ANN. § 36-4-103(3) (requiring in a "irreconcilable differences" divorce, a ninety day-from-filing waiting period if there are children; sixty days if not); VA. CODE ANN. § 20-91(9)(a) (requiring six months separation for those without children; one year with minor children and a separation agreement).

46. See, e.g., ALLEN W. PARKMAN, *NO-FAULT DIVORCE: WHAT WENT WRONG?* (1992); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990).

47. Mary Ann Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553 (1984); Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 MINN. L. REV. 891 (1992).

48. For two relatively recent constitutional challenges to state statutes that reach opposite conclusions, see *Crocker v. Crocker*, 971 P.2d 469 (Or. 1998) (finding a rational basis for requiring payment for college education only from divorced parents); *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995) (holding that it violates equal protection to require college education support only of divorced parents).

49. See generally, LINCOLN CAPLAN, *AN OPEN ADOPTION* (1990); RUTH G. MCROY ET AL., *OPENNESS IN ADOPTION, NEW PRACTICES, NEW ISSUES* (1988); Carol M. Amadio & Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives*, 22 J. FAM. L. 59 (1983-84); Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 L. & PSYCH. REV. 137 (1992); Annette Baran & Reuben Pannor, *Open*

allowing more access to information identifying birth parents,<sup>50</sup> when looked at from the perspective of the adopted child, show a desire by the child to establish his or her roots in the community.

### *E. Conventions and Behavior Channeling*

As mentioned above, spouses and families and the wider community are useful in establishing morals, or, more broadly, culture. As children, we may learn acceptable ways of dealing with older people.<sup>51</sup> In fact, one group of economists claims that parents use their own behavior to their parents specifically to indicate to their children how they wish to be treated when they become aged and dependent.<sup>52</sup> We learn how to act as social beings in our own ethnic groups. Thus, some of the opposition to inter-racial adoption has been on grounds that African-American children need to be educated not only about African traditions and history, but also how to fortify themselves against a racist society.<sup>53</sup> Parents and the wider community also teach

*Adoption*, in THE PSYCHOLOGY OF ADOPTION 316 (David Brodzinsky & Marshall D. Schechter eds., 1990); Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 931 (1994).

50. See, e.g., *Alma Soc'y, Inc. v. Mellon*, 601 F.2d 1225 (2d Cir. 1979); *In re Roger B.*, 418 N.E.2d 751 (Ill. 1981); see also JOSEPH J. CULLIGAN, *ADOPTION SEARCHES MADE EASIER* (1996); LYNN C. FRANKLIN, *MAY THE CIRCLE BE UNBROKEN: AN INTIMATE JOURNEY INTO THE HEART OF ADOPTION* (1998); LOIS LOWRY, *FIND A STRANGER, SAY GOODBYE* (1978).

51. Gary S. Becker, *The Economic Way of Thinking*, 101 J. POL. ECON. 205 (1993) (discussing guilt); see also LOCKE, *supra* note 12, at 33 (stating that "a perpetual obligation of honouring their parents . . . engages him in all actions of defence, relief, assistance, and comfort of those by whose means he entered into being").

52. Donald Cox & Oded Stark, *Intergenerational Transfers and the Demonstration Effect* (1998) (Department of Economics, Boston College).

53. For a recent discussion, see David Crary, *Interracial Adoption Debate Plagues Family*, HARRISBURG PATRIOT, July 3, 2000, at B20 (2000 WL 9351525) (reporting that The National Association of Black Social Workers "shares a yearning to get black children out of foster care. But it says the priority should be to place them with black families who have a better understanding of racism and black culture."). See also *In re Adoption No. 12612*, 725 A.2d 1037 (Md. Ct. App. 1999); Arlo Wagner, *Pixley Loses Custody*, THE WASH. TIMES, Jan 12, 2000. The judge thought Mrs. Blankman "does not have a sufficient understanding about Cornilous' black race." The judge explained, Simply being 'colorblind' or feeling you are a person who is not conscious of the racial difference is not enough, Judge Scrivener said, adding that Cornilous needs to understand the "significance and learn the pride in his race" as he grows older. For some older contributions, see Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 517 (1984); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. OF L. & SOC. CHANGE 33 (1993-94). Thus, while book learning and exposure

children about law, respect for law, and limits they should set for their own behavior.<sup>54</sup>

For marriages, culture in this sense includes such mundane items as whether, and in what way, to celebrate one's anniversary (hence the lists of gifts, beginning with paper and ending with diamonds),<sup>55</sup> Valentine's Day, or Father's Day. More importantly, conventions and behavior channeling include expectations about the duration of marriage, what justifies leaving one's spouse or divorcing,<sup>56</sup> what kind of conduct is acceptable, what kind is cruel. We know, for example, that in places where there are more births to unwed parents or more divorces—in other words, a culture of single parenting or divorce—more occur even holding other explanatory variables constant.<sup>57</sup> Conversely, where there is a culture or tradition of extramarital chastity and lifetime marriages, less of the more socially costly behavior occurs.

#### F. Union-building

Community involvement in marriage can certainly be seen in courtship rituals. Parents and other family members are, and always have been,

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to museums and cultural centers might work for the first concern (history and traditions), it will clearly not be up to the second challenge. This source of family and community contribution provided the background for one of the early privacy cases upon which *Troxel* is built. *Meyer v. Nebraska*, 262 U.S. 290 (1923) (involving German language instruction in a community where German was the language spoken in many homes).

54. For a discussion of how children are taught trust and limits, see Jennifer Roback Morse, *The Development of the Child*, Liberty Fund Symposium, *The Family, The Person and the State* (1995) (George Mason University). For some of my empirical efforts along this line, see Margaret F. Brinig & F.H. Buckley, *The Price of Virtue*, 98 PUBLIC CHOICE 111 (1999).

55. A complete list appears at <http://www.wowpages.com/specialmoments/wedding.html> (visited on July 14, 2001).

56. Empirical research shows, for example, that the percentage of the population that was divorced in the state where a person lived when sixteen (and in that year) predicts the age at which one would marry (a higher divorce rate predicts an older age at first marriage) and even how much education a woman would receive (a higher divorce rate predicts fewer completed years of school). Research is based upon the National Survey of Families and Households (NSFH) coupled with percentages of divorced persons found in the March Current Population Survey (CPS). Statistics available from the author, working with Steven L. Nock, Department of Sociology, University of Virginia.

57. See, e.g., Margaret F. Brinig & Douglas W. Allen, "*These Boots Are Made for Walking*": *Why Mostly Wives File for Divorce*, 2 AM. L. & ECON. REV. 126 (2000) (discussing the divorce rate); Brinig & Buckley, *supra* note 54, at 119, 120 & Table 3, Table 4 (unwed births).

involved when relationships progress from the casual to the serious stage.<sup>58</sup> Some religious groups still require something akin to the historical publishing of banns<sup>59</sup> well before a couple can marry. Ceremonial marriage requires a license<sup>60</sup> and the meeting of certain requirements involving contractual capacity (age and mental capacity)<sup>61</sup> and what might be thought of as social capacity (no continuing other marriage, no close family relationship, and different genders).<sup>62</sup> The community is also vitally involved in the marriage ceremony as necessary witnesses to the couple's vows and also, particularly in the Jewish and covenant marriage contexts, as guarantors of support.<sup>63</sup> Other examples can be drawn from the regulation of ongoing marriages (for example, the necessities doctrine<sup>64</sup> and

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58. For an interesting description of the ancient Choctaws' courtship system, see W.B. Morrison, *Choctaw Marriage Customs—The Ancient Way*, at <http://www.isd.net/mboucher/choctaw/marr1.htm> (visited Jan. 14, 2001). That of the Zapotecs in Mexico, where fathers may deny or give blessings, are described at <http://www.southmex.com/mexico/traditions/marriagecustoms.html> (visited Jan. 14, 2001). At the website <http://www.unam.mx/voices/1996/nov/guelague.html> (visited Jan. 14, 2001), the Guelagueta festival is to honor "that spirit of service among men in the certainty that all joys and all unhappiness belong to everyone at one time or another. José Antonio Gay says the Guelagueta is the aid the indigenous people offer each other freely at all the most important moments of life: birth, death, the raising of a house and marriage." In Choson (Korean) Confucian society, "marriage did not signify the formation of a new family. Instead, marriage signified the extension of an existing family, namely, the husband's." YUNG-CHUNG KIM, *WOMEN OF KOREA: A HISTORY FROM ANCIENT TIMES TO 1945*, at 89 (1979).

59. Banns are public announcements of the intent to marry.

60. See VA. CODE ANN. § 20-14.2 (West 2000). Even in states that recognize common law marriages, the preferred and much more common ceremonial form requires a license. See, e.g., IOWA CODE ANN. § 595.3 (West 2000) ("Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court."). Marriages without following statutory rules are nonetheless recognized under Iowa Code section 595.11 (2000).

61. See IOWA CODE § 595.1 ("Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise declared, and the fairly typical Iowa Code Ann § 595.2 (requiring age of 18, except that minors between 16 and 18 may marry with parental consent with a judicial bypass provision of "consent has been unreasonably withheld.").

62. See, e.g., IOWA CODE ANN. § 595.19 (governing persons related by blood or who have a living husband or wife).

63. For another and particularly vivid example, consider the Moroccan (Islamic) traditions described in M.E. COMBS-SCHILLING, *SACRED PERFORMANCES* 198-205 (1989), where through a number of processions, visits to a spring, and finally gun play, the bridegroom joins the elder generation of men, symbolically reestablishing the Muslim community.

64. See generally Sheryl L. Scheible, *Defining "Support" Under the Bankruptcy Law:*

prohibitions against contracts that contradict the essence of marriage).<sup>65</sup> Of course there are rules involving the exit from marriage (divorce grounds and, for example, the required viewing by divorcing couples of films on the effect of divorce on children).<sup>66</sup>

We do significant community-building with our children as well.<sup>67</sup> In *Family Law and the Pursuit of Intimacy*,<sup>68</sup> Milton Regan mentions the rituals that hold us together as families. This particularly includes family holidays such as Thanksgiving, the Seder meal, and Christmas.<sup>69</sup> All of these include “outside” traditions—turkey, football and cranberry sauce, lamb, specific prayers and bitter herbs, and decorated trees, nativity scenes and carols—and other special customs that run within particular families. Such traditions give us a sense of shared identity and help support the unity necessary to foster family cooperation on harder questions.<sup>70</sup>

*G. The Central Place of Religion in Relationships, or “The family that prays together, stays together.”<sup>71</sup>*

Many of my earlier observations might suggest a linkage between the community involvement (particularly outside the nuclear family) and religion. Obviously religious authorities can perform marriage ceremonies (and in some countries this is exclusively true). Marriages “in” a religion can subject couples to a set of ecclesiastical rules as well as the secular ones.<sup>72</sup> Certainly there are strong marriages that are not part of a religious tradition. Data suggests, however, that Catholics and fundamentalist Protestants, for example, divorce at about the same rate (or higher) as does

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*Revitalization of the “Necessaries” Doctrine*, 41 VAND. L. REV. 1 (1988).

65. See, e.g., *In re Higgason’s Marriage*, 516 P.2d 289 (Cal. 1973); *Favrot v. Barnes*, 332 So. 2d 873 (La. Ct. App. 1976); *Matthews v. Matthews*, 162 S.E.2d 697 (N.C. Ct. App. 1968); *Cumming v. Cumming*, 102 S.E. 572 (Va. 1920).

66. The legislation is collected at <<http://www.divorcereform.org>>.

67. See Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393, 404-05.

68. See REGAN, *supra* note 31.

69. *Id.* at 26-27 (citing STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 48 (1988)).

70. Anthony T. Kronman, *Contract Laws and the State of Nature*, 1 J.L. ECON. & ORG. 5 (1985).

71. This slogan, whose origin is unknown, appeared on numerous bumper stickers in the 1970s.

72. For example, Catholics must obtain ecclesiastical annulments before they can remarry. Orthodox Jewish women need to obtain their husband’s get. See, e.g., *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).



the general public.<sup>73</sup> If this is so, is it strong religious tradition or personal adherence that is important in maintaining marital stability?

Most studies find that the stated religious preference at the time of marriage has very little effect on marital stability.<sup>74</sup> Two Methodists marrying, holding other things constant, will divorce about as often as two Catholics, two Jews, or two atheists. Steven Nock and I wondered whether it might not be religious intensity rather than affiliation that was important. We found, using the National Survey of Families and Households, that difference in religious observance and the importance of God in one's life did affect the couple's ability to stay together over the period in question. Our unpublished work to a large extent duplicated that of B.Y.U. sociologists who used the same data set.<sup>75</sup> Call and Heaton found that when both spouses attend religious services regularly, the couple has the lowest risk of divorce, while difference in church attendance increase the risk of divorce.<sup>76</sup> They posit that church attendance "can either provide a common forum for a couple's religious orientation and family commitment or become a conflict for couples who do not share the same levels of personal dedication."<sup>77</sup> They note that joint participation in church gives a family a sense of purpose and similar values that increase family commitment and social integration.<sup>78</sup> However, the Call and Heaton study found (as did we) that all significant religious affiliation influences disappear once the authors controlled for demographic differences. Call and Heaton continued to find significant results in cases where the spouses differed in church activities, because "joint socialization in religious teachings that support family values and stability affirm the importance of marriage and family," and "joint

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73. See Maja Beckstrom, *Pollster's Data Tell Churches How Their Believers Behave*, COMMERCIAL APPEAL (Memphis), Aug. 17, 1996, at 16A.

74. Vaughn R.A. Call & Tim B. Heaton, *Religious Influence on Marital Stability*, 36 J. SCIENTIFIC STUDY OF RELIGION 382 (1997); see, e.g., Theresa Castro-Martin & Larry Bumpass, *Recent Trends in Marital Disruption*, 26 DEMOGRAPHY 37-52 (1990); Tim B. Heaton & Edith L. Pratt, *The Effects of Religious Homogamy on Marital Satisfaction and Stability*, 11 J. FAM. ISS. 191-207 (1990); Paul Nakonezy et al., *The Effect of No-Fault Divorce Law on the Divorce Rates Across the 50 States and Its Relation to Income, Education and Religiosity*, 57 J. MARRIAGE AND THE FAM. 477-88 (1995); George Gallo & Jim Castelli, *Attitudes on Marriage Surveyed, Catholic, Protestant Divorce Rates Similar*, WASH. POST, April 8, 1989 at C13.

75. Call & Heaton, *supra* note 74.

76. *Id.* at 386-87.

77. *Id.* at 383.

78. *Id.* at 391 (citing Walter R. Schumm, *Beyond Relationship Characteristics of Strong Families: Constructing a Model of Family Strengths*, 19 FAMILY PERSPECTIVE 1 (1985)).

participation in friendship networks provides a greater potential for interaction with friends in a context that generally supports positive communication between spouses."<sup>79</sup>

Religious tradition also suggests more than does civil law<sup>80</sup> that children should be respectful towards their parents<sup>81</sup> and should support them in old age.<sup>82</sup> These would certainly seem to be positive, community-building, and supportive features of families.<sup>83</sup> But religious tradition may also be mutated into allowing an over-disciplinary father and a pious, noninterfering mother.<sup>84</sup>

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79. Call & Heaton, *supra* note 74, at 391.

80. Margaret F. Brinig, *Finite Horizons: The American Family*, 2 INT'L. J. CHILDREN'S RTS. 293 (1994) (detailing laws requiring support of aged parents and the relationship between treatment of children and aged parents living in the home).

81: See e.g., *Exodus* 20:12 (proclaiming the fourth of Ten Commandments).

82. Both the Old Testament books of *Exodus* and *Leviticus* and the New Testament parables and epistles stress the need to support the elderly widow and orphan, see, e.g., *Deuteronomy* 24:19-21; *Job* 24:21; *Timothy* 5:3-8, and the duty to support one's own aged parents, *Exodus* 20:12; *Leviticus* 20:9; *Leviticus* 19:3; *Ephesians* 6:1.

83. The facts that the Amish did not use public welfare and were exempted from Social Security because of their community's self-sufficiency were noted by the Court in *Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972) ("Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.").

84. For two recent fictional additions to this literature, see M. ANNETTE ANSAY, *VINEGAR HILL* (1994) and *SISTER* (1997). The negative effects of extreme religiosity have become one of the stereotypical characteristics of the battered woman and the abused child. See *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) (discussing a successful § 1983 suit against a social worker who stripped searched a child on the basis of an anonymous tip by a neighbor who reported hearing a child crying "No, Daddy" and who noted that the Calabrettas were "extremely religious" and home-schooled their children). For other cases see *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986) (ruling upon successful alienation of affections case against clergy and others involved with Fatima Crusade); *Michigan v. Yarborough*, 384 N.W.2d 107 (Mich. Ct. App. 1986) (finding "prophet" killed boy by beating him with stick for not working, and testified that he had to do so because of the strictures of *Deuteronomy* 21:18); *Spires v. Spires*, 743 A.2d 184 (D.C. 1999) (finding that, apparently, the Spires's marriage had not been doing well. They signed a contract in which the minister husband agreed "to continue in this marriage" in exchange for numerous promises from his wife. She agreed to "conduct herself in accordance with all scriptures in the Holy Bible applicable to marital relationships germane to wives, and in accordance with husband's specific requests." The agreement, which was incredibly one-sided, was invalidated by the appellate court.). See also JAMES ALSDURF & PHYLLIS ALSDURF, *BATTERED INTO SUBMISSION: THE TRAGEDY OF WIFE ABUSE IN THE CHRISTIAN HOME* 10, 16-17 (1989); MARGARET L. BEDROTH, *FUNDAMENTALISM AND GENDER: 1875 TO THE PRESENT* 116 (1993) (reporting on

A study by the George Barna research group<sup>85</sup> found that "Born-Again" Christians are slightly more likely to divorce than the average American (with rates of 27 as opposed to 23 percent of a group of more than 3,000 randomly selected adults). A more recent Associated Press article published statistics showing that the so-called Bible Belt states had higher divorce rates than the national average.<sup>86</sup> Although this piece noted that Protestants seem to divorce more often than Catholics, the difference seems to be decreasing.<sup>87</sup> (Remarriage for Catholics happens less frequently, however.)<sup>88</sup>

One reason religious homogeneity may be important is that it increases attachment to the community in which the couple lives. Home ownership apparently increases marital stability, while living in a large metropolitan area, whether in a suburb or central city, decreases it.<sup>89</sup> In an earlier work, Frank Buckley and I found that divorce rates from 1979 to 1991 were higher both in metropolitan areas<sup>90</sup> and in "frontier" states.<sup>91</sup>

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Christian fundamentalist (Protestant and Catholic) emphasis on women's self-sacrifice and the glorification of their suffering and victimization make women particularly vulnerable to accepting battering relationships); see also Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 465 (1992). Generally, such abuse is common in families with rigid sex roles and gross inequities in power distribution. See ALSDURF & ALSDURF, *supra*, at 17; DAVID FINKELHOR ET AL., COMMON FEATURES OF FAMILY ABUSE, IN THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 17, 19 (1983).

85. See Beckstrom, *supra* note 73.

86. *Bible Belt States Struggling With Divorce*, IOWA CITY PRESS-CITIZEN, Nov. 13, 1999, at 7A.

87. The divorce rate for Catholics in the Barna survey was 21%. However, for younger Catholics, their upbringing had no effect on the rate of divorce. William Sander, *Catholicism and Marriage in the United States*, 30 DEMOGRAPHY 373 (1993). Mormon couples married in the church had a divorce rate of 13% according to a 1993 article appearing in Demography. Bob Mims, *Stats Show Mormons Buck Secularization*, THE SALT LAKE TRIBUNE, March 6, 1999.

88. See, e.g., Barbara F. Wilson & Sally C. Clarke, *Remarriages: A Demographic Profile*, 13 J. FAM. ISS. 123 (1992).

89. Scott J. South & Glenna Spitze, *Determinants of Divorce over the Marital Life Course*, 51 AM. SOC. REV. 583, 589 (1986).

90. Margaret F. Brinig & F.H. Buckley, *No Fault Laws and At-Fault People*, 18 INT'L REV. OF L. & ECON. 325, 336 (1998); see also RODERICK PHILLIPS, PUTTING ASUNDER 452 (1988) (reporting that social ties are generally less strong in urban areas, partly because social support groups, which enforce social norms, are weaker); Sara S. McLanahan & Irwin Garfinkel, *Single Mothers, The Underclass, and Social Policy*, 501 ANNALS, AAPSS 92 (1989). See generally JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY (1990); James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOCIOLOGY S95

## IV. EVIDENCE OF THE POSITIVE RELATIONSHIP BETWEEN MARRIAGE AND COMMUNITY

I have been exceptionally fortunate in reading the stories of many students who have shared with me something of their lives and their families. Two in particular have written about arranged marriages in twentieth-century America.<sup>92</sup> One, a second-generation Indian-American, sent me an exceptionally moving and interesting account of her own arranged marriage. Not surprisingly, as an American-educated and very Americanized young person, she was skeptical that her parents could find someone right for her. Surprisingly, she fell in love with the man she was to marry after her first year in law school, though she became acquainted with him largely over the phone and only met him briefly shortly before their wedding.<sup>93</sup>

She wrote me:

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(1988).

91. Brinig & Buckley, *supra* note 90, at 335, 337 & Table 5. Our tables use the variable Entry to measure this effect.

92. Not all arranged marriage forms seem more successful than love matches. A study of divorce rates in China using a 1985 survey sample from two provinces and the municipality of Shanghai, covering more than 13,307 women, found that the arranged marriages ended in divorce more than twice as often as so called "free choice" marriages. Cailian Lio & Tim B. Heaton, *Divorce Trends and Differentials in China*, 23 J. COMPARATIVE FAM. STUDIES 413, 422 (1992). As one might predict, instability was highest for those women who were older than 25 when they married in arranged marriages. *See id.* at 426. (The divorce rate in China is miniscule compared to U.S. standards, and was about .0016 for those surveyed who were educated seven or more years, even lower for those with less education.). The Chinese apparently date following the commitment to marry rather than before, and know each other for longer before marriage than their American counterparts, regardless of marriage type. *See id.* at 417 (citing M.K. WHYTE & W. PARISH, *URBAN LIFE IN CONTEMPORARY CHICAGO* (1984)). The Liao and Heaton article contains a useful discussion of the traditional Chinese attitudes about marriage and the importance of family; *see also* Xu Xziaohe & Martin King Whyte, *Love Matches and Arranged Marriages: A Chinese Replication*, 52 J. MARR. & FAM. 709, 715-720 (1990) (finding that the incidence of, and couple's satisfaction with, arranged marriage decreased dramatically over the past 60 years. Wives especially are more satisfied in love matches).

For a relatively sympathetic account of Korean arranged marriages, see LAURA KENDALL, *GETTING MARRIED IN KOREA: OF GENDER, MORALITY, AND MODERNITY* 85-115 (1996).

93. Subana Rai, Paper for Perspectives in the Individual, the Family, and the Social Institutions, Fall 1998 (on file with author).

However, deep down, I had always harbored secret thoughts of doubt about arranged marriages. My parents had a great marriage, but I had also observed some unhappy Indian couples. I knew that just because a marriage is arranged does not guarantee that it would work. Another problem with arranged marriages is that there is an immense social stigma to ending that marriage in divorce. Even today, Indian couples rarely choose that course of action, regardless of abuse or other serious marital problems.<sup>94</sup>

On balance, she thinks they are more successful than many of their Western counterparts.

There are numerous benefits of arranged marriages that may not always exist in the "love" marriage. The marriage is generally not based on fleeting sexual desires. I believe this is one of primary reasons arranged marriages are more stable than love marriages. The husband and the wife will have similar religious backgrounds, family friends, and cultural values to rely on if their marriage is having problems. In addition, both the husband and wife's families are very supportive of the marriage because they were the ones who arranged it. An arranged marriage is not just a union between a husband and his wife, but also a union between two families.<sup>95</sup>

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94. *Id.*

95. For a recent account found on the Internet, see Bala Swaminathan, *Love Match and Arranged Marriage*, <http://www.cs.wustl.edu/~bs/essays/marriages.html>. See also Yasmin Alibhai-Brown, *Marriage of Minds Not Hearts*, 6 NEW STATESMAN AND SOC'Y 28 (1993). Alibhai-Brown's description is a bit different from my student's, for she says that "[o]nce vetted, it is left to the individual to make the final choice. The couple can get to know each other, and there is no coercion. The woman has the final say. As parents get increasingly worried about losing their children in this society, they are ever more anxious not to pressurise [sic] them." *Id.* Accounts of older Indian traditions can be found in CHANCHAL KUMAR CHATTERJEE, *STUDIES IN THE RITES AND RITUALS OF HINDU MARRIAGE IN ANCIENT INDIA* (1978) (reporting that multiple wooers negotiate for the woman's hand); USHA M. APTE, *THE SACRAMENT OF MARRIAGE IN HINDU SOCIETY* 37-39, 50-52 (1978).

The Song of the Groom's Anointment, or *brauni*, is sung in rural India when the bridegroom is rubbed with saffron prior to his returning home. It illustrates the involvement of the extended family in the successful union:

In a gold cup  
I make the saffron paste  
And rub it on the bridegroom's body  
The Brahman utters prayers,  
The women sing their joy.  
The mother wipes his mouth with her sari  
The father's sister pencils his eyes

Similarly, a Navajo-American student wrote me:

From the second quarter of this century to the present, the tradition of arranged marriages has been replaced in favor of allowing couples to choose their own spouses. Interestingly, my own observation of the success of these two different marriage processes—if success is measured in longevity—has been that the arranged marriage survives longer than those based on emotion. This does not suggest that an arranged marriage is without affection, rather the initial decision of marriage is made by people whose judgment is not “clouded” by the titillation of love.<sup>96</sup>

In the Navajo tradition,

[M]arriages were arranged between families, which included not only the parents, but also grandparents, uncles, and aunts of the “husband to be and wife to be.” Furthermore, traditionally the bride and groom really did not have a say as to who they would marry. Negotiations between the families included what the groom’s family would give to the bride’s family . . . horses, sheep, cows, jewelry—a sort of dowry. A date for the ceremony was chosen. More importantly, the clans of the couple were stated and approved by the family to ensure against intermarriage. “The bloodlines were kept clean and everyone was knowledgeable about the clanship system and the whole society was kept in balance in that manner.”

I wonder which of the traits my students identify as stabilizing is the more important. They initially pointed to the lack of dependence on sexual love and expectations of romance as why arranged marriages are so stable. Perhaps, instead, it is the qualities of community support, interrelatedness, and approval that they also mention that really make the difference.

Many of us are most familiar with another incarnation of arranged marriage—the early nineteenth century Russian-Jewish tradition that we

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The elder brother’s wife fans his head,  
 The women sing their joy.  
 The father’s brother’s wife wipes his mouth  
 The elder sister pencils his eyes  
 The mother’s brother’s wife fans his head,  
 The women sing their joy.

WILLIAM G. ARCHER, *SONGS FOR THE BRIDE: WEDDING RITES OF RURAL INDIA* 117 (1985).

96. Annette Brown, Paper submitted for Alternative Dispute Resolution, Summer, 1999.

know through our reading, viewing, and listening to *Fiddler on the Roof*.<sup>97</sup> Like the more recent versions of arranged marriages discussed, even the modern Jewish ceremonies include community involvement. The *ketubah* is a set of solemn promises regarding the mutual obligations of husband and wife. It is signed by the bride and groom in front of a community of witnesses, who promise to be supportive of the couple.<sup>98</sup>

The community was involved in traditional (usually arranged) Chinese marriages, too. Consistent with the Chinese emphasis on reverence for ancestors, note the respect paid by the bride to the groom's senior relatives.

When the chairs arrive in the bridegroom's home, three ritual offerings are made: the couple first pay homage to Gods of Heaven and Earth, then to the Kitchen God, and then to the ancestors. At each altar offerings of food, fruit, and flowers were laid before the actual rituals were begun. The bridegroom inserts fresh incense sticks into the bowls before kowtowing side by side with his bride. These rites are necessary to give spiritual validation to the marriage. Then the couple is led by an elderly woman, usually of the same clan, to pay respect (by kowtowing) to the boy's parents, uncles, aunts, the older brothers and sisters-in-law, and any other senior relatives present. This is the formal introduction of the bride into the house and clan, and is the social validation of the marriage.<sup>99</sup>

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97. In the play, the opening song (aptly entitled "Tradition") involves the role of tradition. Note the similarity to Carol Rose's description of custom:

Custom thus suggests a means by which a 'commons' may be managed—a means different from exclusive ownership by either individuals or governments. The intriguing aspect of customary rights is that they vest property rights in groups that are indefinite and informal, yet nevertheless capable of self-management. Custom might be the medium through which such an informal group acts generally; thus, the community claiming customary rights was really not an 'unorganized' public at all.

Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 742 (1986).

98. For a description of the ceremony, including the prayers recited by the couple, the rabbi, and the community, see RABBI RAMI SHAPIRO, *A RABBI'S MANUAL*, at <http://www.judaica.com>.

99. FRANCIS L.K. HSU, *UNDER THE ANCESTORS' SHADOW: KINSHIP, PERSONALITY, AND SOCIAL MOBILITY IN CHINA*, cited at <http://www.chcp.org/Vwedding.html>.

A century ago, Greek weddings involved "a species of marital godfather" called the koumbáros. He was "usually the most influential, and also, necessarily, the most obliging relative or friend of either the bride or bridegroom . . . He promises to provide largely for the wife and any children she may have should she be left destitute and widowed." LOUISE JORDAN MILN, *WOOINGS AND WEDDINGS IN MANY CLIMES* 336 (1900).

Finally, the African-American “broom jumping” ceremony involves community. Instructions for the contemporary wedding include the following:

Have your host ask guests to form a circle around the couple as they stand in front of the broom on the floor.

The host should discuss the symbolism behind the broom as it relates to the joining of the couple and the combining of two families, and the need for the community to support the couple. Meanwhile have the couple hold the broom handle together and sweep around in a circle until the host or designated person is finished talking.<sup>100</sup>

*The Rationale for Community Involvement.* Does the community become involved to strengthen marriages (advancing the individual goals of the couple) or is the relationship more reciprocal than that—one where marriages also strengthen the community? Some historical context will be useful here, too, since marriages historically were so integral to the passing on of land and creation of wealth.<sup>101</sup> It is also interesting to look briefly at the institutions of arranged marriages and mail order brides. The civil law terminology of the “marital community,” like the “Little Commonwealth” of the Plymouth Colonies, suggests instead that marriage and family are separate from the larger society, though mirroring it.<sup>102</sup>

The modern Sikh wedding is followed by the garlanding of the couple and blessings by relations and friends. God is the witness to their vows as “[a] union of not only two hearts but also of two families takes place.” ANAD KARAJ, *CEREMONIES OF BLISS* 117, 62 (1996).

In Burma, though the marriages are love matches, not only do the bride and groom’s families attend the wedding, but also one representative each from every household in the village and the village headmen and elders. MELFORD E. SPIRO, *KINSHIP AND MARRIAGE IN BURMA: A CULTURAL AND PSYCHODYNAMIC ANALYSIS* 183 (1977).

100. <http://www.melanet.com/awg/history/jumping.html>. The history of the broom ceremony discussion comes from Harriet Cole’s “Jumping the Broom: The African-American Wedding Planner” 17-18. For a similar ritual, the Thai Rod-Nam-Sang, see Kriengsak Niratpattanasai, *Thai Wedding Customs*, cited at <http://www.apmforum.com/columns/thai15.htm>.

101. See, e.g., MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1975); John L. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH L. REV. 722 (1988).

102. The “Little Commonwealth” statement comes from Governor John Winthrop’s speech, *A Modell of Christian Charity*, in 2 WINTHROP PAPERS 292, 294 (Massachusetts Historical Society 1931) (Sermon entitled “Christian Charity” preached aboard *The Arabela*, Massachusetts Bay, 1630). For the view that marriage was a civil contract, and not a



Is community involvement and participation necessary for a strong marriage? Sociological evidence suggests that frequent contact with support mechanisms, family and community, does help marriages (and I will recount some of this). It is not clear whether we have traditions after the marriage ceremony itself that encourage such participation,<sup>103</sup> and can see how the modern emphasis on autonomy and mobility work against involvement except when the married ask for it. This tension with the autonomy values is worth exploring at some length.

The different prescriptions for the problem of repeated marital violence provide a snapshot of this problem.<sup>104</sup> The most popular current legislative solution, mandatory arrest, began on the showings of social science research done initially by Lawrence Sherman using randomly assigned control groups in Minneapolis.<sup>105</sup> Sherman has since obtained grants to replicate the study in six American cities and has found that in some instances, particularly where the husband-assailants were unemployed, mandatory arrest worsens the chance of recidivism rather than improving it.<sup>106</sup> In a talk at the University of Virginia during the fall of 1999, Sherman spoke of a new youthful offender "restorative justice" program tested in New Zealand, based upon community involvement much like that of the Navajo nation.<sup>107</sup>

All the emphasis on community discussed above runs counter to another distinctly American trend—family autonomy.<sup>108</sup> For example, in the early

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sacrament, see EUGENE AUBREY STRATTON, *PLYMOUTH COLONY: ITS HISTORY AND PEOPLE* 144, 1620-91 (1986).

103. An exception might be the baby shower, although arguably that is to enhance parenting rather than marriage.

104. See, e.g., Dennis P. Saccuzzo, *How Should The Police Respond To Domestic Violence: A Therapeutic Jurisprudence Analysis Of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765 (1999).

105. See Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

106. See Richard A. Berk & Lawrence W. Sherman, *Police Responses to Family Violence Incidents: An Analysis of an Experimental Design with Incomplete Randomization*, 83 J. AM. STAT. ASS'N. 70 (1988); Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 43-53 (Eve S. Buzawa & Carl G. Buzawa eds., 1996); Lawrence Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992); Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrest for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992).

107. See Sherman & Smith, *supra* note 35.

108. For one account of the trend toward autonomy, see JOHN DEMOS, *A LITTLE COLONY* 50-51 (2d ed. 2000).

Puritan colonies, families were expected to deal with their own problem children.<sup>109</sup> It was only if they could not that the community, through its appointed elders, would adjudge whether a son was "rebellious" and ungovernable by his parents. In a similar vein, it was the head of household (usually the husband) who was responsible for his wife's and children's attendance at church services.<sup>110</sup>

A number of legal academics have written both favorably and unfavorably about autonomy. For example, Carl Schneider has argued that courts give families autonomy, particularly with respect to dealing with children, for a number of reasons, among which are the courts' relative lack of knowledge and expertise.<sup>111</sup> Elizabeth and Robert Scott, as part of their fiduciary principle,<sup>112</sup> treat being "left alone" as part of the reward of good parenting. Jana Singer criticizes at least some autonomy giving because it gives the dominant adult (usually a male) so much power over the less powerful in the household.<sup>113</sup>

One obvious way in which the state's lack of interference privileges families (abuses of that power aside) stems from the additional opportunities for agreement and growth of parenting bestowed on marriage. When others, such as putative fathers,<sup>114</sup> grandparents,<sup>115</sup> and well-meaning strangers,<sup>116</sup> cannot second-guess decisions, families can thrive.<sup>117</sup> Of course, this is not

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109. See John R. Sutton, *Stubborn Children: Law and Socialization of Deviance in the Puritan Colonies*, 15 FAM. L.Q. 31 (1981).

110. See, e.g., 1 Hening [Va. Session Laws] 434 (March, 1657-8); 2 Hening [Va. Session Laws] 165-66 (December 1662, art. IV).

111. CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 213-14 (2d ed. 2000); see also Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REF. 879 (1992) (discussing *Kilgrow* and other cases where parents conflict over religious values or education).

112. Elizabeth S. Scott & Robert F. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

113. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

114. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Kilgrow v. Kilgrow*, 107 So. 2d 885 (Ala. 1958); *State v. Rhodes*, 61 N.C. 349 (1868); SCHNEIDER & BRINIG, *supra* note 111, at 1331-33. *But see Callender v. Skiles*, 1999 Iowa Sup. LEXIS 43; *Apitz v. Dames*, 287 P.2d 585 (Or. 1955).

115. See *Hough v. Hough*, 590 N.W.2d 556 (Iowa 1999); *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); *Penland v. Harris*, 520 S.E.2d 105 (N.C. Ct. App. 1999); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *In re Nearhoof*, 359 S.E.2d 587 (W. Va. 1987).

116. This could have been a legitimate reason for the parents' concern in *In re Phillip B. v. Warren B.*, 188 Cal. Rptr. 781 (Ct. App. 1983).

117. See generally Margaret F. Brinig, *The Supreme Court's Impact on Marriage, 1967-90*, 41 HOWARD L.J. 271 (1998). *But see* Barbara Bennett Woodhouse, *Hatching the*

arguing that others cannot have a positive influence in children's lives. Of course they can, and they do. Sometimes, in fact, the grandparents or other relatives have the most important and most stable relationships.<sup>118</sup> In such cases, they should be treated precisely like parents for custody and visitation purposes.<sup>119</sup>

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*Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1784-95 (1993).

118. See, e.g., *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986) (giving stepmother given custody over birth mother after custodial father's death); *Patrick v. Byerley*, 325 S.E.2d 99 (Va. 1985) (awarding former stepmother awarded custody where natural mother abandoned child); *Watson v. Shepard*, 229 S.E.2d 897 (Va. 1976) (awarding maternal aunt and her husband, who had served as the child's guardian, custody over birth mother but were not permitted to adopt the child). As we will see, the American Law Institute calls such people "de facto" parents and grants them many of the same rights as birth parents to custody and visitation. Such a finding is different from the burden-shifting that went on in the *Troxel* case, where the mother had to prove that *not* allowing the children to visit the grandparents more than they already were was in their best interests.

Justice Stevens seems to intimate an even greater willingness to allow the state to supervise families: "The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily." *Troxel v. Granville*, 530 U.S. 57, 90 (2000) (Stevens, J., dissenting).

119. The class of people permitted custodial allocations is much broader than grandparents, and would include, for example, same-sex partners of a parent. The ALI treat "de facto parents" in the following sections:

American Law Institute, *Principles of Family Dissolution*, § 2.03 (1) (Tent. Draft No. 3, Part I) (1998), provides in part:

(c) A de facto parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,

(i) lived with the child and,

(ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,

(a) regularly performed a majority of the caretaking functions for the child, or

(b) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

§ 2.21 Allocations of Responsibility to Individuals Other Than Legal Parents  
Tentative Draft No. 4, 2000:

(1) The court should allocate responsibility to a legal parent, a parent by estoppel, or a de facto parent as defined in § 2.03, in accordance with the same standards set forth in § 2.09 through 2.14, except that

One of the real hopes behind the covenant marriage movement in Louisiana<sup>120</sup> (and, to a less publicized extent, Arizona)<sup>121</sup> has been the early and continuing involvement of families and, perhaps, broader communities with couples. Those who elect the covenant marriage option must undergo at least five counseling meetings with clergy or lay professionals before the wedding, and the couple commits to seeking out a counselor—hopefully the same one—when trying to resolve marriage difficulties before resorting to divorce in all but the most extreme cases. Research on divorce has found that counseling stressing communication skills is particularly effective,<sup>122</sup> and, perhaps more important, that positive relationships with family and community strengthen marriage.<sup>123</sup>

The covenant marriage option available in Louisiana and Arizona allows unmarried couples to elect between a “standard marriage” with no-fault divorce, and a “covenant marriage.”<sup>124</sup> If they choose the latter alternative, they must undergo premarital counseling, agree to attempt to resolve marriage difficulties through counseling except in cases involving violence,

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(a) it should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility unless

(i) the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions, as defined in § 2.03(6), or

(ii) the available alternatives would cause harm to the child; and

(b) it should limit or deny an allocation otherwise to be made if, in light of the number of other individuals to be allocated responsibility, the allocation would be impractical in light of the objectives of this Chapter.

120. LA. CIV. CODE ANN. art. 9, § 102 (2000).

121. Ariz. Rev. Stat. §§ 25-901 (2000). See generally Margaret F. Brinig, *Economics, Law, and Covenant Marriage*, 16 GENDER ISSUES 4 (1998).

122. Scott M. Stanley et al., *Strengthening Marriages and Preventing Divorce: New Directions in Prevention Research*, 44 FAM. RELATIONS 392 (1995) (reporting on the Prevention and Relationship Enhancement Program (PREP) 18-year follow-up study). The program focuses on couples' communication skills and handling of conflict. *Id.* at 394.

123. Lawrence A. Kurdek, *Marital Stability and Changes in Marital Quality in Newly Wed Couples: A Test of the Contextual Model*, 8 J. SOC. & PERSONAL RELATIONSHIPS 27 (1991). Kurdek found, based on nearly 400 couples' self reports and holding other demographic and personality variables constant, that the more stable and higher quality marriages (after a year of marriage) had significantly better satisfaction with their level of social support. *Id.* at 36 & Table 2, 45. Unlike many other observed variables, this was true for both husbands and wives. *Id.* at 40 & Table 4.

124. The Louisiana legislation and a National Science Foundation project to study its implementation can be found on the web site [www.marriagematters.virginia.edu](http://www.marriagematters.virginia.edu).

and submit to a more traditional mixed fault and no-fault divorce system.<sup>125</sup> Although the *principles* behind the proposals in both states are overwhelmingly supported, according to survey research only about forty percent of the people surveyed in Louisiana knew that the new legislation existed.<sup>126</sup> Empirical analysis of the two to three percent of Louisiana couples taking advantage of the covenant marriage choice so far reveals that there is no difference in their strength of their religious belief or practice from the couples electing "standard marriage." They are disproportionately African-American and are less wealthy than the choosers of "standard marriage." In the majority of covenant marriages, the couple indicated that the woman was the one most enthusiastic about the choice.<sup>127</sup>

Children somehow turn marriages into communities.<sup>128</sup> Many studies,<sup>129</sup> including some of my own,<sup>130</sup> have noted that the divorce rate falls when the family includes children born during the marriage. The

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125. Brinig, *supra* note 121, at 5. The legislation is also discussed in Scott & Scott, *supra* note 20.

126. E-mail correspondence from Steven L. Nock, University of Virginia, Department of Sociology, Feb. 14, 2000.

Further, when a graduate student and sociologist applied for a marriage license in one-fourth of all Louisiana counties, they found that the "Not covenant marriage" box had been checked for them in some instances, while in virtually none was the new law explained. *Id.* In short, Nock explains, "[v]irtually nobody hears about the option when they apply for a license. So the only people asking for covenant marriages are those who heard about it in church." *Id.*

127. *See id.*

128. This is certainly a part of Catholic doctrine. *See* Pope John Paul II, Familiaris Consortio [On the Family] No. 21 (1981); Pope John Paul II, Letter to Families, No. 7, 8 (1994) (advocating that marriage is a communion of two giving rise to a community of persons greater than the two); Theresa Stanton Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 476 (1996).

129. *See, e.g.,* Gary S. Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977); Andrew Cherlin, *The Effect of Children on Marital Dissolution*, 14 DEMOGRAPHY 265 (1977); Joan Huber & Glenna Spitze, *Considering Divorce: An Expansion of Becker's Theory of Marital Instability*, 86 AM. J. SOC. 75 (1980); S. Philip Morgan & Ronald R. Rindfuss, *Marital Disruption: Structural and Temporal Dimensions*, 90 AM. J. SOC. 1055 (1985); Scott J. South & Glenna Spitze, *Determinants of Divorce Over the Marital Life Course*, 51 AM. SOC. REV. 583, 588 (1986); Linda J. Waite et al., *The Consequences of Parenthood for the Marital Stability of Young Adults*, 50 AM. SOC. REV. 850 (1985); *see also* Arland Thornton, *Changing Attitudes Toward Separation and Divorce: Causes and Consequences*, 90 AM. J. SOC. 856 (1985) (noting that attitudes about divorce unfavorable when preschoolers were present).

130. Margaret F. Brinig & Steven L. Nock, *Weak Men and Disorderly Women, MARRIAGE AND DIVORCE: AN ECONOMIC PERSPECTIVE* (forthcoming 2002, Cambridge University Press); Brinig & Allen, *supra* note 57.

interesting question for this paper is why that occurs. The obvious reasons include a sense of responsibility,<sup>131</sup> inculcation of altruism,<sup>132</sup> investment<sup>133</sup> or joy in creation.<sup>134</sup> Perhaps a more subtle reason is that children teach us to give unconditionally and to think of others first. Their presence assures a more permanent relationship between the adults involved (since parenting will go on after divorce, even if marital relations do not).<sup>135</sup> Hence, two of the three conditions can be ascribed to the covenantal nature of families and are present even without outside involvement.<sup>136</sup> And, of course, the presence of children assures that the state will also be interested in the family, for with children come such things as state-mandated education, compulsory use of child care seats, required vaccinations, and mandatory issuance of social security numbers.

#### V. REACHING THE LIMIT

As might be expected, the positive reach of community involvement in marriages, and families more generally, does have its limits. Mentioning that

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131. See, e.g., Glendon, *supra* note 47 (1984); Elizabeth Scott, *Rational Decisionmaking for Marriage and Divorce*, 76 VA. L. REV. 9, 31 (1990); Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. J. 489 (1996). We may feel guilty when we divorce and children are present in a way that we would not otherwise. See Gary S. Becker, *The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385 (1993) (reporting on role of guilt in assuring respect of and support for aged parents).

132. Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 402 (1998).

133. Cherlin certainly works on this assumption, though his results are inconclusive. Cherlin, *supra* note 129, at 288; see also Brinig & Buckley, *supra* note 132, at 402; MARTIN ZELDER, *CHILDREN AS PUBLIC GOODS AND DIVORCE SETTLEMENTS* (1989).

134. A number of papers suggest that (post-partum depression aside) most people feel a sense of accomplishment and happiness at the birth of the child. In fact, this may be one of our oldest and most deeply ingrained emotions. See, e.g., Anthony T. Padovano, *Marriage: The Most Noble of Human Achievements*, 238 CATH. WORLD 140 (1995) ("Marriage unites the human family more profoundly than any religion. The world is one with the wedding couple. Children, born from this union, move us with love more universally than any other reality.").

135. For a lengthy discussion of this point, see JUNE R. CARBONE, *FROM PARENTS TO PARTNERS* (2000); Martha L. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181-215 (1995); Virginia Held, *Mothering Versus Contract*, in *BEYOND SELF INTEREST* 287, 287-304 (Jane Mansbridge ed., 1990); Jenifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 7 (1989).

136. See MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* (2000).

it is problematic when people begin asserting rights instead of feeling obligations is definitely not something new.<sup>137</sup> *Michael H. v. Gerald D.*<sup>138</sup> involved a challenge to the California presumption of legitimacy for children born within ongoing marriages. The case was brought by the birth father of a child born of the wife's adulterous relationship. Later, the child herself, through her guardian, was joined as a party. Justice Scalia wrote about the child's claim: "When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child—or, more accurately, by a court-appointed guardian ad litem—may well disrupt an otherwise peaceful union."<sup>139</sup> In fact, the plurality's holding that the birth father had no protectable liberty interest in his relationship with the child was limited to the liberty interest as the "substantive parental rights [of] the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child."<sup>140</sup>

This claim by Michael might not have been the most effective channel for preserving his relationship with the child, Victoria.<sup>141</sup> In fact, a more successful strategy might have been to work on his relationship with Gerald and Carole, the adults involved, rather than to attempt to vindicate his constitutional rights.<sup>142</sup> In this sense, the limit is reached when we are talking about relationships that are in are in effect "beyond law."<sup>143</sup> Thus,

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137. See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109 (1991); Scott & Scott, *supra* note 20; Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 8-9 (1980); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835-70 (1985); Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321 (1996); Barbara B. Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497.

138. 491 U.S. 110 (1989).

139. *Id.* at 131. Note the similarity to the claims made on behalf of the children in *Troxel* by Justice Stevens's dissent. See *Troxel v. Granville*, 530 U.S. 57, 66-72 (2000) (Stevens, J. dissenting).

140. *Id.* at 127.

141. Carl Schneider, in a series of questions on *Michael H.* and our later discussions at the 1996 family law symposium at the University of Utah, suggested this approach.

142. As Justice O'Connor writes in *Troxel*, "[i]n an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren." *Troxel*, 530 U.S. at 59.

143. The subtitle of my book, *FROM CONTRACT TO COVENANT* (2000), *supra* note 136, on the limits of law and economics, when applied to families is "Beyond the Law and Economics of the Family." One of my points is that the law quite often (as with emancipation by age, divorce, and adoption) tries to cut off relationships that are in fact permanent, and

we have a situation akin to the very deep and thoroughly unenforceable implied contract between parent and child.<sup>144</sup>

In what may be a variant on this theme, David Meyer, in his recent article,<sup>145</sup> suggests a nontraditional solution for some adoption cases:<sup>146</sup> granting the adoption to vindicate the psychological relationship between adoptive parents and child, but preserve visitation and a kind of residual claimant status for the birth father.

An inquiry should be broadened to cases of non-parent visitation like *Troxel* and the other grandparent cases,<sup>147</sup> where, of course, Justice Stevens in dissent suggested a similar analysis.<sup>148</sup> Because of the pluralism in American family forms, some interests of people who have served as stepparents,<sup>149</sup> co-parents in same-sex relationships,<sup>150</sup> and foster

thus “beyond law.” My suggestion here is related but a bit different—it is that law reaches its useful limit when we carve “rights” out of relationships to the point where really nothing is left. Temporally we are speaking about a horizontal relationships, not vertical ones.

144. Brinig, *supra*, note 80.

145. David D. Meyer, *Family Ties: Solving The Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753 (1999) (suggesting that in cases where fathers have neither abandoned their children nor have otherwise been “unfit,” but where the children have strong relationships to families who would adopt them, there should be “the limited allowance for adoption without terminating the rights of biological parents”). He also suggests why this intermediate approach would be both socially desirable and constitutional. *Id.* at 813-45.

146. Meyer is writing particularly about cases like “Baby Richard,” see *O’Connell v. Kirchner*, 513 U.S. 1138 (1995), and “Baby Jessica,” *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992), but discusses the whole line of Supreme Court unwed father cases.

147. See, e.g., *Hough v. Hough*, 590 N.W.2d 556 (Iowa 1999); *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); *Penland v. Harris*, 520 S.E.2d 105 (N.C. Ct. App. 1999); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *In re Nearhoof*, 359 S.E.2d 587 (W. Va. 1987).

148. Stevens’s dissent states:

There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child. . . . While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.

149. See OR. REV. STAT. § 109.119 (governing persons who have established emotional ties creating a child-parent relationship based on having had physical custody of a



parents<sup>151</sup> need to be recognized. When there are non-standard family forms, and a grandparent, stepparent, or same-sex partner has been performing the same role as biological parents usually do, equitable doctrines like estoppel may bar the parent from asserting that the other adult is not entitled to visit, or in extreme cases have custody of, the child.<sup>152</sup> Otherwise, I would suggest that third party interests not be hardened into "rights,"<sup>153</sup> particularly when, as in *Michael H.*, the child is in an ongoing

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child or residing in the same household within six months preceding filing of an action, except unrelated foster parent); *In re Marriage of Carey*, 544 N.E.2d 1293 (Ill. App. Ct. 1989) (granting standing to long-time custodial stepmother); *In re Marriage of Osborne*, 901 P.2d 12 (Kan. Ct. App. 1995) (allowing stepmother who had physical custody of child after death of her husband to intervene in prior divorce action); *Fisher v. Fisher*, 670 P.2d 572 (Nev. 1983) (granting ex-stepparents standing to seek guardianship); *In re J.W.F.*, 799 P.2d 710 (Utah 1990) (stepparent may intervene because of stepparent relationship and legal obligation to support the child); *Paquette v. Paquette*, 499 A.2d 23 (Vt. 1985) (granting standing to stepfather to raise custody issue in divorce action against child's mother); *Garber v. Rupert*, No. 3-01828-9, 1999 WL 512064 (Wash. Ct. App. 1994) (giving custody of child to stepparent who was also father of child's half-sibling and extending visitation with the other).

The American Law Institute, in *Principles of Family Dissolution* § 2.03, recognizes as "de facto parents" "adults, not the child's legal parent, who for a significant period have resided with the child and who for reasons primarily other than financial compensation, and with the parent's consent, have regularly performed a large portion of the caretaking functions for the child." "De facto" parents can be granted custodial responsibility. *Id.* §§ 2.04(1)(b), 221. A state currently providing for such treatment is Wisconsin. *See In re H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995).

150. *In re Astonn G.*, 635 N.Y.S.2d 418 (Fam. Ct., 1995) (giving custody to former lesbian lover of deceased mother over biological grandmother of child's half-sibling); *J.A.L. v. E.P.H.*, 682 A.2d 1315 (Pa. Super. Ct. 1996) (granting standing on best interest grounds to former lesbian long-term partner, who assumed parent-like role toward the child until the couple separated ten months after the child's birth and visited the child regularly for more than a year thereafter); *Fowler v. Jones*, 949 S.W.2d 442 (Tex. Ct. App. 1997) (granting standing when co-parent had actual care, control and possession of child for not less than six months); *In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (finding standing appropriate when petitioner has parent-like relationship with child based on co-parenting agreement with biological parent, and the relationship has been disrupted).

151. *In re J.C.*, 417 So. 2d 529 (Miss. 1982); *In re Francisco A.*, 866 P.2d 1175 (N.M. 1993); *In re Adoption of L.*, 462 N.E.2d 1165 (N.Y. 1984) (applying to would-be adoptive parents like the DeBoers).

152. *See, e.g.*, American Law Institute, *Principles of the Law of Family Dissolution* § 2.03 (1)(b) (parent by estoppel); (c) (de facto parent) (Preliminary Draft No. 9, 1999).

153. Robert Ellickson has helpfully suggested analogizing to the difference between standards for entitlement to property and default liability rules. Telephone Interview with Robert Ellickson (March 6, 2000). The more intrusive the "piece" of the relationship granted to outsiders, the less likely the outsiders should be to win. As the number of "pieces"

intact family relationship. In family law terms, granting rights to third parties disrupts the intimacy<sup>154</sup> and autonomy<sup>155</sup> necessary for families—marriages and children—to thrive.<sup>156</sup>

#### A. *The Institutional Economics Case for Community*

We can perform the same sort of analysis using a different set of tools—those of institutional economics. One strand of this work can be characterized as the *social norms* literature. Although this new field of law and economics is vast enough to be spawning its own conferences,<sup>157</sup> it has flourished in sociology for many years,<sup>158</sup> in economics for at least a generation,<sup>159</sup> in law,<sup>160</sup> and in psychology.<sup>161</sup> “In a sufficiently close-knit

increases, even with relatively weak dispersion of rights, the more closely the situation resembles Heller’s anti-commons.

154. See REGAN, *supra* note 31.

155. Two leading cases vindicating family autonomy principles are *Kilgrow v. Kilgrow*, 107 So. 2d 885 (Ala. 1958) (involving parents in intact family who disagreed on school for child); and *State v. Rhodes*, 6 N.C. 453 (1868) (prosecuting husband who struck wife). See also *Wait v. Pierce*, 209 N.W. 475 (Wis. 1926). See generally MILTON C. REGAN, *ALONE TOGETHER: LAW AND THE MEANING OF MARRIAGE* (1998).

156. The incentives necessary for parents are thoughtfully described in Scott & Scott, *supra* note 112; those for spouses in Scott & Scott, *supra* note 20 (Relational Contract).

157. Robert Ellickson is probably the leading scholar. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). For other sources, see Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338, 339 & nn. 19-38 (1997); Posner, *supra* note 19.

158. A useful survey can be found in McAdams, *supra* note 157, at 339 & n.1. McAdams finds that “the initial force behind norm creation is the desire individuals have for respect or prestige, that is, for the relative esteem of others.” *Id.* at 342. If the consensus is that some behavior X deserves esteem, “a norm will arise if the esteem benefits exceed, for most people, the costs of engaging in X. Conversely, if the consensus condemns X, a norm will arise if, for most people, the esteem costs exceed the benefits of engaging in X.” *Id.* at 358.

159. For citations, see McAdams, *supra* note 157, at 339 & n.2.

160. ELICKSON, *supra* note 157; Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169, 177-80 (1996); Herbert Jacob, *The Elusive Shadow of the Law*, 26 L. & SOC. REV. 565 (1992); William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545; Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Paul Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the “Gypsies,”* 103 YALE L.J. 323 (1993). Perhaps the leading example of the success of this phenomenon is the use of “business norms” in the UCC. See, e.g., UNIFORM COMMERCIAL CODE § 1-102(1)(b); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the*

group, where norms are well-defined and nonlegal sanctions are effective, the law has little impact on behavior."<sup>162</sup> The way it does influence behavior is quite complex, so that sometimes the group's own norms dominate, sometimes the external law does, and sometimes law "reduce[s] the group's ability to regulate its members."<sup>163</sup>

In many communities, outside norms and legal rules operate to regulate various aspects of family behavior. For example, community norms will determine the mechanism for courtship,<sup>164</sup> while legal rules will govern the exact requisites for marriage.<sup>165</sup> The intragroup norms<sup>166</sup> are frequently more efficient than the "blunt instrument" of the law because they take advantage of the common language, features, and traditions of the group.<sup>167</sup> For example, the Native American peacemaker court discussed earlier probably functions better than the civil justice system for members of the Navajo tribe. It accounts for *hozho* and each community member's desire to be restored to balance.<sup>168</sup> The difficulty, as Posner might describe it, occurs when the legal system attempts to regulate intrafamily behavior. According to family law rules, this interference violates the autonomy principle. In the limiting examples we talk about here, it also interferes with the valid operation of intrafamily norms.<sup>169</sup>

A related strand of the law and economics explanation of the importance of community is the idea of *network externalities*.<sup>170</sup> This concept means the web of effects a single action (or nonaction) has on a larger whole

*Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Robert Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005 (1987).

161. See Boyd & Richardson, *Culture and Cooperation*, in BEYOND SELF-INTEREST 111-31 (Jane Mansbridge ed., 1990).

162. Posner, *supra* note 19, at 133.

163. *Id.* at 137.

164. See, e.g., BETH BAILEY, FROM FRONT PORCH TO BACK SEAT: COURTSHIP IN TWENTIETH CENTURY AMERICA 17 (1988); Margaret Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203 (1990).

165. Lynn D. Wardle, *Rethinking Marital Age Restrictions*, 22 J. FAM. L. 1 (1983).

166. See, e.g., Scott & Scott, *supra* note 20.

167. See *Opting Out Of The Legal System: Extralegal Contractual Relations In The Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

168. In Irving Altman, *Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists*, 1996 UTAH L. REV. 367, the "fundamentalist Mormons" had their own culture for holidays and anniversaries as well as their own dispute resolution system designed to accommodate plural marriages illegal in the wider community.

169. See Scott & Scott, *supra* note 20 (referring to many of these as transactional norms).

170. A useful survey can be found in McAdams, *supra* note 157.

because of other existing relationships.<sup>171</sup> The relationship may be one of affinity (like marriage) or status (such as that of parent and child). For example, assume that a couple has tried for many years to have children, but is plagued with infertility problems. Their ensuing marital problems<sup>172</sup> will no doubt be the source of concern to their own parents, siblings, and even extended family. All of these family members, who may offer advice or sympathy, will in some way feel the loss as their own, and will rejoice with the couple when they adopt a child or finally conceive.

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171. In the family law literature, see MARTHA MINOW, *NOT ONLY FOR MYSELF* (1997). See REGAN, *supra* note 31 (finding that community interests override individual preference because the unfettered pursuit of autonomy is not ultimately fulfilling); see also June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 *HOUS. L. REV.* 359 (1994).

172. Elliott Dorff explains:

First, if one suffers from infertility, the doctor will immediately suggest monitoring the woman's temperature to time intercourse to coincide with ovulation. That makes good sense biologically, but it transforms intercourse into a mechanical act, robbing it of much of its romance. Moreover, both husband and wife begin to see themselves as having to accomplish a goal. Consequently, every month they find out whether they succeeded or not. They get an "A" or an "F," nothing in between. This affects their own sense of being a man or woman, for everything they have been taught since childhood associates manhood with begetting children and womanhood with bearing them. One's whole sense of sexual identity needs to be readjusted and reaffirmed in the context of difficulty in having children, and the prospect of having none. There is also a sense that the future of the marriage depends upon whether or not they can have children, for that, after all, was part of their dreams when they wed.

Elliott Dorff, *Jewish Approaches to Assisted Reproductive Technologies*, 21 *WHITTIER L. REV.* 391, 398 (1999); see also LORBER, *In Vitro Fertilization and Gender Politics, in EMBRYOS, ETHICS, AND WOMEN'S RIGHTS* 117 (E. Baruch, A. D'Adamo et al. eds. 1988) (reporting that when the husband did not want a child but the wife did, the couple remained married, but when the husband wanted a child but the wife did not, the couple often obtained a divorce).

Though the infertile couple may have marital problems, some studies show that a couple successfully treated by AID or In Vitro Fertilization will have no worse chances of survival (perhaps because, at least in the case of IVF, there is selection for marital stability before one may join the program). The difference in the separation rates in one study of Norwegian AID families in contrast to a matched non-AID population was not statistically significant. Erik Bendvold et al., *Marital Break-Up Among Couples Raising Families by Artificial Insemination by Donor*, 51 *FERTIL. & STERILITY* 980, 982 (1989). These authors suggest that other studies exaggerated the high separation rate of infertile couples because they did not compare separation rates to populations that were demographically similar. M.T. Hearn et al., *Psychological Characteristics of In Vitro Fertilization Participants*, *AM. J. OBSTETRICS & GYNECOLOGY*, Feb. 1987, at 269, 273. It should be noted, however, that IVF programs may select for patients whose marriages appear stable, thus increasing the likelihood of adjusting to treatment failure. *Id.* at 269.

### B. Reputation Effects

Another strand in the law and economics explanations of community comes from the work of writers such as David Charny.<sup>173</sup> Charny posits that although there are legal sanctions for breaking promises, "virtually all commercial transactions involve nonlegal commitments—commitments enforced only or predominantly by nonlegal sanctions such as concern for reputation."<sup>174</sup> Charny would allow legal intervention when the parties had elected nonlegal commitments only when they were gravely mistaken when the contract was made.<sup>175</sup> Charny contrasts what he calls an autonomy or rights-based system of contract<sup>176</sup> with a communitarian system. "An emerging alternative approach to the problem of nonlegal commitments seeks to go beyond conceptions of contract based on free choice. This communitarian approach purportedly accommodates a range of community interests rather than simply enforcing choices made by the contracting parties."<sup>177</sup>

Like Posner, Charny suggests that sometimes using legal sanctions where the parties intended nonlegal ones may distort the remedies the parties chose for themselves.

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173. David Charny, *Nonlegal Sanctions In Commercial Relationships*, 104 HARV. L. REV. 373 (1990).

174. *Id.* at 376. Charney lists the specific sanctions as (1) "relationship-specific prospective advantage," such as a concern for repeat transactions, (2) loss of reputation with market participants, and (3) the sacrifice of psychic and social goods (guilt, self-esteem, and so forth). *Id.* at 393. Thus "[e]ncouraging trust among workers or long-term customers is one function of the corporate culture of firms and of the feeling of responsibility to clientele that may develop at schools, banks, or other quasi-public" institutions. *Id.* at 394.

175. *Id.* at 377. He goes on to point out that:

If nonlegal pressures are sufficiently powerful to force parties to honor their commitments, the parties would not reasonably have wished to incur the additional cost of providing for legal sanctions—a conclusion that will bear directly on contract interpretation under the "objective" theory of contract. Second, under contract doctrine courts may impose liability under extracontractual doctrines—such as an implied duty of good faith or promissory estoppel—on the basis of commitments that are not legally enforceable as formal contracts.

*Id.* at 379.

176. These divergent approaches to contract formation and interpretation reflect a basic incompleteness in autonomy-based theories of contract. Under autonomy- or rights-based formulations of contract law, the promisor is legally obligated to keep his promise because he has "intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance." *Id.* at 381-82.

177. *Id.* at 387.

In the employment relationship, for example, nonlegal sanctions arguably enforce systems of reciprocity by encouraging mutual gift-giving or by monitoring effort, and thereby make superfluous the legal rules of contract and restitution that are largely directed to the same goal. By disrupting nonlegal systems, legal enforcement of implied limitations on employer discretion may impoverish rather than empower workers.”<sup>178</sup>

He notes that according to communitarians, intervening may run counter to the framework of trust the parties established for themselves.<sup>179</sup> Furthermore, some communitarians suggest that the intrinsic value of social collaboration may depend on the parties’ experience of a sense of trust not dependent on coercive public intervention.<sup>180</sup> Some situations suggest that nonlegal sanctions may in fact work better than the standard legal remedies: for example, those cases involving “vague commitments whose interpretation depends on ‘embedded’ norms or expert decisionmaking, and commitments that have low stakes relative to litigation costs, appear better suited for nonlegal sanctions.”<sup>181</sup>

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178. *Id.* at 388; see also MICHAEL TREBILCOCK, MARRIAGE AS SIGNAL (1999), (reporting to the Donner Conference on Freedom of Contract (the Family), George Mason University, fall, 1988, that: “The adversarial character of legal enforcement means that once resort is had to the law to enforce commitments in an on-going relationship, it is or shortly will be at an end.”).

179. He further states:

First, the prospect of intervention may stifle the development of trust. Individuals would never have a chance to demonstrate trustworthiness, because any honoring of commitment could be attributed simply to the deterrent effect of prospective legal enforcement. The prospect of legal intervention also removes transactors’ incentives to develop the capacity to evaluate the trustworthiness of other transactors. For example, they have no incentive to gather information about another transactor’s reputation for honesty.

Charny, *supra* note 173, at 428.

180. *Id.* at 388-89.

181. *Id.* at 408-09. Here he mentions especially tight-knit communities where: . . . reputation is a perfect substitute for legal enforcement. For that reason, parties can obtain the advantages of nonlegal third-party decisionmaking by enforcing the decisionmakers’ rulings with reputational sanctions. These enforcement schemes often accompany trading among close-knit, ethnically or professionally homogeneous communities, such as the Orthodox Jews of the diamond trade, the Chinese merchants in Southeast Asian trading communities, and the Birmingham cotton guild.

*Id.* at 412 (footnotes omitted).

### C. Information and Signaling

Investments in resources specific to a relationship between identified parties give rise to "specialization by identity."<sup>182</sup> Such relationships, which exist over long periods of time (akin to my permanence requirement),<sup>183</sup> encompass a large variety of activity, involve many implicit terms, have no explicit balancing of the exchange (akin to my unconditional love requirement), have three features that are especially pertinent to this discussion. One is that enforcement is mostly internal (or by the family itself), while another is that the family contract "creates a collective identity that affects the transactions of each member with people outside the family."<sup>184</sup> Finally, it is embedded in the identity of the partners, without which it loses its meaning—it is thus nontransferable.<sup>185</sup> The family (or family firm) thus gives the person an identity "in addition to a past and a future."<sup>186</sup> Moreover, enforcement of agreements is "internal to the contract," and is not done through the market.<sup>187</sup> To the extent that outside forces, including the private market forces, intrude upon the province of the family, the signal given by "family affiliation" becomes diluted.<sup>188</sup>

In a market for partners, in theory at least, a "willingness or unwillingness to marry conveys a signal to prospective partners of the signaler's preferences" about the kind of relationship sought.<sup>189</sup> To the extent that marriage implies a reasonably well understood set of commitments, it serves as an efficient "information economizing" function in a search for partners, sorting and matching them relative to other types of relationships.<sup>190</sup>

Marriage has this sort of "expressive function":

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182. Yoram Ben-Porath, *The F-Connection: Families, Friends, and Firms and the Organization of Exchange*, 6 POP. & DEVEL. REV. 1 (1980).

183. See Brinig & Buckley, *supra* note 132; Margaret F. Brinig & Steven L. Nock, *The Marriage Covenant*, 12 REGENT U. L. REV. 9 (1999).

184. Ben-Porath, *supra* note 182, at 3.

185. *Id.* at 4.

186. *Id.* at 5.

187. *Id.* at 11.

188. *Id.* at 12.

189. TREBILCOCK, *supra* note 178.

190. In his discussion, Trebilcock relies heavily on the paper by William Bishop, "Is He Married?" *Marriage as Information*, 34 U. TORONTO L.J. 245 (1984). Bishop views marriage as a signal of the sort of sexual arrangement sought by the person married or seeking marriage; Trebilcock sees the signal as a broader one.

The concept of "marriage," as compared to "private contract," suggests a meaning that can be interpreted by third parties without knowing anything about the particularities of the spouses. Without defending each one of these, legal efforts at symbolic protection of the parameters of the institution include age restrictions, restrictions on the number of parties to a marriage, to the consanguinity of the parties, and to the sex of the parties. Congress explicitly invoked this power to police the symbol of marriage in passing what is pointedly titled "The Defense of Marriage Act" . . . . The current treatment of family law issues upon divorce attempts to respect the principle that some equality between monetary and nonmonetary contributions is central to the meaning of marriage.<sup>191</sup>

Marriage, to the extent the parties live together, also proves to be an efficient way to monitor the activities of the other spouse. In particular, as Frank Buckley and I have written elsewhere, it provides an excellent way to make sure that the other parent is performing well.<sup>192</sup> Although cohabitation might perform this function, marriage solves the "principal-agent" problem very effectively, with each spouse able to see for him or herself how time and money are spent on other members of the family.<sup>193</sup> Similarly, parents can curb ineffective or excessive discipline.<sup>194</sup>

Dispute resolution can also be accomplished more efficiently and effectively by communities (if not within the families themselves) than by the legal system.<sup>195</sup> The "neutrals" often have a stake in the relationship's

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191. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. REV. 65, 138-39 (1998).

192. Brinig & Buckley, *supra* note 90, at 393; *see also* Judith A. Seltzer, *Consequences of Marital Dissolution for Children*, 20 ANNUAL REV. OF SOCIOLOGY 235 (1994) (suggesting few differences in physical custody arrangements despite different court-ordered patterns, but lower child-support payments by noncustodial fathers); Yoram Weiss & Robert J. Willis, *Children as Collective Goods in Divorce Settlements*, 3 J. LAB. ECON. 268, 288 (1985) (describing father's unwillingness to pay child support as a function of his being able to monitor how the money is spent).

193. Brinig & Buckley, *supra* note 90, at 408. For discussions of the principal-agent problem, *see* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. PAPERS & PROC. 134 (1973). As applied to parents, *see* Scott & Scott, *supra* note 112.

194. Lupu, *supra* note 22.

195. *See, e.g.*, Bernstein, *supra* note 160; (suggesting the advantages of an extra-legal dispute resolution system in a well-known merchant community); Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 327 (1994)



continuation, and they will know more about the particular parties and their circumstances than will judges in divorce or municipal courts (in cases where family violence ensues). Restorative justice, as described earlier, can heal such broken relationships, at least where communities are tight and reputation within them important.

*D. Insurance, or "Distributing the Risks of Regret"*<sup>196</sup>

Any long-term relationship, particularly marriage, involves risks. As noted before, the wavy pattern of my student's Hindu wedding ring signifies not only the permanence of marriage but also its ups and downs. The risk allocation is expressed in the traditional marriage vows: "For richer for poorer, in sickness and in health."<sup>197</sup> They continue by noting that the interwoven and continuously changing factors that affect the emotions of a marriage, and each party's happiness in it, will lead the couple to adopt a broad strategy of shared responsibility and cooperative adjustment rather than trying to specify each contingency.<sup>198</sup>

Investment in identity is rewarding in families, trust is mutually beneficial, and "proximity and general involvement create at little expense the information that is lacking among strangers and generate incentives for proper behavior. Typically insurance between family members is mutual, an exchange of promises for aid contingent on the situation of both (or all) parties."<sup>199</sup> For example, to ensure support in time of sickness or in averaging the randomness of individual incomes, the family can be an effective insurer, and larger families may serve this function either through many children or through ties extending beyond the nuclear family.<sup>200</sup>

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("[M]ediators can create value by controlling the flow of private information (variously eliminating, translating, or even creating it) to mitigate adverse selection and moral hazard.").

196. Scott & Scott, *supra* note 20, at 1267.

197. *Id.*

198. *Id.* at 1269. The Scotts suggest intramarital obligations "function to maintain the relationships and are governed largely by social and relational norms," while after termination of marriage, they will be efficiently enforced by legal coercion upon divorce. *Id.* at 1298. The alternative is the "complete contingent claims contract." In relational contracts in general, such "complete contracting" is not only probably impossible, but also inefficient. See OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, AND RELATIONAL CONTRACTING* (1985); Robert Scott & Charles Goetz, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Oliver Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233 (1979).

199. Porath, *supra* note 183, at 21-22.

200. *Id.*

*E. Investment in Capital*

As mentioned earlier, revolving credit associations of various types are typical ways in which the immigrant communities help their members.<sup>201</sup> There is substantial literature on similar institutions, since they are typical means of savings in a number of developing countries.<sup>202</sup>

Roscas,<sup>203</sup> kye,<sup>204</sup> cundinas,<sup>205</sup> or tontine<sup>206</sup> all serve the important function of allowing people to borrow and save when they otherwise would not have credit markets available to them. For immigrants who have neither high incomes nor established credit ratings, purchasing durable goods, a key purpose of these credit associations, would otherwise become an impossible, or at least time consuming task.<sup>207</sup> The rosca or kye allows the newcomer to trade on his reputation and close social and blood ties to the community (his social capital).<sup>208</sup> In fact, the community will sanction him strongly<sup>209</sup> or make him feel ashamed<sup>210</sup> if the loan is not repaid or the member does not keep contributing to the monthly or weekly pot after he has taken his draw.

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201. For a thorough discussion of revolving credit associations, see Posner, *supra* note 19. For a particularly helpful look at Korean sources of credit both in Korea and Los Angeles, see IVAN LIGHT & EDNA BONACICH, *IMMIGRANT ENTREPRENEURS: KOREANS IN LOS ANGELES, 1965-1982*, 243-72 (1988).

202. For a classic review, see Clifford Geertz, *The Rotating Credit Association: A "Middle Rung" in Development*, 10 *ECON. DEV. & CULTURAL CHANGE* 241 (1962). See also Phillippe Callier, *Informal Finance: The Rotating Savings and Credit Association-An Interpretation*, 43 *KYKLOS* 273 (1990).

203. Timothy Besley et al., *The Economics of Rotating Savings and Credit Associations*, 83 *AM. ECON. REV.* 792, 793 (1993).

204. See Posner, *supra* note 19, at 136; LIGHT & BONACICH, *supra* note 201, at 244.

205. Carlos G. Vélez-I., *Social Change, Commercialization, and Organizational Complexity of Urban Mexican/Chicano Rotating Credit Associations: Theoretical and Empirical Issues of Adaptation*, 41 *HUMAN ORG.* 107, 113 (1982) (reporting on various adaptive functions depending upon region and social group involved).

206. In Francophone Africa, see CALLIER, *supra* note 200; for China, Africa, Southeast Asia and Japan, see Geertz, *supra* note 202, at 273; for Mexico, see Velez-I., *supra* note 205, at 117-18 (tandas and cudina); for Brazil, see LIGHT & BONACICH, *supra* note 201, at 257 (panderos).

207. Velez-I., *supra* note 205, at 113; see LIGHT & BONACICH, *supra* note 201, at 252 (reporting that roscas allow closer ties between community members).

208. LIGHT & BONACICH, *supra* note 201, at 272.

209. Besley et al., *supra* note 203, at 794, 805 (discussing sanctions for defaulting including loss of one's social collateral). LIGHT & BONACICH, *supra* note 201, at 252-53, however, explain the effects of the criminal prosecution of one defaulting key organizer. The Korean community newspaper apparently felt that kyes themselves were illegal. *Id.* at 257.

210. Geertz, *supra* note 202, at 247, 262.

The rosca is not particularly effective as insurance because there is no guarantee that the "winning" turn of the individual will coincide with his need.<sup>211</sup> Even where he can "bid" for an earlier-than-random share, others in the community may well suffer precisely the same tragedies (such as property losses due to riots or crop damage due to flood or drought) at the same moment.

Not only does the revolving credit association give its relatively low-income members an opportunity to purchase goods or invest in their own businesses that otherwise would not be available, it also functions to strengthen the community itself.<sup>212</sup> Not only are all members financially tied to one another, but also they meet periodically at the "winner's" home or an ethnic restaurant (from the same ethnic group, and for which the "winner" pays), usually in the context of a feast or other celebration.<sup>213</sup> This regular meeting, available only to members of the credit association, serves as a time to exchange information, develop additional social ties (for example, allowing the children of group members to meet and perhaps court) and promote the affinity called "union."<sup>214</sup>

#### VI. THE CASE FOR LIMITS—THE ANTICOMMONS

In his ingenious article, *The Tragedy of the Anticommons*,<sup>215</sup> Michael Heller writes about the privatization of Soviet housing stock. The problem he describes is that too many people have ownership interests in the same units. In a commons, to which he contrasts the Soviet situation, multiple owners are each given a privilege to use some resource, and no one has the right to exclude another. The resource will then be overused.<sup>216</sup> With the anticommons, multiple owners are each given the right to exclude others from a scarce resource, and no one can effectively use it.<sup>217</sup> The resource is

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211. Besley et al., *supra* note 203, at 793.

212. See, e.g., Geertz, *supra* note 202, at 246; Véléz-I., *supra* note 205, at 111.

213. LIGHT & BONACICH, *supra* note 201, at 248; Geertz, *supra* note 202, at 246-48 (Java); see TAN, *supra* note 18.

214. Anthony Kronman, *Contract Laws and the State of Nature*, 1 J.L. ECON. & ORG. 5, 20 (1985).

215. Heller, *supra* note 9.

216. *Id.* at 623-24. Examples include depleted fisheries, overgrazed fields and polluted air.

As Heller notes, the literature on the subject is vast. He particularly credits Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968) (introducing the term); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 182-84 (1990) (discussing applications of the tragedy of the commons

therefore prone to under use—hence the tragedy. He writes that empty Moscow storefronts are a good example, but that others include Irish property before the “potato famine,” and “upstream” biotechnology patents that must be secured before new products can be brought to market.<sup>218</sup> In fact, he notes, that an anticommons tragedy can appear whenever governments create new property rights.<sup>219</sup>

In some ways, children possess many of the properties of a commons. In fact, they have been described as “public goods” of their parents’

and showing sustainable informal management of commons resources). In describing non-private property, property theorists have characterized ocean fisheries, open ranges, fur trapping, potlaching, and gold mining as examples of commons property. See ARTHUR F. McEVoy, *THE FISHERMAN’S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES 1850-1980*, at 257 (1986) (fisheries); Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 169-72 (1975) (western land); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 351-53 (1967) (fur trappers); H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124, 134 (1954) (fisheries); D. Bruce Johnsen, *The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians*, 15 J. LEG. STUD. 41, 41-42 (1986) (potlaching); John Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.L. & ECON. 421, 422-23 (1977) (gold mining).

217. In the former Soviet Union, one owner would be given the right to sell, one to receive sale revenue, and still others to lease, receive lease revenue, occupy and determine use. Each could block the other owners from using the space as a storefront, and no one could set up shop without collecting the consent of all the others. Heller, *supra* note 9, at 623. Another real property example comes from the management of Native American lands. See *Hodel v. Irving*, 481 U.S. 704, 708 (1987); see also John H. Leavitt, *Hodel v. Irving: The Supreme Court’s Emerging Takings Analysis: A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVTL. L. 597, 611-12 (1988) (describing the difficulties that the Bureau of Indian Affairs faces in selling or leasing allotments today); Suzanne S. Schmid, Comment, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?*, 43 U. MIAMI L. REV. 739, 741-42 (1989) (“The fractionation of individually owned Indian trust or restricted land represents one of the outstanding problems in Indian law.”).

218. See Michael A. Heller & Rebecca S. Eisenberg, *Upstream Patents and Downstream Products: A Tragedy of the Anticommons?*, 280 SCIENCE 698 (1998) (reporting that the need for paying for use of the earlier patents on substances needed to reach further in genetic research impedes progress in biology). Another intellectual property example Heller mentions is the need for getting permission from all the many members of a show. Heller, *supra* note 9, at 659 & n.270. He notes that use of “The Brady Bunch” required agreement from each of the actors portraying Brady kids (and from their parents, while the actors were still minors), the Brady parents, and the Brady housekeeper, Alice—as is typical of licensing agreements for such shows. The difficulty of getting agreement, particularly from Maureen McCormick (“Marcia Brady”), is reported in BARRY WILLIAMS & CHRIS KRESKI, *GROWING UP BRADY* 139, 149, 153 (1992).

219. Heller, *supra* note 9, at 629.

marriage.<sup>220</sup> Unlike the pond that can be over-fished, parents cannot “over love” their children. Managing the scarce resource that is children’s time can effectively help parents develop informal norms and institutions. Carol Rose,<sup>221</sup> and Elinor Ostrom<sup>222</sup> have shown how people sometimes develop informal norms and institutions to manage commons property efficiently. As Rose notes, when the parents are “locked together” in their relationship, their common task may reinforce communitarian values and help them learn to work together.<sup>223</sup> Informal coordination and the non-utilitarian value of overlapping ownership apply on the anticommons end of the property spectrum as well.<sup>224</sup> Whether anticommons ownership of a particular resource results in tragedy depends in part on people’s ability to cooperate informally. And this ability, of course, is precisely what is threatened by granting parental prerogatives<sup>225</sup> to third parties.

220. Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. 503, 507 (1994); see also Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86, 86 (1994).

221. Rose, *supra* note 97.

222. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 182-84 (1990) (discussing applications of the tragedy of the commons and showing sustainable informal management of commons resources).

223. See Rose, *supra* note 97, at 774-77. Rose points out that formal legal rules, as opposed to the “unorganized public,” may not always reach happy endings. The “comedy of the commons” occurs when the community benefits more as more members participate. *Id.* at 767-68 (or “the more the merrier,” hence the article’s title “Comedy”).

224. Heller, *supra* note 9, 625 & n.17.

225. Note the similarity between property ownership rights and the rights claimed by parents (and grandparents) in the visitation cases. According to August Honore, her rights include: Ownership, in *Oxford Essays in Jurisprudence* 107, 112-28 (A.G. Guest ed., 1961):

- (1) the right to exclusive possession;
- (2) the right to personal use and enjoyment;
- (3) the right to manage use by others;
- (4) the right to the income from use by others;
- (5) the right to the capital value, including alienation, consumption, waste, or destruction;
- (6) the right to security (that is, immunity from expropriation);
- (7) the power of transmissibility by gift, devise, or descent;
- (8) the lack of any term on these rights;
- (9) the duty to refrain from using the object in ways that harm others;
- (10) the liability to execution for repayment of debts; and

residual rights on the reversion of lapsed ownership rights held by others.

See *id.*; see also JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 49 (1988) (summarizing Honore’s list of incidents); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1362-63 (1993) (attributing some of these private entitlements to a “Blackstonian”

Turning to what is more obviously a marital issue, we can see the same sort of analysis in Katharine Silbaugh's *Marriage Contracts and the Family Economy*,<sup>226</sup> where Professor Silbaugh struggles with the problem of whether or not women should be compensated for household services performed during marriage. In an earlier piece,<sup>227</sup> Silbaugh argued persuasively that married women are under-compensated for the work they do (and will probably always be at a financial disadvantage to their husbands)<sup>228</sup> because they have no legal entitlement to recover for their significantly greater work around the household.<sup>229</sup> In the second article, Silbaugh first argues that corrective legal rules shouldn't just compensate for *losses* that are themselves the result of legal rules, but instead should view nonmonetary contributions as a gain to the family.<sup>230</sup> However, instead of arguing that both paid and unpaid labor should be subjects of compensation worked through premarital agreements,<sup>231</sup> she argues that children,<sup>232</sup> wage labor, and money itself<sup>233</sup> all become highly intimate within families.<sup>234</sup> They are treated as equivalent in her analysis because

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bundle). Incidents (1), (2), (3), (6), (7), and (8) would seem to have at least some application to child custody matters.

226. Silbaugh, *supra* note 191.

227. *Id.*

228. For a recent analysis of this problem, see JOAN C. WILLIAMS, *UNBENDING GENDER* (1999).

229. In a recent empirical piece, Steve Nock and I calculated that married women average nearly 36 hours of housework per week (mostly in traditionally "women's work") compared to about 16.7 hours for their husbands (with a higher proportion of time spent doing traditionally "men's work"). At the same time, the married women in our sample were spending an average of 18.52 hours in the paid labor force compared to their husbands' 34.3 hours. See Margaret F. Brinig & Steven L. Nock, *Weak Men and Disorderly Women: Divorce and the Division of Labor*, in *MARRIAGE AND DIVORCE: AN ECONOMIC APPROACH* (Anthony Dnes & Robert Rowthorn eds., forthcoming 2001). Silbaugh notes that the estimated dollar value of unpaid household labor in the United States is the equivalent of 24%-60% of Gross Domestic Product. SILBAUGH, *supra* note 191, at 99 & nn. 127-28.

230. Silbaugh, *supra* note 191, at 97.

231. See Brian Bix, *Bargaining in The Shadow Of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998).

232. Silbaugh, *supra* note 191, at 105 (finding that the presence of children confers benefits upon both parents, but nonetheless finds that they should not be permissible subjects of premarital agreements).

233. *Id.* at 109-10.

234. *Id.* at 101, 110.

One of the powerful arguments fathers make when seeking custody upon divorce is that their work hours, and especially overtime work, was done for the family and was not

“they are both expressions of affection as well as materially beneficial.”<sup>235</sup> At the end, she finds that “the goal of legal parity necessitates a solution that changes the legal status of wage labor within marriage, rather than the status of domestic labor. In order to treat the monetary and nonmonetary aspects of marriage equally, we should not enforce monetary premarital agreements.”<sup>236</sup>

Here, as in the Scotts’ *Parents as Fiduciaries* terms, law may reduce the incentives (rewards) for optimal behavior by parents.<sup>237</sup> The same reasoning

something they would have contemplated in the abstract. They therefore find it difficult to swallow the idea, present in its most vivid form in the “primary caretaker” custody rules, that time spent directly with children is somehow qualitatively different from time spent working for them. See ARLIE HOCHSCHILD, *THE TIME BIND* 177-83 (1997) (describing a 32 year old blue collar worker and father of three (in an intact marriage) who works 50 to 60 hours a week stacking and loading boxes). Hochschild writes, “Hours were his source of pride.”

Most of my buddies will settle for forty hours and say, “See you later.” But they’re buddies without kids. If I had no kids, I’d work forty hours, too.

People look at the hours I work and say, “What, are you crazy?” I earned \$40,000 last year, and Deb normally earns \$23,000. An older woman in my department is taking all the overtime she can get to retire and go on a trip. I kid her, “That’s my overtime. You’re taking food out of my kids’ mouths.” . . .

When I come home, the kids want to see me. They missed me. So even though I’m exhausted, I’ll go downstairs and lie on the floor. They enjoy getting on top of me and pounding me. They make me give them rides like an elephant. So I play the game for half an hour before I go to bed.

My dad never went to school events, and I’m not interested in making it a habit either. But I can see myself doing a double [shift] in the future, and then going to watch one of my kids play a ball game. I would cheat myself out of sleep to see their games.

*Id.* at 179, 180.

235. *Id.* at 110.

236. *Id.* at 122-23. In the course of her argument, she spends some time on debates about whether contractualization of families creates “rights” rather than some less monetary obligations. *Id.* at 111-12; see also Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 782, 786-88.

237. Scott & Scott, *supra* note 112. The Scotts are apparently writing about the informal rules couples and parents and children set up to regulate the behavior within the family—rules like bedtimes or the observance of birthdays. For a systematic examination of such intrafamilial (and intracommunal) norms, see Altman, *supra* note 168.

Marriage, like adoption, carries with it a commitment toward permanence that places it in a different category of relational interests than if it were temporary. A ‘justifiable expectation . . . that [the] relationship will continue indefinitely’ permits parties to invest themselves in the relationship with a reasonable belief that the likelihood of future benefits warrants the attendant risks and inconvenience. There is a clear analogy between the motivational factors that influence human investment and those that influence economic investments. Jeremy Bentham believed that private

probably holds true for marriage as well. When many people have rights, as opposed to moral justifications, to pieces of marriage or children, as Trebilcock notes when he criticizes enacting multiple choices of marriage type, the signal becomes confused.<sup>238</sup> When the signal becomes dilute, the benefits from marriage are not as strong, nor is marriage as well differentiated from, say, cohabitation.<sup>239</sup>

## VII. CONCLUSION

Communities are vital for marriage and parenting. Informal communities should be encouraged socially and through channeling legislation.<sup>240</sup> Turning these informal ties into legal rights destroys the relationships.<sup>241</sup>

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ownership of property is more likely to maximize social utility than is collective ownership because "the human motivations which result in production are . . . such that they will not operate in the absence of secure expectations about future enjoyment of product." The will to labor and the will to invest "depend on rules which assure people that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings."

Bruce C. Hafen, *The Constitutional Status Of Marriage, Kinship, And Sexual Privacy*, 81 MICH. L. REV. 463, 486 (1983).

238. TREBILCOCK, *supra* note 178.

239. See Scott & Scott, *supra* note 20 at 1330: the option of a unilateral exit at will signals that commitment to marriage is not distinguishable from commitment in cohabitation relationships." They posit that this "disconnection" may have contributed to the current divorce rate, because of the reduction of "the potency of societal norms promoting fidelity, loyalty, and cooperation in marriage." *Id.*

240. For example, there might be tax deductions for elder care, continued differentiation (through removal of the "marriage tax penalty") between marriage and cohabitation, legislation giving benefits for counseling prior to marriage or divorce, and generally, more support given to union-building activities. Two such family-strengthening and completely extra-legal activities that I've found in Iowa City are our block's port-luck millennium party, including a number of three generation families, and one of my colleague's holiday cookie-decorating party, to which children and grandchildren are invited, though they may bring their relations. See Rose, *supra* note 94, at 779-80 (advocating public access to unique recreational sites: "recreation educates and socializes us, it acts as a 'social glue' for everyone, not just those immediately engaged; and of course, the more people involved in any socializing activity, the better").

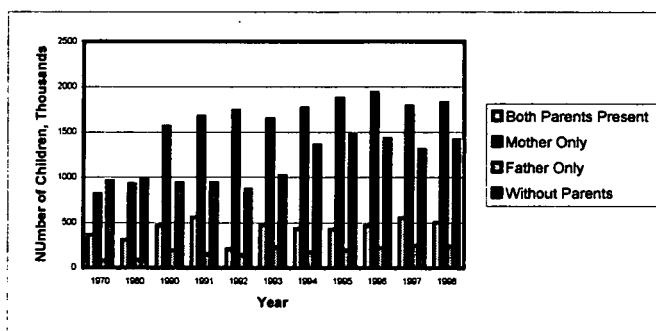
241. As Carl Schneider wrote some years ago,

Where a right exists, we prima facie prefer the individual, as the law of substantive due process illustrates. But the rights schema is often inapposite in the family context, since there a right against the government is also a right against other family members. And because we dislike compromising a right against the government, we are inhibited from looking for ways to encourage compromises or even discussion



The Finn, Elian Gonzalez and *Troxel* situations present us with a good opportunity to reexamine the need for community involvement in families. At the same time, however, these cases demonstrate the strength of the emotions involved and the problem arising when splinters of legal rights replace more normal—and natural—bonds of affection. For the sake of children (not the power of parents), there should be limits to the exercise of external legal power. At the same time, we should recognize limits to the explanatory power of economics. The limit of both is love.

**Chart 1. Children Living in Grandparents' Homes**



within the family. Indeed the very appeal to law—to an external set of standards enforced by might—is atomistic in that it circumvents the (no doubt idealized) standards of family decision: private persuasion and eventual accommodation based on solicitude for the person with whom one disagrees.

Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1857-58 (1985).

I realize, of course, that all states have grandparent visitation statutes. The least offensive are those that restrict claims to (1) cases in which there is already some sort of legal activity surrounding the family, for example, adoption and divorce and (2) cases in which visitation is shown to be “in the best interests of the child.” I reiterate my position that de facto parents should be given many of the same rights as are legal parents. *See supra* note 121. Certainly that would include many of those grandparents with whom the children live in Chart I (and particularly those without parents in the home). It would exclude most of those in Chart II.

**Chart 2. Child Care for Preschoolers While Mothers are Working, Bureau of the Census, January 1998, P-70-91.**

