

MODERN LAW AND CHRISTIAN JURISPRUDENCE ON MARRIAGE AND FAMILY

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The tradition of Christian jurisprudence had enormous influence on Western marriage and family customs. It had impact as well on both religious and secular law.¹ Christianity held sway over family law even into the twentieth century in Europe, South America, and the United States.

Today this tradition of influence is on the defensive. Secular family law, both in the United States and abroad, increasingly insists that this influence was negative and is either already dead or soon should be. I will argue, however, that secular law's suspicion of Christian jurisprudence on marriage is based on an inadequate understanding of both its history and the dimensions of rationality that it contained.

There are two complaints against the influence of Christianity on secular family law. First, there is the refrain that Christianity, like all religion, is based on faith and, therefore, its views fail to pass what law calls the "rationality test." This rationality test seems to mean that law must be advanced with publicly defensible reasons that do not rest on custom or blind authority. For example, European legal scholar Maria Antokolskaia claims that Christian jurisprudence is grounded on "mystique and dogmatism."² And University of Illinois legal scholar Harry Krause asserts that Christian marriage theory is based on "supra-(or indeed super-) natural virtue" and therefore fails the rationality test.³

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¹ See generally JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987); STEVEN OZMENT, *WHEN FATHERS RULED: FAMILY LIFE IN REFORMATION EUROPE* (1983); JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* (2002) [hereinafter WITTE, *LAW AND PROTESTANTISM*].

² Maria V. Antokolskaia, *Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendencies*, 28 J. FAM. HIST. 52, 56 (2003).

³ Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends—And Vice Versa*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1116 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

Second, there is the widely heard criticism that Christianity is the chief carrier of Western patriarchy. Sometimes this view suggests that the very idea of marriage is inextricably connected with deep patriarchy and that Christianity, from biblical times to the present, is the leading architect of the androcentric institution of marriage. Emory School of Law scholar Martha Fineman expresses this view when she associates, without historical qualification, all of Christianity with the patriarchy of a present-day conservative denomination that advises wives not only to submit to their husbands but to “take submission into their own hands.”⁴ Fineman continues, “This state of affairs is viewed . . . as consistent with God’s natural order of things—‘a mirror of the relationship between Christ and church.’”⁵

Yet contemporary marriage law theory exhibits a troubling lack of knowledge about historical scholarship on Christianity’s marital patterns and norms. In tracing Christianity’s influence on Western family law, legal scholarship generally goes back no further than eighteenth and nineteenth century England and the 1753 Lord Hardwicke Act. This ignores the massive influence of the Protestant Reformation; the synthesis of Christianity and Roman law in Gratian, Peter Lombard, and Thomas Aquinas; and the special twists that early Christianity placed on Jewish, Greek, and Roman perspectives on marriage.

Although much of contemporary family law claims to be value neutral, one can find in it a variety of value-laden influences in place of the once visible impact of Christianity. I will comment on four: (1) the growing influence of the culture of psychotherapy; (2) the influence of cultural individualism and the social theory of what Brent Waters calls late liberalism;⁶ (3) legal accommodation to the spread of what Max Weber called technical rationality;⁷ and (4) the impact of thin views of moral rationality built on either Kantianism, utilitarianism, or rational-choice ethical egoism. On this last point, most of contemporary law seems unaware of advances in cognitive science that are uncovering the metaphorical and narrative ground of more explicit forms of

⁴ MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 131 (2004) [hereinafter FINEMAN, *AUTONOMY MYTH*]. Fineman is quoting from a statement by the Southern Baptists. See Chad Brand, *Christ-Centered Marriages: Husbands and Wives Complementing One Another* (Sept. 1998), <http://www.baptisttobaptist.net/b2barticle.asp?ID=230>.

⁵ FINEMAN, *AUTONOMY MYTH*, *supra* note 4, at 131.

⁶ BRENT WATERS, *THE FAMILY IN CHRISTIAN SOCIAL AND POLITICAL THOUGHT* 74–79 (2007).

⁷ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181 (Talcott Parsons trans., Charles Scribner’s Sons 1958) (1904–1905).

moral rationality, even its preferred thin models.⁸ Secular law has its own deep metaphors undergirding its more focused rationalities—models that function analogously to the metaphors of explicitly religious legal traditions. But contemporary law is not only unable to analyze the interplay between Christian metaphors and its other levels of rationality, it seems to be blind to its own metaphorically expressed faith-like assumptions and how they shape more explicit forms of reasoning.

I turn first to the impact of the culture of therapy on the law. In 1998, University of Michigan legal scholar Carl Schneider argued that not long ago, family law advanced moral arguments in support of its positions.⁹ Now it more frequently puts forward psychological and therapeutic arguments,¹⁰ and we later will see how this works, specifically in the concept of the best interests of the child.¹¹ The language of psychological health, however, works in concert with the cultural individualism of American society—the second factor listed above. American individualism has been well-documented from the writings of Alexis de Tocqueville to the recent investigations of Robert Bellah and his colleagues.¹² Much of contemporary law recognizes this social trend and builds allowances for it in its normative theoretical frameworks. Stanford University law professor Lawrence Friedman states succinctly much of the prevailing attitude when he writes:

More and more, law, like the broader society, focuses on the wishes, desires, and needs of individual people, freely chosen, within a broad band of possibilities. Each person is felt to have the right to select his or her own lifestyle, to craft his or her marriage and divorce, even to make basic decisions about family affiliation in general. . . . [T]he ideology of choice is an important social fact.¹³

The therapeutic ethos and cultural individualism interact with a third factor to shape secular marriage and family law. This is the spread of what Max Weber called the “iron cage” of technical rationality—the increased reliance

⁸ See generally STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

⁹ Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503 *passim*.

¹⁰ *Id.*

¹¹ See *infra* notes 18–21 and accompanying text.

¹² ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835).

¹³ LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 146 (2004).

on powerful technical means to gain short-term satisfactions.¹⁴ One example is the absorption into the wage economy (which increasingly functions on principles of rational efficiency) of men in the nineteenth century and women in the twentieth century, thereby reducing their financial dependency on family farms, family crafts, and even their spouses. The advance of the wage economy functioned to loosen the ties of kinship and the economic necessity of marriage.¹⁵ More recently, the spread of technical rationality has given rise to a host of new family challenges resulting from the increasing use of assisted reproductive technology (ART), not only by married couples but by individuals, unmarried couples, and same-sex partners. Technical rationality enhances the range of individual choice and the possibilities for personal fulfillment.

Finally, contemporary law increasingly tries to solve the challenges of these three cultural trends with thin models of Kantian, utilitarian, or rational-choice ethical reasoning. This is true in spite of assertions that family law is morally neutral, such as those found in the American Law Institute's (ALI) *Principles of the Law of Family Dissolution*.¹⁶ Law's drive toward neutrality is really a misguided struggle to liberate itself from the wisdom of inherited religious traditions, whose rationality is embedded in metaphors and narratives that may actually support, rather than undercut, their reasonableness. At the same time that law is blind to the rationality of tradition, it is oblivious to how its own faith-like assumptions, metaphors, and stories influence its otherwise thin, and inconsistently applied, theories of moral rationality.

These four cultural forces have introduced a variety of well-documented separations into the field of human sexuality. These are the increased separation of love from sexual exchange, sexual intercourse from marriage, marriage from conception, marriage from childbirth, childbirth from parenthood, sexual intercourse from parenthood, child-rearing from marriage, child-rearing from biological parenthood, and the economic viability of individuals from the economic dependencies of marriage. These goods were previously held together in the legal and religious institution of the marriage-

¹⁴ WEBER, *supra* note 7, at 181–82.

¹⁵ GARY S. BECKER, A TREATISE ON THE FAMILY 356–57 (rev. ed. 1991).

¹⁶ See ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02 & cmt. a, at 913–16 (2002). These pages give no preference to marriage, are highly sympathetic to the reasons for cohabitation domestic partnerships, and assert that marriage as such may “have little or no bearing on the character of the parties’ domestic relationship,” *id.* § 6.02 cmt. a, at 914–15, thereby making much of marriage law the default rules for dissolving cohabitation and domestic partnerships. This, functionally, is a morally neutral position.

based family. *All of these trends have culminated in one stunning social fact that society is just now beginning to recognize: Children born today increasingly will not be raised to maturity by the parents who conceived them. This raises a new question in children's rights. Do children have the right to be born into a society whose legal institutions maximize their chances of being raised by their parents of conception? If children have this right, we must face the fact that law today is working against them. The formal provisions of law today are increasing the social possibility that children will be deprived of this basic human right.*

I. PRIVATE ORDERING: THE PROPOSED FRONT DOOR OF FAMILY LAW

Much of family law today copes with these cultural and social trends with two increasingly dominant guiding principles: “private ordering” for adults and the “best interests of the child” for infants, children, and youth. The idea of private ordering applies to family formation, and the doctrine of the best interests of the child applies mainly, although not solely, to family dissolution.

Private ordering holds that adults know their needs and goals in intimate family life better than government, religion, tradition, or law. Therefore, law should have the flexibility to allow, follow, and support the sexual and procreative arrangements that grown men and women believe are best for them. University of Utah legal scholar Martha Ertman writes the following with reference to the direction of ALI's proposed *Principles of the Law of Family Dissolution*: “Freedom of contract, also known as private ordering, is one important cultural value that is expressed.”¹⁷ She explains that private ordering requires the law to recognize and protect as legally legitimate the contracts implicit in private living arrangements, whether or not they are part of legal marriage. Private ordering refers to the implicit contracts that are latent in human arrangements such as cohabitation, domestic partnerships, sexual intimacy, shared parenting between unmarried lovers, uses of ART in informal relationships, or shared use of property.

The best interests of the child increasingly come into play when adult family-formation decisions, often guided by private ordering, lead to family dissolution and raise issues of child custody, parental guidance, residence, and

¹⁷ Martha M. Ertman, *Private Ordering Under the ALI Principles: As Natural as Status*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 284, 284 (Robin Fretwell Wilson ed., 2006).

financial support.¹⁸ The principle of private ordering increasingly guides family law dealing with our intimate relations and procreative strategies—what I call the “front door” of family formation. More and more, the principle of the best interests of the child guides law at the “back door” of family formation—the moment of divorce, the dissolution of cohabiting couples, and the complex issues confronting legal and informal families using ART. One sees the influence of the culture of therapy in the way the best-interests doctrine is often applied at the back door of family dissolution. Continuity of relations is often the central value, even to the point of leaving the child of divorce with three or more functional or legal parents.¹⁹ The best-interests-of-the-child doctrine can take many forms. For example, Professor Fineman wants it to mean that in a divorce sole custody of a child would be given to the mother.²⁰ This would be based on the psychological theory, following the work of Carol Gilligan, that men are less able to show care for offspring.²¹

Increasingly, family law in both theory and practice is defining the front door of family formation in light of the contingencies, strains, and emergencies of family dissolution—the back door of family life. The triumph of the culture of therapy appears significantly, although not exclusively, in the wonderfully positive-sounding rule of the best interests of the child. To say it differently, *the direction of family law is to make the principle of the best interests of the child function mainly at the moment of family dissolution. It works decreasingly around the legal and moral channeling of family formation, which is now shaped principally by the individualism implied by the principle of private ordering.* Furthermore, the concept of the best interests of the child often rebounds on the principle of private ordering to create even more complexity in family formation. The current thin models of legal rationality, devoid of the counterbalance and thickness of religious traditions, further accelerate the emerging multiple separations in sexuality and family life listed above.

¹⁸ See ALI, *supra* note 16, § 2.02, at 95–96 (stating general criteria for defining the child’s best interests).

¹⁹ *Id.* §§ 2.02(1)(b)–(c), at 95–96.

²⁰ MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 106, 146–48 (1991) [hereinafter FINEMAN, *ILLUSION OF EQUALITY*].

²¹ See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1993).

II. CHRISTIAN INTEGRATIONAL MARRIAGE AND FAMILY THEORY

Family law theory is insufficiently aware of the resources of Christian jurisprudence to address the cultural trends discussed above. Most legal theories do not understand the multidimensional ways in which Christian marriage theory rationally weaves together naturalistic observations about the patterns of nature and the needs of children with moral principles and the integrating metaphors of covenant and one-flesh union. Christian jurisprudence has over the centuries advanced an integrational view of marriage and family formation. It has concentrated on the front door of family law—the matter of family formation—more than the back door of family dissolution. Its rationality can be seen in the range, validity, and mutually reinforcing character of the goods that it has sought to integrate.

This integrational view had a uniquely Christian stamp but was not exclusively Christian. It is best to think of Christian marriage and family theories as special twists on a variety of other folk, philosophical, legal, and economic perspectives on marriage and family. Christianity mixed with and gave special definition to influences from Judaism, Greek philosophy, Roman law, and German law. It massively influenced the formal legal theories and practices of medieval and early modern Europe, but it did so through its unique packaging of a complex range of sources, as I will illustrate below.

The Christian tradition should continue contributing to secular family law but only if it rejects the view that its teachings are pure revelation devoid of other forms of thinking. Christianity should understand itself as a carrier of forms of practical rationality applied to marriage and family, which its sacred narratives reinforce but neither fully create nor overwhelm. Only when its rational core is detected and advanced can the confessional narratives of Christianity be understood to enhance, rather than disqualify, its contributions to contemporary law.

A Christian jurisprudence that aspires to integrate the goods of the sexual field for the benefit of both children and adults cannot be happy with its many separations. It is precisely the concern to integrate sex and marriage, marriage and childbirth, parenting and marriage into a mutually reinforcing and self-renewing whole that has been at the core of Christian marriage theory. It has done this through the way its doctrines of God's Creation, Governance, and Redemption have further defined and shaped the natural rhythms of human sexuality and the possibility of offspring. Building on these metaphors of

God's action, this tradition has viewed marriage as either a sacrament (Roman and Orthodox Catholicism) or covenant (Protestantism). Both concepts see marriage as recapitulating the enduring and redemptive love of God expressed in creation and ratified through the life and death of Jesus.²² But this narrative and its metaphors also organize subordinate levels of rationality.

Traditionally, secular law has shown its respect for marriage as covenant and sacrament by treating it as a *status* that was defined by the values of the wider society, rather than by law itself as narrowly defined. The legal status of marriage functioned as a covenant defining the mutual rights and obligations that couples freely chose (the contractual element of marriage) but did not themselves create or define.²³ Although marriage as status is still visible in legal codes today, this view has been put on the defensive by no-fault divorce, the trend toward giving cohabitation legal equivalence to marriage, and the theory of private ordering. There are, however, exceptions to this legal trend, and I will illustrate this at the conclusion by discussing the legal writings of Margaret Brinig.²⁴

A. *Notes on Early Christianity*

As I said earlier, Christianity gave a complex twist to Jewish, Greek, and Roman perspectives on sex, marriage, and family.²⁵ This led early Christianity both to appropriate yet critique aspects of Judaism and to use and reject the Aristotelian-aristocratic paternalism of Roman-Hellenistic civic life. It redefined Aristotle's theory of paternal aristocracy by introducing a new image of servant fatherhood and a new love ethic of equal regard between husband and wife. Understanding these moves will show how unfounded are the two complaints by contemporary legal theory against this tradition: that it is based only on faith with no rationality and that it is rife with patriarchy.

I will begin with the second—the patriarchal complaint. The two most central scriptures from his Hebrew heritage that influenced Jesus on marriage are Genesis 1:27 and Genesis 2:24. The first reads, "So God created human kind in his image, in the image of God he created them; male and female he created them."²⁶ The second says, "Therefore a man leaves his father and his

²² *Ephesians* 5:25.

²³ JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 13 (1997).

²⁴ See *infra* Part IV.

²⁵ See *supra* notes 22–23 and accompanying text.

²⁶ *Genesis* 1:27.

mother and clings to his wife, and they become one flesh.”²⁷ Jesus is portrayed in the gospel of Matthew as interpreting these passages in his response to a Pharisee’s question as to whether it was “lawful for a man to divorce his wife for any cause.”²⁸ Jesus’s answer has possibly influenced Western marriage customs and law more than any other words ever spoken or written. He is represented as saying:

Have you not read that the one who made them at the beginning “made them male and female,” and said “For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh?” So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate.²⁹

But what do these words mean, and why do they open a trajectory of equal regard between husband and wife? Unfortunately, this text has been interpreted for centuries without the benefit of accurate scholarly insights into its cultural context. New Testament scholar Warren Carter points out that these words should be interpreted within the structure of the nineteenth and twentieth chapters of Matthew’s gospel.³⁰ He demonstrates that they assume a Jewish metropolitan audience that has been shaped, since the conquests of Alexander the Great, by Roman Hellenism and the hierarchical Aristotelian family codes that came with this cultural conglomerate. Jesus’s listeners would have known the customs and laws sanctioning the male householder’s aristocratic rule over wife, royal rule over children, and tyrannical rule over slaves—ideals found in Aristotle’s *Nicomachean Ethics* and disseminated throughout the spheres of Hellenic influence by his philosophical followers.³¹

Carter believes that this passage questioned this Aristotelian influence and promoted instead an equality of discipleship in both household and economic life. This first happened in its strictures against the then-current practices of arbitrary patriarchal divorce, which, in the context of ancient societies, functioned at the great expense of economically dependent and vulnerable women. This equality of discipleship also appears in a nearby verse where Jesus gives centrality to the principle of neighbor love: “You shall love your

²⁷ *Genesis* 2:24.

²⁸ *Matthew* 19:3.

²⁹ *Matthew* 19:4–6.

³⁰ See WARREN CARTER, *HOUSEHOLDS AND DISCIPLESHIP: A STUDY OF MATTHEW 19–20*, at 56–89 (1994).

³¹ ARISTOTLE, *NICOMACHEAN ETHICS* bk. 8, ch. 10 (350 BCE), *reprinted in* THE BASIC WORKS OF ARISTOTLE 935, 1069–70 (Richard McKeon ed., W.D. Ross trans., 1941).

neighbor as yourself,”³² suggesting that this also applies to the relation of husband and wife. And finally, in Matthew 20:1–16, we glimpse this principle of equality in the parable of the generous landlord who paid laborers the same wages no matter how long they worked—a story that illustrates the radical economic justice of the Kingdom of God. It ends by saying, “So the last will be first, and the first will be last.”³³ If Carter’s interpretation is correct, we should view Jesus’s teaching on marriage and family as countering the hierarchies of economic and family life of the Greco-Roman world. Doing this opens a more egalitarian *trajectory* of meaning in Christian family theory than generally has been appreciated by both contemporary law and culture.

This trajectory—the meaning “in front of the text,” to use a phrase by the French philosopher Paul Ricoeur,³⁴—occurred not only within a hierarchical social context but one also defined by the honor-shame code of Roman Hellenism. This code reflected what anthropologists call an agonistic cultural system. It celebrated male public honor expressed through male dominance and female shame. Female shame was a form of female honor that protected mothers, wives, and daughters by more or less restricting their lives to the domestic realm.³⁵ Not only did early Christianity conflict with the Aristotelian-aristocratic family model of Roman Hellenism, but also with the honor-shame gender code often associated with it.

Grasping this cultural context helps us understand the equal-regard trajectory of the second most influential New Testament text on Western culture and law, the famous passage from Ephesians 5:21–33. Although these verses are ambiguous, three points of enduring jurisprudential significance were made for both ecclesial and civil law. One had to do with the husband’s role in marriage as modeled after Christ’s unbreakable and sacrificial love for the church: “Husbands, love your wives, just as Christ loved the church and gave himself up for her.”³⁶ Recent New Testament scholarship now sees this view of male servanthood as a striking contrast to the aristocratic male honor codes of the surrounding Hellenic civic society.³⁷ Second, the ethic of neighbor love or equal regard, as I call it, is brought directly into the marital

³² *Matthew* 19:19.

³³ *Matthew* 20:16.

³⁴ ANDRÉ LACOCQUE & PAUL RICOEUR, THINKING BIBLICALLY: EXEGETICAL AND HERMENEUTICAL STUDIES 277 (David Pellauer trans., 1998).

³⁵ See generally Halvor Moxnes, *Honor and Shame*, 23 BIBLICAL THEOLOGY BULL. 167 (1993) (discussing the concepts of honor and shame as understood by early Christian communities).

³⁶ *Ephesians* 5:25.

³⁷ See Moxnes, *supra* note 35.

relationship: “In this same way, husbands should love their wives as they do their own bodies.”³⁸ In addition, the passage reaffirms the Genesis 2:24 understanding of marriage as a one-flesh union: “For this reason a man will leave his father and mother and be joined to his wife, and the two will become one flesh.”³⁹

The passage ends with an extremely important addition that became, as we will later see, a great point of controversy in ecclesial and civil law in subsequent centuries. With reference to the analogy between marriage as a one-flesh union and Christ’s covenantal love for the church, the writer adds, “This is a great mystery (*mysterion*), and I am applying it to Christ and the church.”⁴⁰ Translations of words are crucial, and the debate over whether *mysterion* should be translated as the word “mystery” or “sacrament” (*sacramentum*) gets to the heart of one of the great divisions between Protestant and Roman Catholic jurisprudence and the traditions of civil law in countries influenced by these two divisions of Christianity. It is now commonly thought that *mysterion* should be translated as *mystery*. As we will later see, this questions the sacramental understanding of marriage so central to Catholic views. However this controversy is resolved, this passage suggests that Christian marriage should be enduring. This gave rise to the concept in later ecclesial and civil law that marriage should be a status with covenantal features—a predefined set of mutual and enduring obligations that could be chosen and affirmed by the couple through an act of mutual consent.

But traditions never unfold smoothly, and the equal-regard trajectory that early Christian teachings gave to ancient marital customs was often misinterpreted. For instance, later teachings in Colossians and the Pastoral Epistles of 1 Timothy, 2 Timothy, and Titus, often retreated back to the hierarchies of the surrounding Greco-Roman civic culture. This happened partially under the pressure of persecution by Greco-Roman civil powers, whose more hierarchical family practices Christianity was perceived to challenge because of its more egalitarian families and more visible women.⁴¹

³⁸ *Ephesians* 5:28.

³⁹ *Ephesians* 5:31.

⁴⁰ *Ephesians* 5:32.

⁴¹ DAVID L. BALCH, LET WIVES BE SUBMISSIVE: THE DOMESTIC CODE IN *I PETER*, at 90, 108–09 (1981).

B. An Integrative Rationality: Augustine and Aquinas

But how can one answer the second complaint that Christian marriage theory is all faith with no elements of rationality? Early Christianity continued the idea that marriage was a one-flesh union that in principle was open to the trinity of the embodied mother-father-child relationship. It is within this covenant of the one-flesh union that the integrative rationality can be found in the tradition of Christian marriage, especially when this concept began to be elaborated later with insights from Plato and Aristotle on the importance of kin altruism. These views, as we will see, became more explicit in the writings of Augustine and Aquinas.

With Augustine (354–430 CE) and his pivotal *The Good of Marriage*,⁴² the classic form of the integration model of Christian marriage gained explicit articulation. Augustine saw Christian marriage as integrating three fundamental goods—the good of the procreation and education of children (*proles*), the good of faithfulness and marital chastity (*fides*), and the good of a permanent union (*connubi sacramentum*).⁴³ In speaking of the goods of marriage, Augustine advanced an early Christian formulation of the teleological ends—the human goods—of this institution. He gave a Christian twist to a form of thinking found in Plato’s *The Laws*.⁴⁴ Plato understood marriage as a natural institution that was simultaneously beneficial to the couple, their children, and the wider community.⁴⁵ Augustine built on this view but understood procreation as more than the brute fact of bringing warm little bodies into the world. It was a matter of giving birth to human infants made in the image of God—infants who also should be raised to become citizens of the Kingdom of God. When Augustine characterized marriage as a sacrament, he meant that this natural union should be permanent. This contrasted with the medieval view that saw sacrament as a sign of the supernatural grace actualized in the mutual consent of the marital couple. Sexual exchange and mutual rights to each other’s bodies were part of Augustine’s view of marriage, but less as a source of intimate pleasure and more as an integration of sex into the good of conception and responsible child-rearing.

⁴² Augustine, *The Good of Marriage*, in 27 THE FATHERS OF THE CHURCH 9, 13–16 (Roy J. Deferrari ed., Charles T. Wilcox trans., 1955).

⁴³ *Id.*

⁴⁴ PLATO, THE LAWS (Trevor J. Saunders trans., Penguin Books 1975) (360 BCE).

⁴⁵ *See id.* at 253, 256, 267–68.

Augustine brought together what philosophers call a *teleological* language (a language about marital goods) with what they call a *deontological* language (a covenantal language of obligation). Both were designed to convey an integrative one-flesh view of marriage—unifying love, sex, procreation, and child-rearing into an enduring relationship.

Later in the twelfth and thirteenth centuries, Christian views of marriage combined with and somewhat redefined two additional traditions—aspects of Roman family law and Aristotle’s rediscovered biophilosophical writings on the importance of kin altruism for parental investment in offspring, particularly investment by the father. These two strands came together most powerfully in the thought of St. Thomas Aquinas (ca. 1225–1274 CE). Aquinas accepted much of Peter Lombard’s (ca. 1100–1160 CE) synthesis of Roman law and Christian sensibilities, especially his view that mutual consent to marriage stated by the couple in the present tense, even if without witnesses, made for a valid marriage. Aquinas also accepted the emerging view, articulated by Lombard as well, that marriage is a sacrament—a supernatural source of grace that overcomes the taint of sin and provides forgiveness.⁴⁶ As I mentioned earlier, Aquinas made the error of following the Latin Vulgate and rendering Ephesians 5:32 as saying Christian marriage is a great “sacrament” (*sacramentum*), rather than a great “mystery” (*mysterium*).⁴⁷ The word mystery would have been the better translation of the Greek *mysterion*, as Martin Luther would later argue.

Aquinas also made a remarkable synthesis among biblical narrative and two of Aristotle’s ideas. The first was Aristotle’s naturalistic observation that humans, like other animals, have a tendency to leave behind “an image of themselves.”⁴⁸ The second was the belief that natural parents, who have bodily continuity with their offspring, are likely to care more for their children than alternative caregivers, especially the state nurses recommended by the early Plato in *The Republic*.⁴⁹ Aquinas combined Peter Lombard’s emphasis on consent with an Aristotelian interpretation of the Genesis and Ephesians one-flesh understanding of marriage. According to Aquinas, the statement in

⁴⁶ Peter Lombard, Book of Sentences (ca. 1150), in *SEX, MARRIAGE, AND FAMILY IN WORLD RELIGIONS* 110–11 (Don S. Browning, M. Christian Green & John Witte Jr. eds., 2006).

⁴⁷ 3 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* supp. Q. 42, art. 1, at 2715 (Fathers of the English Dominican Province trans., Benziger Brothers 1948) (1265–1272 CE) (“Of Matrimony as a Sacrament”).

⁴⁸ ARISTOTLE, *POLITICA* bk. 1, ch. 1 (350 BCE), reprinted in *THE BASIC WORKS OF ARISTOTLE* 1113, 1128 (Richard McKeon ed., Benjamin Jowett trans., 1941).

⁴⁹ PLATO, *THE REPUBLIC* bk. V, para. 460 (ca. 360 BCE), reprinted in *THE REPUBLIC OF PLATO* 139 (Allan Bloom trans., Basic Books 2d ed. 1991).

scripture, “And they shall be two in one flesh,”⁵⁰ meant that the couple consents to become one flesh, embodying this consent in their sexual relations and in their love for and identification with their child, who is part of their very substances.⁵¹ In saying this, Aquinas was consistent with the great Eastern Orthodox Bishop of Constantine, John Chrysostom (347–407 CE). Several centuries earlier, without reference to Aristotle, Chrysostom wrote this in his commentary on Ephesians 5:31:

[P]aul shows that a man leaves his parents, who gave him life, and is joined to his wife, and that one flesh—father, mother, and child—results from the commingling of the two. The child is born from the union of their seed, so the three are one flesh.⁵²

But Aquinas carried the naturalistic argument further. He believed that matrimony arose among humans because, in contrast to other mammals, the human infant takes a long time to mature. In species where infants mature rapidly, long-term bonding between male and female does not occur. He wrote, “In man, however, since the child needs the parents’ care for a long time, there is a very great tie between male and female, to which tie even the generic nature inclines.”⁵³ For Aquinas, the naturalistic springs of marriage come from the long period of infant dependency and the altruistic inclinations of parents toward the infants born of their very bodily existence. Aquinas also used a primitive theory of kin altruism as a trope to symbolize the wife-husband relation in which each spouse treats one another as blood kin—“bone of my bone and flesh of my flesh”⁵⁴—even though they are not biological kin. *Hence, in Aquinas’s Christian view of marriage and family, the marital relationship symbolically builds on, transforms, and analogically generalizes the basic solidarities of kin altruism.*

Aquinas’s use of the real and symbolic attachments of kin altruism is further consolidated by a metaphor of marital commitment that sees kin altruism as recapitulating the unbreakable covenantal love of Christ for the church. He believed that this reenactment by spouses of Christ’s enduring sacrificial love was necessary to meet the needs of the slowly developing

⁵⁰ *Genesis* 2:24.

⁵¹ 1 AQUINAS, *supra* note 47, Q. 92, art. 1, at 466 (“The Production of the Woman”).

⁵² ST. JOHN CHRYSOSTOM, ON MARRIAGE AND FAMILY LIFE 51 (Catherine P. Roth & David Anderson trans., St. Vladimir’s Seminary Press 1986).

⁵³ 3 AQUINAS, *supra* note 47, supp. Q. 41, art. 1, at 2712 (“Of the Sacrament of Matrimony as Directed to an Office of Nature”).

⁵⁴ *Genesis* 2:23.

infant, protect the vulnerabilities of the wife and mother, and stabilize the real but distractible inclinations of humans to form enduring bonds and nurture their offspring. Although Aquinas made the mystery (*mysterion*) of this enduring commitment into a sacrament (*sacramentum*), it is instructive to notice how the narrative of Christ's sacrificial love functioned as a model to give lasting integration to the one-flesh union of spouses and their offspring. Aquinas says it this way: "Although Matrimony is not conformed to Christ's passion as regards to pain, it is as regards charity, whereby He suffered for the church who was to be united to Him as His spouse."⁵⁵

I have illustrated the core of practical rationality in the Christian integrational view of the marital family to suggest that it is identifiable independent of surrounding Christian metaphors and narratives. Yet this core is also informed, further consolidated, and enriched by these symbolic forms. *The enduring solidarity of mother-father-infant one-flesh union enacted primarily to meet the dependency needs of the slowly developing human infant captures the heart of this rational core.* In this sense, this religious tradition was a carrier of an insight into what many strands of the social sciences, especially evolutionary psychology, today identify as the natural conditions needed for the formation of the long-lasting marital unions at the level of *Homo sapiens*—unions that do not exist at other levels of mammalian life.⁵⁶ Marriage as an institution functions to increase the probability that the adults who conceive a child will channel and integrate their sexuality, affections, and labor to meet its long-term dependency needs.

In its Christian context, marriage was always perceived as a finite good that was not itself a condition for salvation. In addition, discipleship in the Kingdom of God was seen as having priority over marital or family standing. Nonetheless, as Augustine had said, there were many goods associated with marriage, and these goods could and should be integrated and given Christian theological meaning. Furthermore, as important as one's own children were, the obligation to extend analogically the solidarities of kin altruism to needy or orphaned little ones as children of God, possibly even through the act of lawful adoption, was viewed as a worthy expression of Christian *agape* or self-giving love.⁵⁷

⁵⁵ 3 AQUINAS, *supra* note 47, *supp.* Q. 42, art. 1, at 2715.

⁵⁶ See Martin Daly & Margo I. Wilson, *The Evolutionary Psychology of Marriage and Divorce*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 91–110 (Linda J. Waite ed., 2000).

⁵⁷ See Don S. Browning, *Adoption and the Moral Significance of Kin Altruism*, in *THE MORALITY OF ADOPTION* 52, 65–66 (Timothy P. Jackson ed., 2005).

C. *Protestant Family Jurisprudence*

The Protestant Reformation altered important aspects of this Roman Catholic canon-law tradition of marriage and family. As I have indicated, Luther rejected the sacramental view of marriage, thus opening Christian jurisprudence to more realistic possibilities of divorce. He also rejected, as did Calvin, the belief that celibacy was a higher religious status than marriage and family life. Luther reversed this ranking and elevated family formation, marriage, child-rearing, and the education of offspring to the level of a religious vocation. But, as legal historian John Witte has pointed out, even though the early Luther railed against Roman Catholic canon law as a condition for salvation, later he and Philip Melanchthon incorporated much of it into the civil law of the German state.⁵⁸ They did this in a social theory that distinguished between the earthly kingdom of this world and the heavenly kingdom of salvation. The earthly kingdom was the realm of the social institutions of family, marriage, government, and the visible manifestation of the church. Luther's later views saw the norms of family and government as drawing on the Ten Commandments, natural law as revealed in scripture, natural law discerned by practical reason, and even the wisdom of the Roman Catholic canon-law tradition.⁵⁹ Much of the Catholic blend between the Genesis one-flesh view of marriage and the Aristotelian-Thomistic kin altruism model found its way into the civil law of Protestant states.⁶⁰ This was a view of marriage as a social and legal status that was good for the modern state yet also open to the blessings of the church and its portrayal of marriage as a sacred covenant.

Both the Lutheran and Calvinist wings of the Protestant Reformation gave rise to the idea of marriage as a twofold institution governed by a double language with complementary but differentiated rationales—a secular justification that saw marriage and family as natural institutions useful for the common good and covenantal institutions recapitulating Christ's faithfulness to the church. Before the Protestant Reformation, both the legal and religious dimensions of marriage had been administered for centuries in most of Europe by the clergy and tribunals of the Roman Catholic Church. After the Reformation, the legal registration, public witness, and certification of valid marriage became in most Protestant territories a function of the state even

⁵⁸ WITTE, *LAW AND PROTESTANTISM*, *supra* note 1, at 120–24.

⁵⁹ *Id.* at 113–15.

⁶⁰ *Id.* at 141–46.

though the church gave it additional meaning and sanctity. The conditions of divorce were broadened to include desertion in addition to adultery. Because family law was primarily the obligation of the state, both practical rationality and scripture led Protestant jurists to revise older canon-law traditions by lowering the number of impediments to marriage, permitting remarriage after legitimate divorce, eliminating the distinction between the future promise and the present consent to marry, and requiring marriage vows to be made in public before witnesses and with parental consent for the underaged. Seldom, however, did the Reformation totally reject the older canon-law tradition.

Calvin (1509–1564) may have been even more influential than Luther on the civil law of marriage in Protestant countries. This was due to his extensive influence on both church law and civil law in the city of Geneva and the spread of these legal frameworks into countries influenced by Calvinism (such as Scotland, Holland, England, and the United States) and their respective spheres of influence. His contributions both built on and revised the Catholic canon-law tradition in which Calvin had been trained as a law student. His legal teachings on marriage found a place for practical reason and natural law.⁶¹ Calvin and his associates, Theodore Beza and Pierre Viret, retained and amplified Luther's distinction between the earthly and heavenly kingdoms, thereby developing an elastic double language of practical reason, natural law, and religious narrative and metaphor—especially the metaphors of creation and covenant—to order the life of both secular society and the church. This kind of double language was particularly visible and powerful in the social and constitutional theory of the Calvinist Johannes Althusius (1557–1638), who influenced both the Dutch and American Revolutions. He combined an Aristotelian natural law theory of family as the natural core of social symbiosis (mutual dependency and cooperation) with a Calvinist theory of covenant, or *pactum*, that defines the special obligations of marriage both within the family and in relation to other spheres of society.⁶²

⁶¹ 1 JOHN WITTE, JR., & ROBERT M. KINGDON, *SEX, MARRIAGE, AND FAMILY IN JOHN CALVIN'S GENEVA*, at xxiv, 181–82, 224–26 (2005).

⁶² JOHANNES ALTHUSIUS, *POLITICS METHODICALLY SET FORTH, AND ILLUSTRATED WITH SACRED AND PROFANE EXAMPLES* (1614), *reprinted in THE POLITICS OF JOHANNES ALTHUSIUS* 22–24 (Frederick S. Camey trans., Beacon Press 1964).

III. RECENT INFLUENCE OF CHRISTIAN JURISPRUDENCE

Roman Catholic canon law continued to influence the civil law in Catholic areas such as France, Spain, Italy, South America, parts of Germany, and the southern parts of the United States. It also has had considerable influence on modern human rights thinking, especially as it pertains to the rights of children and the place of marriage and family. Beginning with Pope Leo XIII (1878–1903), the Aristotelian-Thomistic influence on Roman Catholic marriage theory had a powerful revival, especially in his important encyclical *Rerum Novarum*.⁶³ His social teachings reaffirmed the importance of kin altruism in the one-flesh union of husband, wife, and child.⁶⁴ This view was extended by Pope Pius XI into a full-blown theory of subsidiarity—the idea that care for the young, vulnerable, and even the stranger radiates outward from the family and kin to the wider society, something in the fashion that Althusius had earlier described in his concept of symbiosis. The theory of subsidiarity also held that neither the state nor the market should undermine the family, although both should stand ready to support it (*subsidium*) when it is weakened or endangered by poverty, war, or economic stress.⁶⁵ The idea of subsidiarity significantly influenced the theory about the role of the family and the rights of children in the later Universal Declaration of Human Rights⁶⁶ and many successor declarations, including the United Nations Convention on the Rights of the Child.⁶⁷ In a series of human rights documents, we find variations of the words of the Universal Declaration: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁶⁸ This statement exhibits the rational core of Christian marriage theory that, as we saw, became explicit in the writings of Augustine

⁶³ POPE LEO XIII, *RERUM NOVARUM* (1891), reprinted in *PROCLAIMING JUSTICE AND PEACE: PAPAL DOCUMENTS FROM RERUM NOVARUM THROUGH CENTESIMUS ANNUS 15* (Michael Walsh & Brian Davies eds., rev. ed. 1991).

⁶⁴ See *id.*

⁶⁵ POPE PIUS XI, *QUADRAGESIMO ANNO* (1931), reprinted in 3 *THE PAPAL ENCYCLICALS, 1903–1939*, at 415 (Claudia Carlen Ihm ed., 1981).

⁶⁶ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); see also MARY ANN GLENDON, *Universal Declaration of Human Rights, in A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 311–14 (2002).

⁶⁷ See generally Don Browning, *The Meaning of the Family in the Universal Declaration of Human Rights*, in *THE FAMILY IN THE NEW MILLENNIUM* 38–59 (A. Scott Loveless & Thomas Holman eds., 2007); Don S. Browning, *The United Nations Convention on the Rights of the Child: Should It Be Ratified and Why?*, 20 *EMORY INT’L L. REV.* 157 (2006).

⁶⁸ Universal Declaration of Human Rights, *supra* note 66, art. 16(3).

and Aquinas. It gives priority to the natural family in matters of child care, the rights of the child to his or her family, the rights of the child to protection from abuse, whatever the source, and the obligations of state parties to guarantee these rights but never to undermine them.

IV. A NEW DIRECTION IN FAMILY LAW: AN ILLUSTRATION

This historic double language of covenant and subordinate forms of natural law offers a model for Christian jurisprudence today. It can function well both within the church and as an influence on secular family law. To illustrate this, I will discuss the work of legal theorist Margaret Brinig.⁶⁹ Her writings illustrate new ways to adapt to modern law the accomplishments of the older Christian jurisprudence. Brinig does this without being apologetic for Christianity as such. Her position can answer the two objections to Christian jurisprudence in family law listed above—the complaints that it cannot meet the rationality test and that it is irredeemably patriarchal. Her work resists private ordering at the front door of family formation and saves the best-interests-of-the-child principle from the situational ethic emerging from law's too rapid accommodation to the fragmentations at the back door of family dissolution. Her position mitigates the multiple separations presently complicating the sexual field, exposes the self-deception of law's alleged neutrality, and helps restore law's capacity to channel sexual intimacy into more durable one-flesh covenants.

Fundamental to her view is a phenomenology of covenant. In making this her starting point, Brinig begins her legal thinking something like the great sociologist Emile Durkheim began his. She presents a thick description of the dominant religious and moral framework that has historically ordered marriage in Western religion and law, and in the leading metaphor used to communicate it—the metaphor of covenant. She claims that the recent trend to view marriage solely as a freely chosen contract is inadequate to both our actual personal experience and the ideals forming past cultural and legal understandings. She believes that marriage historically has been viewed as a solemn covenant of “unconditional love and permanence” through which the “parties are bound not only to each other but also to some third party, to God or the community or both.”⁷⁰ This is not a confessional religious statement in

⁶⁹ *E.g.*, MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000).

⁷⁰ *Id.* at 6–7.

the narrow sense; it is an account of the culturally received meaning of a dominant metaphor ordering marriage.

Brinig is not unique in grounding her legal theory on a comprehensive metaphor. This often happens in legal theories of marriage and family; it is just not acknowledged. Careful analysis of leading secular legal theories reveals that they are not without their own deep metaphors that serve as faith assumptions or uncritically held presumptions about how life is grounded. Professor Ertman intentionally grounds the doctrine of private ordering in the metaphor of the “handshake.”⁷¹ In her view, covenant and one-flesh union are rejected and the metaphor of the handshake would suffice to order intimate relations in today’s world of autonomous individuals.⁷² One can find deep metaphors of “molecules” and “individual atoms” in the marriage law proposals of Stanford University law professor Lawrence Friedman,⁷³ deep metaphors of “symbiosis,”⁷⁴ and “nurturing,”⁷⁵ in Professor Fineman, free “market” and agonistic metaphors in University of Chicago’s Richard Posner,⁷⁶ and “status” metaphors in Georgetown University law professor Milton Regan.⁷⁷ The task of legal scholarship today is to reject the false dichotomy between religious and secular thought, and to analyze how the comprehensive metaphors of both domains of society increasingly influence their other respective levels of more focused rationality.

Brinig’s position provides a model that can facilitate this comparison. She supplements her phenomenology of the metaphor of covenant with a further account—a second-level explanation—of its concrete institutional implications. She then uses the new disciplines of institutional economics and evolutionary psychology in ways analogous to Aquinas’s use of the biopsychology of Aristotle. She does this to illustrate the meaning of covenant for what Althusius called the *symbiotics* of the family association, in other words, the hard procreative, economic, and health dependencies of marriage and family—the social realities of main concern to the law.⁷⁸

⁷¹ Ertman, *supra* note 17, at 285.

⁷² *Id.*

⁷³ FRIEDMAN, *supra* note 13, at 121.

⁷⁴ FINEMAN, AUTONOMY MYTH, *supra* note 4, at 61.

⁷⁵ FINEMAN, ILLUSION OF EQUALITY, *supra* note 20, at 128.

⁷⁶ RICHARD A. POSNER, SEX AND REASON 118 (1992).

⁷⁷ MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 9 (1993).

⁷⁸ See BRINIG, *supra* note 69, at 5–9.

The new institutional economics builds on the rational-choice view of marriage advocated by economist Gary Becker and legal theorist Richard Posner but goes beyond this perspective by turning to the institutional theories of Ronald Coase.⁷⁹ Marriage, Brinig argues, is more like a firm than a negotiated contract between individuals. A firm is an association organized to perform a specific function, achieve economies of scale, capitalize on special talents of individual participants, and relate to external parties as a collective unit. A firm is based on a prior agreement between the marital couple and the surrounding community about the purpose of the corporate unit.

Hence, a firm is something like a covenant. The agreement establishing a firm also illustrates the agreement implicit in covenants. According to Brinig: “This agreement does not purport to anticipate all future transactions among the firm members. In fact, one of the goals of the firm is the elimination of explicit interparty contracting and account keeping.”⁸⁰

The new institutional economics helps us see things in firms and marriages (especially those with children) that were overlooked by the individualistic rational-choice model of these institutions—a model that is increasingly dominating marriage law today. It helps us discern the channeling, “signaling,” and “reputational” aspects of firm-like marriages.⁸¹ The firm model enables us to notice how marriages formed by settled public commitments—covenants between husband and wife, parents and potential children, and the couple and society—develop identifiable social patterns that convey trusted information, dependable access to important goods, and valued reputations both within the marriage and between the marital couple and the wider community.⁸²

Marriages that result in children, however, are more like a particular type of firm called franchises. Franchises distribute, with predetermined covenants, access to highly valued goods, services, knowledge, and procedures.⁸³ Marriages with children are similar to franchises; the existence of the child imposes a set of responsibilities, social expectations, shared social capital, and shared histories for good or ill. Families giving birth to children, however, are different from business franchises. Business franchises can be legally

⁷⁹ R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* (1988).

⁸⁰ BRINIG, *supra* note 69, at 5.

⁸¹ *Id.* at 6.

⁸² *Id.*

⁸³ *Id.* at 7–8.

dissolved. Families with children, however, cannot be totally dissolved, even with a legal divorce. The inextricable one-flesh union of father, mother, child, their shared family history, and their social capital do not completely “disappear” when the marriage ends or the child turns eighteen.⁸⁴ Brinig points out something that the ancient “one flesh” metaphor profoundly understood: “[D]ivorcing couples never completely revert to a pre-marriage state. Nor do children leaving home entirely free themselves from their parents or siblings.”⁸⁵ Brinig’s twofold language of marriage—conveyed through a phenomenology of covenant and an institutional-economic analysis of the goods that covenants organize—leads her to assert that “marriage persists to a certain degree in spite of divorce. To the extent that it persists, the family still lives on as . . . the franchise.”⁸⁶

Brinig acknowledges that these analogies do not fully comprehend the unconditional love associated with the idea of covenant. But they amplify the implicit rationality of the covenant concept. Her contributions illustrate how religion and law can still have fruitful interaction and beneficial consequences for modern views of the family. In recent empirical research done with sociologist Steven Nock, Brinig demonstrates a social fact that should subdue pressure from some parts of law to accept and regularize fully the principle of private ordering.⁸⁷ Analysis of a nationally recognized social-science panel on families reveals that being raised by parents who are legally married is a leading indicator of child well-being when the factors of wealth, education, neighborhood, and race are controlled.⁸⁸ Brinig provides both theory and empirical evidence challenging the direction toward private ordering of much of contemporary legal theory.

Her position has many concrete implications that apply to the front door of family formation. Her view of the covenantal status of marriage, and her concept of the signaling and reputational value of legal marriage, accounts for her rejection of private ordering. In contrast to *Principles of the Law of Family Dissolution*, she believes that rendering cohabitation and marriage equivalent before the law would undermine the signaling and channeling functions of marriage. This would be a significant loss for guiding men into integrating

⁸⁴ *Id.* at 7.

⁸⁵ *Id.* at 7–8.

⁸⁶ *Id.* at 9.

⁸⁷ Margaret F. Brinig & Steven L. Nock, *Legal Status and Effects on Children* (Notre Dame Law Sch. Legal Studies Paper, No. 07-21, 2007), available at <http://ssrn.com/abstract=973826>.

⁸⁸ *Id.* (manuscript at 13–14).

their sexuality, affection for sexual partner, and commitment to children. She accepts the massive witness of tradition and the contemporary social sciences that, on average, children do much better on a host of measures of well-being when raised by their own married biological parents in a legal marriage.

Brinig contends that law should do what it can, in cooperation with other sectors of society, to encourage the marital franchise as the defining center of child-rearing. She believes that marriage can be encouraged through the law by not legally recognizing cohabitation, not protecting it except with respect to the children involved, and by increasing the social and cultural rewards of marriage.⁸⁹ She holds that it is worth taking seriously the Louisiana, Arizona, and Oklahoma experiments in “covenant marriage”—the provision offering couples both the present no-fault marriage option and marriage with higher standards of commitment, demanding more preparation as well as counseling and a waiting period before divorce.⁹⁰ Brinig rejects proposals to end the practice of joint custody in favor of a default preference for custody by the mother; she accepts social-science evidence showing that divorced fathers remain more involved with their children when awarded a role in custody.⁹¹ Joint custody provides a way for separated parents to deal with the one-flesh union, or franchise, that remains after the marriage officially ends.

Brinig does less to address explicitly the second complaint against Christian family jurisprudence—the accusation of patriarchy. She does not avail herself of the recent historical research, reviewed above, that uncovers the trajectory toward gender equality in early Christianity. Of course, as indicated already, defending Christianity is not her explicit goal. But her position at least demonstrates that covenantal marriage theory need not lead to patriarchy. Brinig is a feminist legal scholar interested in the equal treatment of women in advanced modern societies. She is a “difference feminist” who holds that equality for women can be best maintained by compensating for their special vulnerabilities and best be realized in a world where men relate to their sexual partners and offspring in legal marriage.

Brinig has no full theology of Christian marriage; that is not her purpose. A richer theology would view marriage as willed by God in creation, offer a more explicit equal-regard ethic of marital love that locates a place for self-sacrificial love within it, and articulate a theology of forgiveness so crucial for

⁸⁹ BRINIG, *supra* note 69, at 28–29.

⁹⁰ *Id.* at 29.

⁹¹ *Id.* at 193.

the renewal of marital commitment. But in Brinig's perspective, we have glimpses of a jurisprudence of marriage that meets both the rationality and equality tests of secular law. Yet it is a view that is both influenced by and broadly compatible with the integrational view of marriage so central to a Christian jurisprudence. She helps us see how Christian jurisprudence and secular family law can continue to interact fruitfully.