

## SYMPOSIUM

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### FAITH, LAW, AND LOVE: PEG BRINIG'S LEGACY

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#### INTRODUCTION

Peg Brinig is a treasure. I'm deeply honored to be here to celebrate the life and work of my dear friend and former colleague. She has touched the lives of many through her scholarship, her teaching, her friendship, and her personal example. It is fitting and proper to pay tribute and salute her many accomplishments.

Though she hardly trumpets it, Brinig is a profound scholar. She is the consummate interdisciplinarian, writing at the intersection of family law and social sciences. She is careful and measured, cautious about what the data show and what conclusions she can draw.<sup>1</sup> She is also clever, spotting exogenous variables that help to tease apart the effect of the phenomenon she is

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\* Judge, U.S. Court of Appeals for the Third Circuit; Senior Fellow, University of Pennsylvania Law School. Thanks to the *Notre Dame Law Review* for including me as the keynote speaker at this symposium and festschrift in honor of Peg Brinig. I'm grateful for the excellent research assistance of my law clerk, Zachary Enos. Thanks especially to Peg for being an outstanding colleague, mentor, and friend throughout the four years that we taught together at the University of Iowa College of Law. I remain deeply grateful and inspired by her example as a dogged scholar, a devoted mother, and a Christian who lives her faith.

Much if not most of the scholarship discussed here was coauthored. For simplicity's sake and because this is her festschrift, I will simply refer to this work as Brinig's. I intend no disrespect to her coauthors. Humble as she is, she would be the first to acknowledge her debt to others.

1 When comparing cohabitation and marriage, for instance, she reflects on a range of competing explanations and variables before pronouncing marriage better for children. MARGARET F. BRINIG, FAMILY, LAW, AND COMMUNITY: SUPPORTING THE COVENANT 15–24 (2010) [hereinafter BRINIG, FAMILY, LAW, AND COMMUNITY].

studying.<sup>2</sup> And she is innovative, using the language and tools of sociology and economics to model families.

Many of these scholarly moves are motivated by her faith. Brinig exemplifies kenotic love, striving as a scholar to pour herself out to serve her family, colleagues, community, and church. Her faith enriches her scholarship in many ways. As the late, great Bill Stuntz argued, Christianity's most important contribution to law is not moralism but humility.<sup>3</sup> That humility, a spirit of modest caution, is alas not common in the academy.<sup>4</sup> It enriches Brinig's scholarship in three ways.

First, humility fills her work with a genuine selfless love for people. People are not just economic units, but bearers of God's image, entitled to respect, care, and love. So, families are not just objects of study, but sacred relationships blessed by God, well positioned to nurture souls.

Second, humility tempers her expectations. She strives to help fallen people in our fallen world. That is the paradox of the human condition: we are all made in God's image and likeness, but fallen.<sup>5</sup> The *imago Dei* means that each person is intrinsically valuable and capable of love. But the Fall means that each of us is capable of great evil, so our passions must be restrained.<sup>6</sup> This contradiction is deep within our fallen human nature, and Brinig sees both sides of it quite clearly.<sup>7</sup>

Thus, she advocates modest steps toward realistic objectives, not grandiose ambitions for social change. She is keenly aware of her own fallibility and the limits of her own research. She is not led astray by the sirens of ideology or perfection; she seeks to improve existing arrangements rather than to tear them down.

Third, humility changes her priorities. Economists may focus on making rules better to maximize efficiency or raw freedom. But even though she deploys economic concepts and methods, she sees their limits and uses them as tools rather than ideological frameworks. She thus aims to nurture rela-

2 For example, by figuring out what apart from social decay might prompt a Catholic school to close, she managed to tease apart the independent contribution of Catholic schools to the fabric of their neighborhoods. MARGARET F. BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA* 4, 57–98 (2014).

3 William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1729, 1741–46 (2003) (reviewing *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* (Michael W. McConnell et al. eds., 2001)).

4 One notable exception is an article by Peg's late colleague John Copeland Nagle, *Humility and Environmental Law*, 10 LIBERTY U. L. REV. 335 (2016).

5 *Genesis* 1:26–27, 3:1–24.

6 This is precisely why the Founding Fathers approached the task of designing our system of government with trepidation, fully aware of man's ambitions, passions, and need for checks and balances. See, e.g., *THE FEDERALIST* NO. 51 (James Madison).

7 As Blaise Pascal wrote, "What a chimera then is man! What a novelty! What a monster, what a chaos, what a contradiction, what a prodigy! Judge of all things, imbecile worm of the earth; depositary of truth, a sink of uncertainty and error; the pride and refuse of the universe!" BLAISE PASCAL, *PASCAL'S PENSÉES* 121 (E.P. Dutton & Co., 1958) (1670).

tionships and promote a richer vision of human flourishing in community. Christianity, after all, is about the relationship between human beings and our Triune Creator, as well as our familial solidarity as children of God. Outcomes like self-esteem, social capital, educational attainment, and earnings matter, but they are secondary—proxies for what we care about most.

Modern economists sometimes lose sight of all that. They sometimes speak as if people are atomized individuals, pursuing their self-interest on their own. But Brinig is truer to the original understanding of economics. She “recognize[s] that the market system proposed by Adam Smith did not completely depend upon individual pursuit of self-interest but rather was ‘embedded’ in social relationships, which generate trust, establish expectations, and create and enforce norms.”<sup>8</sup> That is in keeping with the etymology of economics itself, a word whose Greek roots mean the science or art of managing a household.<sup>9</sup> On this classical vision, economics seeks to help households fulfill their mission of rearing and educating responsible adults.

Likewise, we lawyers tend to think in terms of rules and rights. But Christianity is not fundamentally about these juridical constructs. What matter far more in Christianity are relationships, especially our relationships with our Creator but also our relationships with one another.<sup>10</sup> We are all brothers and sisters in Christ; we are all parts of the Body of Christ.<sup>11</sup> Market metaphors risk exalting competition and selfishness, obscuring our fundamental union in relationship. Treating life as nothing more than a series of discrete exchanges serving our self-interests, she argues, destroys unconditional love.<sup>12</sup>

These insights guide Brinig’s work. Her vision of the good life depends largely on building or strengthening communities characterized by love and self-sacrifice. But communities comprise people, who start their social lives as kids. And the crown jewel of Brinig’s life work has been raising her own wonderful, healthy children and trying to help others to do the same. By healthy, she means children with a robust capacity to trust, love, and sacrifice for others.<sup>13</sup>

So the central question in Brinig’s work is how the law can help intimate associations to raise healthy kids. She pursues this theme through a variety of inquiries, ranging from parochial schools in big-city neighborhoods to covenant-marriage laws in Louisiana. Her answers depend on context, varying with how close each social actor or institution is to the process of raising children. But nearly all her recommendations seek to foster permanent, loving, involved social environments.

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8 BRINIG & GARNETT, *supra* note 2, at 113 (summarizing with approval the social-capital thinking of sociologist Mark Granovetter).

9 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1986).

10 Stuntz, *supra* note 3, at 1749.

11 1 *Corinthians* 12:12–27.

12 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 2.

13 *See id.* at 147–49.

Following Brinig's lead, I'll celebrate her work by highlighting some of the answers she offers in three different social contexts. In Part I, I'll explore her treatment of the nuclear family. The family is the base of society, the foundation of love on which everything else rests. Part II then addresses other mediating associations, ranging from extended families to churches and schools. These build bridges, connecting people and cultivating love in community. And in Part III, I'll turn to the backstop of society, the state's relationship to the family. The government is no substitute for healthy, loving families, but it can at least avoid harming them and in some ways offer support.

Finally, in Part IV, I'll show how Brinig's work adroitly puts disciplines into perspective, revealing their limits. Economics casts light on important human phenomena. But it is incomplete and sometimes loses sight of deeper human ends. Brinig's Christian faith is an important corrective, warning us against the ideological sirens that tempt us to oversimplify family life. Families succeed when they promote not just adult freedom or choice, but rich human flourishing in community. Autonomy alone is not enough; we need relationships and strong communal bonds to live together in community and rear the next generation.

## I. FAMILY: THE SOCIAL BASE OF RELATIONSHIPS

### A. *Brinig's Focus: The Central Roles of Marriage and Parenting in Raising Healthy Kids*

In studying family law, it is easy to focus on pathologies. We are fascinated (and revolted) by stories of abused and neglected kids, so the news often leads with the negative. But Brinig does the opposite. She emphasizes the positive, the institutions and practices that promote health among kids, families, and communities.<sup>14</sup> Her positive vision starts with her understanding of who children are and how they flourish.

Children, Brinig sees, are made in God's image and according to His likeness.<sup>15</sup> Their human nature includes the capacity to love and trust. That includes the fruit of those traits, like kindness and self-control.

But these capacities are seeds, not mature plants. Men are not angels, and neither (*pace* Rousseau) were their childhood selves. Because of the Fall, the consequence of sin dwells even in the heart of a child. The will is not an unerring guide; its fickle restlessness can threaten the stability we need to flourish. We need to cultivate the God-given seeds of virtue, offering plenty of warmth, light, and nutrition to help them grow. That also means that someone must be charged with regularly pulling the weeds that could choke them or cause them to grow askew.

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14 MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 1 (2000) [hereinafter BRINIG, FROM CONTRACT TO COVENANT].

15 *Genesis* 1:26–27.

The institution that does the most to socialize children is the family. As Brinig is fond of noting, the Puritans praised the family as a “little Commonwealth.”<sup>16</sup> Families are especially good at teaching kids to love, trust, and develop kindness and self-control. And those traits are the seeds of all kinds of positive social outcomes.

Brinig finds that families do best at nurturing these traits when they are permanent, full of unconditional love, and embedded in a community.<sup>17</sup> “[T]rust and unconditional love” grow out of the examples that children see: their “parents’ love for each other,” their love for their child, and the love of their religious community.<sup>18</sup> So as discussed below, she goes on to explore the love that parents share for each other and for their children.

### *B. Mothers and Fathers: Founding Permanent, Loving Marriages*

The foundation of a child’s upbringing is ideally his parents’ stable marriage. Brinig highlights and praises structures that treat marriages as institutions, not just contracts. She calls these kinds of institutions covenants.

The language of covenant reinforces the love, trust, faithfulness, and mutual sympathy that ground a solid marriage. It downplays the role of law, treating it more as a backstop. Instead, covenant language emphasizes “enforce[ment] not by law so much as by individuals and their social organizations.”<sup>19</sup> The bride, the groom, and their community understand their marriage promises as solemn oaths, with each spouse committing to the other and to the family that they are forming. These solemn oaths often draw strength from their religious provenance and our cultural traditions of loyalty, fidelity, and self-sacrifice.<sup>20</sup>

A good example of a marriage covenant is the Jewish marriage agreement, the ketubah. It is not a mere contract. Rather, it is a venerable “set of solemn promises” entered into “in front of a community of witnesses, who promise to be supportive of the couple.”<sup>21</sup> And it invokes a series of blessings, rooted in the Jewish religious tradition, which set apart the marriage bond.<sup>22</sup>

Covenants, Brinig argues, have two main advantages over contracts. First, they are permanent. They are supposed to endure the vicissitudes of life: for better or worse, for richer or poorer, in sickness and in health. Cove-

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16 BRINIG, FROM CONTRACT TO COVENANT, *supra* note 14, at 5 & 224 n.12 (citing Governor John Winthrop’s 1630 sermon “Christian Charity” preached aboard a ship in Massachusetts Bay); JIM EGAN, AUTHORIZING EXPERIENCE: REFIGURATIONS OF THE BODY POLITIC IN SEVENTEENTH-CENTURY NEW ENGLAND WRITING 75 (1999); WILLIAM GOUGE, OF DOMESTICAL DUTIES 11 (Greg Fox ed., 2006) (1622).

17 BRINIG, FROM CONTRACT TO COVENANT, *supra* note 14, at 6–7.

18 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 156.

19 BRINIG, FROM CONTRACT TO COVENANT, *supra* note 14, at 1.

20 *See id.*

21 *Id.* at 4.

22 *Id.* at 4–5.

nants are not transactional, tit-for-tat exchanges.<sup>23</sup> They signal “unconditional giving as opposed to more precise accounting,” reflecting their permanence.<sup>24</sup>

The second advantage of covenants flows from the first: permanence makes possible unconditional love. Love, especially the love fostered within established families, simply does not fit transactional models of human behavior.<sup>25</sup> “[U]nconditional love becomes rational only when relationships lose their exchange quality.”<sup>26</sup> That makes sense: haggling is neither romantic nor selfless.

Unconditional love, on the other hand, nourishes trust. Parents set safe limits to guide their children’s growth and teach them by example to grow into social, altruistic adults. Love helps to temper a child’s natural selfishness. “But in a profound sense, [children] will be less than fully human if they cannot trust and therefore cannot think beyond themselves except in strategic ways.”<sup>27</sup>

Yet treating marriages as mere contracts undercuts permanence and unconditional love. Brinig holds up prenuptial agreements as a cautionary example. Prenups undermine marriage’s permanence. As Brinig argues, “the very fact of negotiating the contract may be threatening to the relationship itself. It is unromantic to contemplate divorce and death and to haggle over a detailed agreement on the eve of a wedding, and to do so may signal undesirable qualities about one self.”<sup>28</sup>

Prenuptial agreements reflect the Holmesian bad-man theory of law, putting a price on breach, and so undercut permanence by legitimizing transience. As Brinig argues, healthy families are stable families. Extending the Tinder approach to married life, being constantly “on the lookout for better” spouses or kids, would “destroy family life.”<sup>29</sup> And a contractual damages remedy is a pale substitute; love and trust are priceless. The law should not let people contract freely for divorce, sex, or childbearing, she argues, because doing so would commodify and change the meaning of those things for the community as a whole.<sup>30</sup>

Contractual language likewise threatens unconditional love. Contracts rest on exchange, while relationships of love rest on free gifts. Contracts focus on individual economic actors, atomized and free of intimate associations.<sup>31</sup> Contracting parties seek to maximize their own self-interests. But Brinig’s empirical work finds that focusing on one’s own interests in a mar-

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23 *Id.* at 83–84.

24 *Id.* at 79.

25 *Id.*

26 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 2.

27 *Id.* at 147.

28 BRINIG, FROM CONTRACT TO COVENANT, *supra* note 14, at 39.

29 *Id.* at 3.

30 *See id.* at 9–10.

31 *See id.* at 79, 104.

riage, and keeping score, is a recipe for marital trouble.<sup>32</sup> “The successful intimate relationship,” she agrees, “is reciprocal but not contractual.”<sup>33</sup> Prenups introduce tit-for-tat thinking up front, at the start of a marriage. So Brinig argues that focusing on divorce up front makes it more likely.<sup>34</sup>

Brinig likewise favors traditional marriage over cohabitation. Cohabiting, she argues, is less stable because it lacks a shared social meaning and a permanent bond. Marriage has a rich history and an enduring social meaning. Cohabitation, by contrast, sends at best a “fuzzy signal.”<sup>35</sup> People think about it differently and decide to cohabit for very different reasons, with very different expectations.<sup>36</sup> Because cohabitation lacks a settled social meaning, it cannot glue people together as well or signal the permanence that is best for raising healthy kids.

Marriage, by contrast, is meant to be till death do us part. Because it is permanent by design, people invest more intensely in their marriages, sacrificing for the good of the family.

### C. *Parents and Children: Promoting Permanence in Parenting*

Brinig sees strong marriages as the backbone of strong families. And Brinig favors permanence in marriage to promote permanence in families. On the whole, she finds that kids do better in two-parent married homes and worse if their mothers never married.<sup>37</sup>

Brinig's careful empirical studies find that divorce is usually bad for kids. True, some marriages are unstable or full of conflict. But she reports research finding that, setting aside these cases, kids do better in unhappily married families than in divorced ones.<sup>38</sup> Unfortunately, roughly three-fifths of divorces involve minor children.<sup>39</sup> Children of divorce may suffer emotionally, lose a parent's familiar presence, have to move, and be financially worse off.<sup>40</sup> And the noncustodial parent may be depressed, lose the community's trust, and have less contact with his (or her) children.<sup>41</sup>

Of course, not all children can be raised by two stably married biological parents. Another successful way to raise children is adoption. Adoption, like marriage, signals permanence. It leaves no doubt about the status and stabil-

32 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 53.

33 *Id.* at 57 (citing Ira Mark Ellman, “Contract Thinking” Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1375 (2001)).

34 *See id.* at 14.

35 *Id.*

36 *Id.* at 12–13.

37 *Id.* at 19.

38 *Id.* at 69, 229 n.116 (citing Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1269–87 (2000)).

39 BRINIG, FROM CONTRACT TO COVENANT, *supra* note 14, at 174, 294 n.229.

40 *Id.* at 174–75.

41 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 3, 75–78.

ity of the new family.<sup>42</sup> Thus, Brinig finds, adopted children do about as well as those who stay with their biological families.<sup>43</sup>

Blended families are more complicated. The presence of stepchildren complicates remarriages, Brinig reports, more than doubling the chance of divorce.<sup>44</sup> Some stepfamilies ensure permanence by adopting their stepchildren. But except when they do, Brinig reports, a stepfather or other male figure is not as ideal as the child's biological father.<sup>45</sup> Though only a small fraction are abusive, stepfathers are more likely to abuse their stepchildren than biological fathers are to abuse their own.<sup>46</sup> And, Brinig explains, when stepfathers have new children, they tend to "favor their own biological children."<sup>47</sup>

Placing children with their other relatives also has mixed results. In the African-American community, kinship care seems to work about as well as living with a biological or adoptive parent.<sup>48</sup> But outside that context, kids cared for by their relatives are much more likely to use drugs, get into trouble, and suffer depression.<sup>49</sup>

Unfortunately, Brinig's research finds, foster care has the worst results of all. Its instability is the antithesis of permanence, which makes it much harder to nurture unconditional love. Children in foster care are most likely to use drugs, be depressed, be juvenile delinquents, and fear that they will not survive to adulthood.<sup>50</sup> These effects are two to three times as large for foster children as for those being cared for by relatives.<sup>51</sup>

Brinig is a careful empiricist, not a moralist. She never utters a word judging or condemning people whose family circumstances are less than ideal. But she does lay out the data without flinching, and the data themselves tell a powerful tale. Marriages are healthiest when they are permanent and transcend selfishness. And children do best when they have homes that are permanent and full of unconditional love. The law cannot always guarantee that; Brinig is too humble to be a social engineer. But she argues that the law can at least try to preserve and strengthen existing families or to promote forming stable new ones through adoption when old ones have failed.

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42 *Id.* at 39.

43 *Id.* at 32.

44 *Id.* at 26 ("In the early 1980s, couples with stepchildren were more than twice as likely to end their marriages in divorce.")

45 *Id.* at 19.

46 *Id.* at 25.

47 *Id.*

48 *Id.* at 32, 34–40.

49 *Id.*

50 *Id.* at 36–38.

51 *Id.* at 36–37.

## II. COMMUNITY: A SOCIAL BRIDGE OF RELATIONSHIPS THAT SUPPORT THE FAMILY

### A. *Brinig's Focus: The Social Architecture That Supports Healthy Families*

As I can attest from personal experience, raising kids is an arduous task. By comparison, parenting makes the labors of Hercules seem easy: at least his dozen labors were discrete, not a decades-long slog. And they did not involve screaming toddlers or sullen teenagers.

Nuclear families cannot do it all alone. They need help, including resources, social order, and moral instruction. A number of social institutions are well positioned to provide some of this assistance. Extended families are often a part of the solution. So are neighbors, neighborhood schools, and churches. Healthy communities trust families, lend a hand, and reinforce their stable, loving environment for raising children.<sup>52</sup> Brinig's thesis is that "good family relationships very much need larger communities to begin them right, support them, and effect necessary repairs when they founder."<sup>53</sup>

### B. *Two Factors That Help Governments and Communities to Maximize Their Support*

Families and communities interact in complex ways. First, community recognition signals and cements a family's *permanence*. That encourages parents to invest over the long term and social institutions to back them up. When parents know they are married for the long term, that knowledge gives each incentives to invest in the other and in their family life together.

Those investments tell onlookers that this marriage will last, inviting outside investment too.<sup>54</sup> "Once the community trusts that partners or parents are capable of thinking unselfishly and over the long run, it lends vital support to the marriage or parenting relationship."<sup>55</sup> That support can be financial, emotional, and spiritual. It can also include respecting a family's autonomy and privacy.<sup>56</sup>

Second, *proximity* makes community institutions more effective. In other words, they offer better support when they are very local. Neighborhood churches, for instance, are not just houses of worship but hubs of community too.<sup>57</sup> Brinig draws on Robert Putnam's finding that churches (including other houses of worship) "are arguably the single most important repository of social capital in America."<sup>58</sup> And she explains the secular social benefits of transmitting religious belief. Because "God's love is, for the believer, the model for all human unconditional love," strong religious affiliations can

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52 *Id.* at 2–3.

53 *Id.* at 98.

54 *Id.* at 24.

55 *Id.* at 98.

56 *Id.* at 97.

57 *Id.* at 107.

58 BRINIG & GARNETT, *supra* note 2, at 132 (quoting ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 66 (2000)).

strengthen a child's capacity to love and trust.<sup>59</sup> Those effects are most concrete at the local, neighborhood level, where neighbors build bonds with one another. Local churches not only wed couples, but also sustain them and their children day to day. Both clergy and fellow parishioners offer emotional, spiritual, and sometimes financial support through the ups and downs of married life.

To take another example, Brinig's empirical study of big-city Catholic schools finds that their roles are not just religious or narrowly educational, but civic as well. They are intentional communities whose mission includes forming students' characters.<sup>60</sup> Parochial schools, she finds, are often the best at teaching and modeling civic skills, community service, and political tolerance.<sup>61</sup> But why?

Brinig's answer is that parochial schools work because they are intensely local. They are deeply rooted in their communities. Students, parents, and many teachers and administrators all live and work together. They pull together for the good of their neighborhood, perhaps as an extension of their parish.<sup>62</sup> They are the hubs of hyperlocal networks, helping to generate social capital.<sup>63</sup> And because parochial schools do so within a moral framework, the respect and norms that they inculcate gradually spread from the school to the neighborhood.<sup>64</sup> If kids are likely to come across their teachers on the baseball field or grocery store, they may keep acting as they were taught to do in school.<sup>65</sup> They may also stand as beacons in poor, troubled neighborhoods, "send[ing] a symbolic message that success and order are possible."<sup>66</sup>

We ordinarily think of Catholic schools as educational institutions. But Brinig finds strong empirical evidence that they knit together communities and fight crime too.<sup>67</sup> Notably, I'm not aware of anyone who even thought to ask that question before Brinig and her coauthor Nicole Garnett did. Their joint inquiry is a good example of the value of peripheral vision, looking across disciplines like education, sociology, economics, religious studies, and criminal justice to study how they interact.

"Catholic schools," she argues, "are important, stabilizing forces in urban neighborhoods."<sup>68</sup> They keep neighborhoods cohesive. By doing that, she argues, they reduce disorder and the fear that comes with it.<sup>69</sup> And

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59 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 149.

60 BRINIG & GARNETT, *supra* note 2, at 115–16.

61 *Id.* at 133–34, 144–45.

62 *See id.* at 114–18, 130, 133–34.

63 *Id.* at 128–30.

64 *See id.* at 132–33.

65 *Cf. id.* at 134–35.

66 *Id.* at 135.

67 *Id.* at 71.

68 *Id.* at 71.

69 *Id.*

they maintain “the social capital that a community needs to organize informally to address neighborhood problems.”<sup>70</sup>

Catholic schools' stabilizing effects extend past neighborhood disorder and fear to crime control. Catholic schools in Chicago, she finds, are potent vaccines against crime. Even after controlling for many demographic factors, police beats with Catholic schools consistently have less serious crime.<sup>71</sup> Beats with charter schools, however, do not. Indeed, when a charter school takes the place of a Catholic school, crime rates go up.<sup>72</sup> The bottom line: in Chicago between 1999 and 2005, where a Catholic school closed, crime in that police beat went down more slowly than it did elsewhere.<sup>73</sup> Brinig interprets these data at least in part in terms of social capital and community solidarity. Parochial schools appear to knit together communities in ways that charter schools do not.<sup>74</sup>

### C. *Three Benefits That External Communities Offer Families*

To repeat, raising kids is hard. It is all the harder to go it alone. Communities support families in at least three important ways. First, communities offer financial support. Nowadays, we default to thinking that financial support comes from the government. But private associations play important roles too. For instance, immigrant families or communities often pool their funds to support immigrants' efforts to build small family businesses.<sup>75</sup> And private charity remains a safety net for families who fall on hard times.

Second, communities offer emotional and spiritual support. The road of family life is bumpy, pockmarked with stress and frustrations. Networks of friends and extended families let spouses and parents vent. They share not only joys but also sorrows, reminding them that this too shall pass. And when disputes erupt, these networks can mediate disputes, resolving them well short of divorce or a lawsuit.<sup>76</sup> So a thick web of social capital serves as a safety net, catching and supporting families that fall on hard times.

Religious communities play a big role here. Faith builds children's capacity to trust, modeling how we should love one another and stressing selfless love's spiritual dimension.<sup>77</sup> And religious tradition teaches children to respect and support their parents, building bonds across generations.<sup>78</sup>

Third, communities draw lines, protecting a space for family privacy and autonomy. When a family falters or falls apart, it is good to have supports

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 92.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 86.

<sup>74</sup> *See id.* at 130–35.

<sup>75</sup> BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 100–01.

<sup>76</sup> *Id.* at 101–04.

<sup>77</sup> *See id.* at 156.

<sup>78</sup> *Id.* at 107. Think, for instance, of the Commandment: “Honour thy father and thy mother . . . .” *Exodus* 20:12. (Catholics number this the Fourth Commandment; Jews, Protestants, and Orthodox Christians count it as the Fifth.)

and fallbacks. These concentric circles of support have stakes in the health of a family and can offer first aid. But as long as spouses and parents are doing their jobs, Brinig argues, neither nosy neighbors nor extended kin nor bureaucrats get to meddle. Thus, she resists letting lawsuits and third-party rights “interfere and dilute the effectiveness of the parenting done by fit parents.”<sup>79</sup> Outsiders can set good examples and try to teach parents and persuade them. But healthy community members also understand that their role is circumscribed, protecting families’ freedom and intimate bonds.

### III. THE STATE: A SOCIAL BACKSTOP FOR WHEN FAMILIES FALTER

#### A. *Brinig’s Focus: Strengthening Family Ties, Not Just Empowering Adults*

So Brinig argues that the law can help create a sanctuary for family intimacy. And that intimacy helps families raise healthy kids. Kids, she argues, reap the biggest benefits from stable marriages. But our law has been so focused on liberating adults, she explains, that it has too often forgotten about collateral damage to kids and communities.<sup>80</sup>

The state, she contends, can help families raise healthy kids by making families more permanent. The state can do so by helping to make families more permanent on the front end and to slow divorce on the back end. And the state can stop crowding out the sort of community involvement that families need to raise healthy kids.

#### B. *Promoting and Protecting Permanence*

Brinig is not a reactionary. She knows that no-fault divorce is here to stay. But even though we cannot turn back the clock, she argues that we can take modest steps to make marriages more permanent.<sup>81</sup> Though it is hardly omnipotent, she notes that the law can influence for the better both marriage formation and dissolution.

On marriage formation, Brinig’s instinct mirrors the Hippocratic oath: first, do no harm.<sup>82</sup> The law should retain its historic privileges for marriage and adopt policies that protect communities so that they can support marriage.<sup>83</sup> Academic radicals complain that privileging married couples is

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79 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 141. For a thoughtful article by one of Peg’s colleagues developing the same point, see Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1875–82 (2001) (discussing *Troxel v. Granville*, 530 U.S. 57 (2000), and other Supreme Court cases).

80 BRINIG, FROM CONTRACT TO COVENANT, *supra* note 14, at 8.

81 See BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 87.

82 See *id.* at 19–20.

83 For example, tax law could not only reduce the marriage penalty, but also support family-building activities like elder care. *Id.* at 256–57 n.154. And tuition vouchers, charitable tax deductions, and tax exemptions for church property can preserve the distinctive social contributions made by religious institutions and parochial education. *Id.* at 149–50.

unfair to cohabiters.<sup>84</sup> Some would even abolish it as a special legal status. But it is perilous to chip away at the cornerstone of our society, she argues, especially when doing so imperils our kids.<sup>85</sup> In the same vein, the American Law Institute suggests treating cohabitation like marriage.<sup>86</sup> But Brinig fears that doing so would discourage couples from marrying.<sup>87</sup>

The law can also go further, offering the option of more stable forms of marriage. Brinig is fascinated by Louisiana's (and Arizona's) opt-in alternative of covenant marriage. Many commentators fear that any more restrictive law may be oppressive.<sup>88</sup> But Brinig highlights the potential benefits of precommitment. Covenant marriage, she suggests, may signal greater permanence, inviting more trust, investment, and external support.<sup>89</sup>

On the back end, Brinig would slow down divorce, to make it more reflective. She has no quarrel with the fraction of divorces that end for concrete causes like adultery, desertion, or cruelty. But that is only a fraction: in Virginia, for instance, only six percent of all divorces result from cruelty.<sup>90</sup> Most divorces are no-fault.

Brinig would tweak no-fault divorce to protect children. For instance, she would consider making "some sort of real counseling effort" a prerequisite.<sup>91</sup> The birth of children would, she suggests, trigger waiting periods before no-fault divorce.<sup>92</sup> And she would encourage formal efforts to mediate family conflicts, like those of Navajo peacemakers.<sup>93</sup>

Most importantly, Brinig argues that child-custody rules need reform. Current custody rules, she explains, create incentives to file for divorce. More than two-thirds of divorces are filed by women.<sup>94</sup> Her empirical work finds that "they probably do so because they expect to receive physical custody of their children."<sup>95</sup> In our society, the primary caretakers of children are wives. So when they divorce, judges most often award them primary custody.

Women do so rationally. They may have less power within a marriage and less than complete control over child-rearing decisions. By filing for divorce, she reasons, many women increase their relative power and share of custody, as well as improve their opportunities after divorce.<sup>96</sup> Custody rules

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84 See *id.* at 20.

85 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 21, 24.

86 *Id.* at 10.

87 See *id.* at 12–13.

88 BRINIG, FROM CONTRACT TO COVENANT, *supra* note 14, at 29–34.

89 *Id.* at 32–34.

90 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 1, at 87.

91 *Id.* at 20.

92 *Id.*

93 *Id.* at 203.

94 *Id.* at 81.

95 *Id.* at 80.

96 *Id.* at 81.

are often winner take all, preferring the primary caretaker—in practice, usually the mother.<sup>97</sup>

Indeed, custody laws can make divorce rational for some women, even when it risks harming their children. But Brinig once again puts children's welfare front and center, asking how custody law can avoid encouraging divorce. Thus, she advocates custody rules in divorce that track caretaking roles in marriage. "Physical custody arrangements should not force children to be nomads, and continuity of living situations should be encouraged."<sup>98</sup> The law should also guard against letting one parent use custody as a weapon against the other, for instance to reduce child support or get back at the ex-spouse.<sup>99</sup>

#### IV. PUTTING DISCIPLINES IN THEIR PLACE

One of Brinig's broader contributions is her appreciation of both the value and the limits of academic disciplines. She is an adept and careful economist: she identifies all the relevant variables, has a keen eye for exogenous shocks, and patiently considers a range of causal hypotheses. She is appropriately humble and restrained about what the data can and cannot tell us, clearly separating her descriptive and analytical work from the thoughtful prescriptions she draws from it. She is likewise well read and careful in her uses of sociology and feminism to understand family and communal life. Each gives us part of the puzzle.

But her appreciation of the limits of these fields is important too. Economists understand human actions as rational displays of self-interest. But they risk confusing means with ends. Brinig understands that self-interest is but a means to the greater end of happiness. That is not simply pleasure as we think of it, but human flourishing, the *eudaimonia* of Aristotle and the Declaration of Independence. Self-interest may cast light on how people choose to marry and divorce. Analogies to firms and franchises work, to a point. But the primary goods that families create transcend mere efficiency and self-worth.

Healthy families strive to teach their kids to love, trust, and sacrifice themselves for others. Economics presupposes a sort of egoism, but families thrive on altruism. You can't TaskRabbit parenting; it's not that sort of monetizable good. Putting a price on bearing or raising a child cheapens that rich experience. Our everyday lives teach us that love, intimacy, and romance die when they are reduced to self-interested transactions. Reducing the family to a series of transactions obscures its primary end: raising healthy and happy kids.

Brinig sees that people, made in God's image, must be treated as ends in themselves. And she understands that our end is to find happiness through adoption into the family of God. By living for others in families and finding

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97 See *id.* at 87.

98 *Id.* at 202.

99 *Id.*

the strength to shrug off the inevitable frustrations of marriage and parenting, we give of ourselves, die to ourselves, and are reborn as the loving children of God whom our Creator made us to be. Freedom does not mean isolating us in our own fickle wills but letting us join together in secure families where we can flourish in community. Egoism may seem more instinctive in our fallen world, but martyrdom to self is our true calling. And Brinig understands that calling. Indeed, she is living it out.

#### CONCLUSION

Peg Brinig has been a beacon to many around her: to her colleagues (like me), her students, and especially her own kids and grandkids. She lives her faith, giving humbly of herself and touching the lives of many around her. And she exemplifies the scholarly virtues: honesty, humility, persistence, scrupulous care, and principled concern. We will miss her. But she leaves behind an impressive body of research on how to build healthy communities and support families. We will always treasure her friendship and her deep commitment to building stable, permanent families to help raise healthy kids. God bless you, Peg.

