

THE INSTITUTIONAL ECONOMICS OF MARRIAGE:  
A REINTERPRETATION OF MARGARET  
BRINIG'S CONTRIBUTION TO FAMILY LAW

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*Margaret (Peg) Brinig has made a massive contribution to family law over the course of the past thirty-five years. Spanning the two fields of economics and law, her views have evolved over time to ones that see family as a matter of covenant. The concept of a covenant is mostly unknown in the modern secular world and is absent in economics. Without (hopefully) changing Brinig's meaning, I reinterpret her work and argue that her concept of a covenant is equivalent to the economist's understanding of an institution. The goal of reinterpreting her work in light of institutional economics is to make it more accessible to economists and to provide additional transaction-cost insight into why a covenant is so important.*

*If all the world and love were young,  
And truth in every shepherd's tongue,  
These pretty pleasures might me move  
To live with thee and be thy love.*

—Sir Walter Raleigh, “The Nymph’s Reply to the Shepherd”<sup>1</sup>

INTRODUCTION

Some thirty years ago I presented a paper on household bargaining at a law-and-economics conference in a city I can no longer remember. From the start I was hounded by a law school dean who thought that marriage was a patriarchal trap to victimize women, in which no bargaining was possible. At one point the dean said, “And what exactly would a wife have to bargain with?” Motivated by a petty desire to annoy the dean, I replied, “Well, she

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<sup>1</sup> Sir Walter Raleigh, *The Nymph’s Reply to the Shepherd*, in *THE NORTON ANTHOLOGY OF POETRY* 105 (Alexander W. Allison et al. eds., 3d ed. 1983). Peg Brinig had a knack for finding appropriate movie dialogue and song lyrics for titles and opening quotes. I hope she approves of Raleigh’s realistic response to the opportunistic shepherd interested in cohabitation with benefits.

could offer her husband more sex.” The anticipated apoplectic response was enjoyable in the moment, but the session quickly deteriorated.

Following my talk, a woman approached me and said, “Hi, I’m Peg Brinig. What if the wife wanted to have sex more than the husband?” I thought to myself, “Here is an academic woman after my own heart!” Peg Brinig had heard my remark, but rather than take offense her mind grasped the economics of the application and considered a comparative static test. The use of sex as a bargaining chip for the wife required sex to be valued by the husband at the margin; therefore, what would the effect on bargaining be in cases where the marginal value of sex was higher for the wife?

Her question generated two wonderful effects for me. First, it led to one of the most enjoyable research experiences I have ever had. Within thirty minutes of her first question, we realized that (a) the demand for sex between men and women is likely different given our biological differences, (b) this difference in the demand for sex might also vary between men and women over the life cycle, and (c) this could lead to a changing bargaining-power dynamic that might explain some puzzling stylized facts about divorce—for example, why did wives seem so vulnerable to divorce in the middle years of a marriage? By the time my plane later landed in Vancouver, I had the basic model worked out with about eight testable implications, mostly relying on differences in age between the husband and wife. Peg Brinig quickly produced a wonderful data set based on Virginia divorce court records that contained the spousal ages, and the estimations testing our model so strongly confirmed it that one colleague thought we had discovered some type of accounting identity related to relative age. Our paper, *Sex, Property Rights, and Divorce*, remains one of my all-time favorites, even though it was rejected multiple times and remains relatively uncited.<sup>2</sup> The second long-run effect of our first meeting was a lasting friendship and six subsequent works on various issues in the family<sup>3</sup> (including Peg Brinig’s most-cited<sup>4</sup> paper).

Peg Brinig’s scholarship is the culmination of several pathways. She was initially trained as a lawyer and has spent her entire career in law schools; it is natural—and probably correct—to think of her as a lawyer first. However, I

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2 Douglas W. Allen & Margaret Brinig, *Sex, Property Rights, and Divorce*, 5 EUR. J.L. & ECON. 211 (1998). According to Google Scholar, the paper has only 42 citations.

3 See Douglas W. Allen & Margaret Brinig, *Child Support Guidelines and Divorce Incentives*, 32 INT’L REV. L. & ECON. 309 (2012); Douglas W. Allen & Margaret F. Brinig, *Child Support Guidelines: The Good, the Bad, and the Ugly*, 45 FAM. L.Q. 135 (2011); Douglas W. Allen & Margaret Brinig, *Do Joint Parenting Laws Make Any Difference?*, 8 J. EMPIRICAL LEGAL STUD. 304 (2011) [hereinafter Allen & Brinig, *Joint Parenting Laws*]; Allen & Brinig, *Sex, Property Rights, and Divorce*, *supra* note 2; Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: A Reply, 4 AM. L. & ECON. REV. 376 (2002); Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: Why Most Divorce Filers Are Women, 2 AM. L. & ECON. REV. 126 (2000) [hereinafter Brinig & Allen, “*These Boots Are Made for Walking*”].

4 According to Google Scholar, Brinig & Allen, “*These Boots Are Made for Walking*,” *supra* note 3, has 233 citations.

met her after she had completed her PhD in economics, and whether that training fundamentally changed her or whether she was always a natural economic thinker, I have always thought of her as an economist who just happens to be in a law school. Her subsequent path to becoming both an academic research economist and a legal scholar was unconventional. She initially started at George Mason when it was mostly a teaching law school that did not require faculty to produce academic research. She then started a PhD relatively late in life and within an eclectic department. As time passed, Peg Brinig worked not only with pure economists like me but also with sociologist Steven Nock and other social scientists.<sup>5</sup> Finally, Peg Brinig has a deep and sincere Catholic faith, which along with her life experience, has shaped her view of marriage.

As a result of these disparate influences, her theoretical worldview has never fit neatly into a conventional box, and to make matters more complicated it has evolved over time. As a fan, I would claim that Peg Brinig's scholarship has at least four characteristics. First, her work is highly original and not derivative of any one mentor's influence. Second, her legal writings almost always have an economic foundation, but one that may not be recognized by lawyers or mainstream economists. Third, her work always contains real-world examples that range from song lyrics to hard data that point to puzzles or test theories. And finally, her work is often couched in a vocabulary and terminology that is almost unique to Peg Brinig (e.g., "covenant").<sup>6</sup>

On the one hand, these features make Peg Brinig's work interesting, convincing, and important. But on the other hand, they also limit the audience and influence of her work. In this Essay I want to slightly recast the ideas of Peg Brinig solely in terms of the ideas and language of institutional economics.<sup>7</sup> There are several advantages in doing this. First, although Peg Brinig has written on multiple elements of the family (marriage, divorce, children, elders, etc.), most of the time her language is distinctly legal with complementary ideas drawn from economics, political science, sociology, and social-norms literatures. This can give the impression of an ad hoc bundling, when in fact, the entire package can be understood through the broad

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5 See, e.g., Margaret Brinig & Steven Nock, *Covenant and Contract*, 12 REGENT U. L. REV. 9 (1999); Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403 (2004) [hereinafter Brinig & Nock, *Marry Me, Bill*]; Margaret F. Brinig & Steven L. Nock, *What Does Covenant Mean for Relationships?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137 (2004) [hereinafter Brinig & Nock, *What Does Covenant Mean*].

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

7 This is not as radical as it might sound. At one time, this framework was called "the economics of property rights," "transaction cost economics," "new institutional economics," or "law and economics." For a host of reasons, these handles have generally been abandoned and replaced by "institutional economics." Peg Brinig herself often notes that she uses ideas from the field of institutional economics. See, e.g., MARGARET F. BRINIG, FAMILY, LAW, AND COMMUNITY: SUPPORTING THE COVENANT 199–200 (2010) [hereinafter BRINIG, FAMILY, LAW, AND COMMUNITY].

lens of institutional economics. Second, explicitly articulating the ideas of institutional economics in a general way may help legal scholars recognize the powerful platform that is available for understanding the law. Finally, a slight translation will help economists understand the work of Peg Brinig and recognize how specific knowledge of legal relationships can complement theoretical economic arguments.

Thus, I will begin with a brief summary of both the Becker and institutional approaches to the family in order to establish a baseline. Then I will go through the theoretical ideas of Peg Brinig to show that she is an institutional economist at the core—even in cases where she has explicitly denied it.<sup>8</sup> I will attempt to do this without recasting Peg Brinig in my image and in the hope of showing that Peg Brinig’s combination of family knowledge (based on personal experience, broad reading, exposure to various types of data, and understanding of family law) and economic understanding makes her work original, convincing, and meaningful.

## I. THE TWO TYPES OF “ECONOMICS OF THE FAMILY”

*Time drives the flocks from field to fold  
When rivers rage and rocks grow cold . . . .*

*The flowers do fade, and wanton fields,  
To wayward winter reckoning yields . . . .*<sup>9</sup>

### A. *The Becker Model*

Coincidentally, Peg Brinig graduated from law school and began teaching at the George Mason Law School right around the time when the great Chicago economist Gary Becker published his first work on the theory of marriage.<sup>10</sup> For Becker, the household was a place where men and women combined their time and market goods to produce household commodities.<sup>11</sup> Within the context of household production, couples matched based on their production complementarities, and their relative shares of the commodities produced were determined in a “marriage market” that maximized the total household production across all households.<sup>12</sup> It was a revolution-

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8 Peg Brinig has written a tremendous volume of material over her career—over eighty articles, twelve books, and several book chapters. I will not comment upon or use her purely legal commentary, nor her pure empirical papers. Also, I will mostly ignore her fine work on elder abuse and the role of zoning in creating elder accommodation, which is also mostly empirical.

9 Raleigh, *supra* note 1, at 105.

10 Becker’s first article on the theory of marriage was published in 1973. See Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813 (1973). Brinig graduated from Seton Hall’s Law School in 1973 and began teaching at George Mason’s Law School in 1975. Becker went on to publish *A Treatise on the Family*, which Brinig credits as the watershed for serious theoretical work on family law. See Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083, 1084.

11 See Becker, *supra* note 10, at 816.

12 *Id.* at 823–25.

ary theory at the time and a major leap forward in the use of economic tools in understanding “nonmarket” behavior. In terms of explaining the number of marriages and divorces, the labor supply of women, household specialization, and the relative returns/bargaining power of husbands and wives, it was also quite successful.

The original Becker model of the family is essentially an application of the perfectly competitive neoclassical model of markets to the household. Ironically, the model rests on several assumptions that turned out to be quite inapplicable to the family.<sup>13</sup> In particular, the neoclassical model assumes that information is free regarding all of the elements of the family, and therefore, members of the household know perfectly all of their household production attributes, all of the attributes of others, all utilities and production possibilities of any possible matching of males and females, and all prices that come from the marriage market.<sup>14</sup> Furthermore, utility generated within the family is completely monetized and therefore transferable within the household, which means that lump-sum transfers can be made across individuals within the household to induce family members to behave optimally in specific ways.<sup>15</sup> Finally, the perfect-information assumption means that there is never any bargaining, cheating, shirking, abuse, violence, neglect, or other type of “dissipating” bad behavior in any family relationship.<sup>16</sup> Prices solve all problems, and the actual “rules” or institutional contexts of marriage are irrelevant.

Not too surprisingly, with her personal knowledge of the law and how real marriages function, Peg Brinig has never been a fan of this approach to the family. As late as 2015 she stated:

The neoclassical economics system assumes that individuals, acting on the basis of rational self-interest, will acquire the “perfect” knowledge needed to make decisions, that individuals will respond rationally to changes in “price,” that distributional consequences can be ignored in setting laws since losses can be made up through taxes and transfer payments, and that it is enough that parties theoretically could compensate third parties for their losses out of the gains from choices they make. *None of these assumptions holds particularly true in the complex systems of families . . .*<sup>17</sup>

Peg Brinig has always been interested in “the family” and “marriage” per se. She sees these as “complex systems,” which is another way of stating they are “institutions.” The Becker model is not a model of institutions, but rather a model of production and cohabitation. Peg Brinig has never denied that households produce commodities like meals, childcare, and shelter; how-

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13 Harold Demsetz, *R.H. Coase and the Neoclassical Model of the Economic System*, 54 J.L. & ECON. S7, S7 (2011).

14 *See id.* at S7, S11.

15 *See* Becker, *supra* note 10, at 816.

16 *See id.* at 823.

17 Margaret F. Brinig, *Result Inequality in Family Law*, 49 AKRON L. REV. 471, 471 (2016) (emphasis added) (footnote omitted) [hereinafter Brinig, *Result Inequality*].

ever, her entire body of work on the family demonstrates that they are not *sufficient* conditions for a family or marriage.

When reading Peg Brinig's work one often comes across pejorative mentions of "the rational actor," "rationality," "narrow self-interest," or "rational self-interest."<sup>18</sup> She does not mean that marriage or its participants are irrational, but rather she is referring to models based on the basic Becker framework. For example, consider:

In the end, public policy favors laws set up to maximize behavior that is not profit-maximizing in the financial sense (even though housework may increase GNP and maximize gains from specialization and efficiencies of scale). This thought itself drives noneconomists crazy with Becker's theory. Family law relationships follow the public policy of behavior that is not necessarily profit-maximizing. In my view, couple relationships seem most "efficient" when they produce intimacy, and parenting relationships seem most efficient when they allow children to flourish.<sup>19</sup>

A simple reading of this passage implies that Peg Brinig recommends abandoning the most fundamental idea in economics (maximization). However, her real meaning is that the family can only be understood within the context of wealth *broadly understood*.<sup>20</sup> Merely considering the dollar values, the explicit market goods, or other financial benefits produced by a family is inappropriate and misleading.

The Becker model, like most competitive models, does well explaining quantities, production, and prices, but Peg Brinig has never been too interested in these questions. Her interests lie in *how* the quantities (the children, the division of labor, etc.) or the prices (the shares of parenting time and household goods) of the family are organized and put together, and how they can be put together in a way that makes family members happy.<sup>21</sup> The neoclassical model of Becker turns out to be literally useless in explaining

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18 See, e.g., Margaret F. Brinig, *In Search of Prince Charming*, 4 J. GENDER, RACE & JUST. 321, 325 n.28 (2001) (discussing "rationality" of human beings); Brinig, *Result Inequality*, *supra* note 17, at 471 (discussing "rational self-interest"); Margaret F. Brinig, *The Role of Socioeconomics in Teaching Family Law*, 41 SAN DIEGO L. REV. 177, 178 (2004) [hereinafter Brinig, *The Role of Socioeconomics*] (discussing "the rational actor" and "narrow self-interest"); Brinig & Nock, *What Does Covenant Mean*, *supra* note 5, at 154 (discussing "rational self-interest").

19 Margaret F. Brinig, *"Money Can't Buy Me Love": A Contrast Between Damages in Family Law and Contract*, 27 J. CORP. L. 567, 596-97 (2002) [hereinafter Brinig, *"Money Can't Buy Me Love"*] (footnotes omitted).

20 By my reading, this is also what Peg Brinig means by her frequent references to "socioeconomics": economics applied to more than financial transactions and where utility cannot be costlessly monetized. See Brinig, *The Role of Socioeconomics*, *supra* note 18; Margaret F. Brinig & Steven L. Nock, *"I Only Want Trust": Norms, Trust, and Autonomy*, 32 J. SOCIO-ECON. 471, 471-72, 484-85 (2003) [hereinafter Brinig & Nock, *"I Only Want Trust"*].

21 See, e.g., Margaret F. Brinig, *The Influence of Marvin v. Marvin on Housework During Marriage*, 76 NOTRE DAME L. REV. 1311, 1324-25 (2001) [hereinafter Brinig, *The Influence of Marvin v. Marvin*] ("If men and women were truly equal, they would not so much specialize, but rather, share household and market work. Both husband and wife would participate in the marketplace to the extent that this made them happy. Both would participate

any element of the *organization* of the household; that is, it is useless in understanding the institutions of “marriage” or the “family.”

### B. *The Institutional Model*

Ronald Coase, another Chicago Nobel Prize–winning economist, would rescue the economics of the family, even though he never wrote directly on the subject. Coase made two major contributions to economics. The first was to show that when “transaction costs” were zero, then the allocation of resources was independent of the allocation of “property rights.”<sup>22</sup> This is known as the “Coase Theorem,” and despite the controversy around it, it is logically coherent when the proper definitions of transaction costs and property rights are used.<sup>23</sup>

It is the Coase Theorem that provides the theoretical reason for the inability of the neoclassical (Becker) model to explain any organizational issue related to the family. That model, with its perfect information assumption, implicitly assumes zero transaction costs.<sup>24</sup> Given this, any type of family operating under any institutional arrangement achieves a first-best outcome; and therefore the arrangement is irrelevant. Furthermore, perfect competition in this environment means that the total value of all marriages is maximized.<sup>25</sup> Changes to any type of institutional constraint have no impact on any family because the same efficient wealth-maximizing allocation is achieved by the appropriate transfer payments.<sup>26</sup> But, if any type of family produces the same set of family outcomes, then “family” does not matter: family law, family and community norms, private deals between spouses, and

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in child rearing and in any other household tasks for which the market did not provide a satisfactory substitute.” (footnotes omitted)).

22 See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 10 (1960).

23 The key to understanding Coase is to understand the relationship between transaction costs and “economic property rights.” Legal scholars hear the term “property rights” and immediately think of “property,” “property law,” or “legal property.” The Coase Theorem, however, rests on a conception of property rights devised by Alchian as “a socially enforced right to select uses of an economic good.” Armen A. Alchian, *Property Rights*, in THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 1031, 1031 (Eatwell et al. eds., 1987); see also Armen A. Alchian, *Some Economics of Property Rights*, 30 IL POLITICO 816, 817 (1965) (discussing property rights as the “rights of individuals to the use of resources” that most individuals want enforced). The connection between these types of rights and Coase’s concept of transaction costs was first suggested by STEVEN N.S. CHEUNG, THE THEORY OF SHARE TENANCY 16–29, 79–87 (1969); and then later developed in Douglas W. Allen, *What Are Transaction Costs?*, 14 RES. L. & ECON. 1, 3–4 (1991); and Douglas W. Allen, *The Coase Theorem: Coherent, Logical, and Not Disproved*, 11 J. INSTITUTIONAL ECON. 379, 379–80 (2015) [hereinafter Allen, *The Coase Theorem*]. Transaction costs are *the costs of enforcing and maintaining these economic property rights*, and therefore the two ideas are different sides of the same coin. Allen, *What Are Transaction Costs?*, *supra*, at 3.

24 See generally Becker, *supra* note 10.

25 *Id.* at 825.

26 See, e.g., Gary S. Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141, 1170 (1977) (regarding divorce).

specific family customs or social capital investments do not matter.<sup>27</sup> To put this another way, an economic model based on neoclassical (Becker) principles cannot explain anything about the nature of marriage or the family. Due to Coase, we understand that the Becker model is not a model of marriage, but rather is just a model of household production.<sup>28</sup>

Coase's second major contribution was the idea that all forms of organizations, whether simple (like a contract) or complicated (like an institution) are created, designed, or evolving to maximize wealth (broadly interpreted!) net of the transaction costs.<sup>29</sup> Thus, the organizations, norms, rules, and laws (institutions) observed, though not perfect, are human attempts to constrain the bad behaviors of individuals in an effort to achieve some social purpose. This provides a powerful engine for thinking about marriage and the family. For economists in this Coasean tradition, marriage is an institution to control and mitigate the bad behaviors of family members within the context of procreation and the distribution of wealth within the household.<sup>30</sup>

Ironically, early economists working on marriage assumed that the transaction costs involved in the family were likely small because husbands and wives lived in close proximity to each other.<sup>31</sup> However, work by Peg Brinig and others has shown that the transaction costs surrounding cohabitation and procreation are enormous and many. As noted above, Brinig and I found that evolving differences in the demand for sex between men and women change the relative bargaining power over the course of a marriage and therefore alters the ability to bargain (which is a method of establishing rights to the gains from the marriage).<sup>32</sup> Cohen was the first of many to note the specific sunk investments made by wives in the production of children, and how this type of investment led to marriage rents that could be exploited by husbands.<sup>33</sup>

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27 As ridiculous as this sounds to anyone who has lived within a family, the Coase Theorem element of the Becker model is actually deeply entrenched in the modern secular world. For example, no-fault divorce was a "silent revolution" mostly due to the belief that divorce law would have no effect on divorce rates or marriage behavior. Douglas W. Allen, *No-Fault Divorce in Canada: Its Cause and Effect*, 37 J. ECON. BEHAV. & ORG. 129, 129 (1998). The switch in law only amounted to a switch in rights, which would not influence the optimal matching of couples. Likewise, in the current debate over the welfare of children in same-sex versus opposite-sex homes, the popular wisdom is Coasean: the type of family is independent of the welfare of children.

28 In a Becker model it does not matter if the members are married or cohabitating, whether there are two spouses or twenty, or whether the couple is of opposite- or same-sex attraction. See generally Becker, *supra* note 10.

29 See Allen, *The Coase Theorem*, *supra* note 23, at 382–83.

30 See, e.g., Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage*, 29 HARV. J.L. & PUB. POL'Y 949, 955–58 (2006).

31 See, e.g., Becker et al., *supra* note 26; H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986)

32 Allen & Brinig, *Sex, Property Rights, and Divorce*, *supra* note 2, at 227–28.

33 See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 287–89 (1987).

In both of these cases biology tends to work against women, but this is not always the case. Cuckolding—where a married woman engages in casual sex with another male in order to “breed up” and improve the genetic quality and future possibilities of her children at the expense of her husband—is a transaction-cost problem for men. Assortative mating is a well-known outcome of marriage matching where similar-quality men and women match with each other. In this context a low-quality woman is unable to compete for a high-quality male husband in the marriage “market.” However, she can marry a comparable low-quality husband and bear the children of the high-quality male by committing adultery with the latter and leaving the raising of the children up to the lower-quality male. All of this is possible because paternity is not known with certainty. High monitoring costs between husbands and wives prevents any type of bargaining solution to this problem.

Transaction-cost problems arise in marriage out of differences in physical size and aggression that can be the basis for violence and abuse. They can arise out of the public-good nature of children and other household assets that make divisions difficult. Transaction costs can arise out of government failures to enforce family laws of support or the unenforceability of promises made within a marriage union. As I will point out below, one of Peg Brinig’s major contributions to family law has been her articulation of many subtle transaction-cost situations that arise out of distributing the benefits of marriage, violating trust between spouses, and trying to make the procreative and parenting aspects of the family into matters of “unconditional love.”<sup>34</sup>

Within the context of institutional economics, an institution is a set of nonphysical, created constraints (norms, laws, beliefs, and organizations; not mountains, time, or income) that shape human behavior in order to solve one or more social problems.<sup>35</sup> Thus, marriage is a creation that is intended to mitigate the bad transaction-cost behaviors of spouses and other family members in the process of procreation and parenting in order to generate a sufficiently sized future generation to perpetuate society.<sup>36</sup> Under this view, marriage is more than just the formal laws regulating entry, exit, and sexual behavior; marriage is a set of constraints that include community and religious norms and formal rules, private orderings of the couple, peer pressures from friends and social connections, and intergenerational constraints by other family members.

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34 See Margaret F. Brinig, *Domestic Partnership: Missing the Target?*, 4 J.L. & FAM. STUD. 19, 22 (2002) [hereinafter Brinig, *Domestic Partnership*].

35 See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

36 Peg Brinig would say that God, not humans, created and sanctified marriage, but the distinction makes little difference for understanding why there is marriage. This is because biblical marriage, after the fall of man, is still a set of constraints designed to mitigate bad behavior. Speaking in reference to divorce Jesus said, “Because of the hardness of your hearts he wrote you this commandment.” *Mark* 10:5. In Heaven there is no marriage because there is no sin. Thus, whether we view marriage as created by man or God, it is an institution designed to deal with fallen, selfish humans.

Regardless of how Peg Brinig frames her arguments, they all fit within this framework. Although this will be demonstrated throughout this Essay, consider one of her most famous works: exploring why large diamond engagement rings arose in the 1930s and 1940s.<sup>37</sup> Prior to this time most common-law jurisdictions had “breach of promise to marry” laws.<sup>38</sup> A man who proposed marriage, and then later backed out, could be sued. The result was either damages paid to the woman, or a forced marriage. Since loss of virginity was not uncommon during the engagement, a failed engagement meant poorer future marriage prospects for the woman. When the laws were removed, the future groom posted a performance bond in the form of a diamond ring. As the value of virginity fell over time, so did the size of diamond, other things held constant.<sup>39</sup>

This explanation for the rise and fall of diamond engagement rings rests on a transaction-cost problem. The engaged couple are sexually attracted to each other, and a loss of virginity a few weeks before a wedding has the benefit of reducing stress on the big day. However, the cost of sex is not equal, and there is the possibility that after intercourse the man will renege. The law and ring are two methods of reducing this type of moral hazard behavior. As substitutes, when one solution was lost, the other filled in. In a world of perfect information, there would have been no concept of breach of promise to marry and no need for engagement rings as a bonding device.<sup>40</sup>

Peg Brinig was not formally trained within the Coasean school of thought, but her ground-level knowledge of actual transaction-cost constraints faced by various members of the family, her awareness of the information asymmetries that exist between people in intimate relationships, and her economic intuition that households are made up of fallen, greedy people, have allowed her to make significant theoretical and empirical contributions to the understanding of the family as an institution. Peg Brinig’s work is characterized by realistic frameworks for understanding marriage, coupled

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37 See Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203 (1990).

38 See *id.* at 204.

39 See *id.* at 204–05, 211–13.

40 The institutional theory stands in sharp contrast to the “soulmate” matching models often found in economics, or the “patriarchy to exploit women” feminist models found in law and elsewhere. At the same time, the institutional approach is able to absorb some of the key ideas in these other theories. For example, the transaction costs that can arise in the matching of one couple might be much different than with another. Hence, match quality depends on who matches with whom, and institutional rules can be created to encourage the right matches on transaction-cost grounds. See generally Douglas W. Allen, “What Does She See in Him?": *The Effect of Sharing on the Choice of Spouse*, 30 ECON. INQUIRY 57 (1992). Likewise, in a general institutional approach to the family, everyone is trying to exploit everyone else (children vs. parents, one sibling vs. another, wife vs. husband, elders vs. adults), and there is no single aggressor type (i.e., father) or victim type (i.e., mother). Furthermore, an institutional model of marriage lacks the assumption of massive collusion by sex that is implicitly assumed in many feminist models of the family, based on the concept of patriarchy.

with empirical work that either investigates the assumptions of her framework or (more often) tests the implications of that framework.

Thus, Peg Brinig interprets marriage as a solution to a set of transaction-cost problems that mostly stem from biological differences between men and women within the context of producing and raising successful children. As such, she is generally positive and optimistic about the institution.<sup>41</sup> She is not a Pollyanna, however, and recognizes that marriage, like all institutions, can fail. In such cases, the question is again, what can other institutions do better under the circumstances faced by those involved? As a result, much of Peg Brinig's work is within the context of divorce, abuse, and other types of family breakdown.

## II. MARGARET BRINIG ON FAMILY

*A honey tongue, a heart of gall,  
Is fancy's spring, but sorrow's fall.*

*Thy gowns, thy shoes, thy beds of roses,  
Thy cap, thy kirtle, and thy posies  
Soon break, soon wither, soon forgotten—  
In folly ripe, in season rotten.*<sup>42</sup>

### A. Marriage

In some sense, everything Peg Brinig has written is grounded in the idea of marriage; marriage is the cornerstone of the family, and cohabitation, divorce, custody, and support are manifestations of some type of marriage failure. This Section, however, deals with her explicit work on marriage. Although Peg Brinig's understanding of marriage has evolved over time, it was always institutional at some level. In contrast, her views have never been Beckerian, purely contractual, nor feminist. Peg Brinig ultimately came to see marriage as a "covenant," something historically designed to protect the interests of those involved, particularly mothers and children. Like most of

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41 Consider this list of promarriage policy recommendations:

[L]aw and public policy, as an instrument of law, should encourage and support marriage, particularly marriages that last. . . . Law can encourage official family relationships in part merely by leaving well enough alone—by *not* adopting domestic partnership laws that equate unmarried, cohabiting couples with those that are married, and by *not* getting rid of special "privileges" enjoyed by the married when academics clamor that such benefits are not fair. Law ought also to make pre-marriage counseling and skills building more attractive and affordable, as some states have done through lower license costs, and make some sort of real counseling effort requisite to divorces on non-fault grounds, as the covenant marriage movement suggests. Laws can be written to require mutual consent for divorce, or to become two-tier on the birth of children, so that the waiting period for no-fault separation divorce lengthens.

Margaret F. Brinig & Steven L. Nock, *Legal Status and Effects on Children*, 5 U. ST. THOMAS L.J. 548, 550 (2008) (footnote omitted).

42 Raleigh, *supra* note 1, at 105–06.

her work, Peg Brinig's writings on marriage are characterized by three features: a core fundamental idea or theory of marriage, the idea that individuals respond to incentives, and comparative static predictions that are often tested with various types of data.

In the late 1980s it was common for economists to speak of marriage as a "contract."<sup>43</sup> The intention behind this was to get at the idea that marriage contained elements of voluntary exchange and negotiation, and it could therefore be analyzed with economic tools.<sup>44</sup>

In some of her earliest work Peg Brinig also referred to marriage as a contract, but always with some sort of qualifier.<sup>45</sup> For example, in 1994, Brinig wrote that "this article . . . describes the nuclear family as a relational contract with infinite horizons."<sup>46</sup> In 1995, she wrote that "[m]arriage represents a (long-term) legal contract,"<sup>47</sup> and in 2008 she described her article as "compar[ing] two sets of contracts that are structurally and contextually similar. They originate in two quite different fields, however: the commercial arena and the family."<sup>48</sup>

Thus, even in Brinig's earliest references, marriage is not a mere short-term contract between two people. It is long-term and involves multiple parties. For Peg Brinig, the contract metaphor is useful in discussing specific aspects of marriage like courtship, adoption, fraud, and divorce.<sup>49</sup> But even in the mid-1990s, Peg Brinig saw shortcomings:

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43 In economics this idea started with Cheung in his explanation of Chinese foot binding. See generally Steven N.S. Cheung, *The Enforcement of Property Rights in Children, and the Marriage Contract*, 82 *ECON. J.* 641 (1972). Cheung, and most economists who followed his path, used this term in contrast to "price" and the predilection of economists to monetize all values and assume allocation was through a "Walrasian auctioneer" or "invisible hand." See *id.*; Cohen, *supra* note 33. Eventually, however, many economists came to take this metaphor literally.

44 In the 1980s and 1990s, I always described marriage as a "contract." It was not until I was editing a volume on marriage—*IT TAKES TWO: THE FAMILY IN LAW AND FINANCE* (Douglas W. Allen & John Richards eds., 1999)—that I was confronted by a family lawyer named Don Moir (recommended by Peg Brinig) on the inappropriateness of this metaphor.

45 In perhaps her earliest paper on marriage, Brinig, writing with June Carbone, uses the contract metaphor to its fullest extent. Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 *TUL. L. REV.* 855 (1988). The paper reevaluates the situation of wives after the introduction of no-fault divorce in light of Lenore Weitzman's (incorrect) 1985 finding that divorce financially benefitted husbands and hurt wives. See *id.* at 870 n.68, 891; see also LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 339 (1985). In this context, Brinig and Carbone use the contractual notion of a "reliance interest" in an effort to protect wives and their property. Brinig & Carbone, *supra*, at 870–82. Likewise, in a 1994 article, Brinig sees the relationship between adult children and their aging parents within the context of an implicit contract. See Margaret F. Brinig, *Finite Horizons: The American Family*, 2 *INT'L J. CHILD. RTS.* 293, 296–313 (1994) [hereinafter Brinig, *Finite Horizons*].

46 Brinig, *Finite Horizons*, *supra* note 45, at 296.

47 Margaret F. Brinig & Michael V. Alexeev, *Fraud in Courtship: Annulment and Divorce*, 2 *EUR. J.L. ECON.* 45, 45 (1995).

48 Margaret F. Brinig, *Are All Contracts Alike?*, 43 *WAKE FOREST L. REV.* 533, 533 (2008).

49 For example:

[D]ragging contract law from its usual commercial context into family law has serious drawbacks. The most obvious drawback is that contract law is virtually useless for treating love, trust, faithfulness, and sympathy, which more than any other terms describe the essentials of family. The second problem is that contract law implies the possibility of breach. When a better deal comes along, it may be more appropriate to breach, pay damages, and recontract with an inviting third party. However, when people are involved, particularly children, paying damages doesn't really compensate. One's affections are not and, normatively speaking, should not be readily transferable.<sup>50</sup>

Notice the reasons for the failure of contracts to solve problems in families.<sup>51</sup> Trust, faithfulness, and breach are transaction-cost problems that result from asymmetric information.<sup>52</sup> Love, sympathy, and affection are goods produced in families that, along with children and parenting, are *not* produced in the market because of transaction costs like measurement and enforcement costs. At the heart of a contract are ideas and language of exchange, specialization, measurement, and accounting. But families, for all of the trading that takes place within them, are mostly arranged without prices, and the language of successful families is one of gift and sacrifice over scorekeeping and accounting. Likewise, because affection is *not* transferable, a family dictator cannot make lump-sum transfers within the family to always induce first-best efficient behavior. Nor can others outside the family cooperate and trade with it to produce love, affection, and well-parented children. There are substitutes, but since the time of Sparta no daycare has ever matched the parenting effectiveness of two biological parents.<sup>53</sup> As noted,

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Divorce can be described as an occasion of breach, dissolution of the marriage contract, or a contract terminable at will. A dissolving marriage seems like any other failed enterprise but involves problems that go beyond the simple dissolution of a relationship. Like a sliding house of cards, a dissolving marriage includes numerous other agreements made in the expectation that the relationship would continue.

Brinig, *"Money Can't Buy Me Love," supra* note 19, at 587 (footnotes omitted). For similar sentiments see Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393, 397–98 [hereinafter Brinig, *The Family Franchise*].

50 Brinig, *The Family Franchise, supra* note 49, at 397–98 (footnotes omitted).

51 Brinig also notes the information problem in parents' contracting with children who do not yet exist. See Brinig, *Finite Horizons, supra* note 45, at 296.

52 Trust is a major concept in Peg Brinig's work, and one that grows over time. Her 2010 book revolves around trust and culminates her thoughts on the subject. See generally BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7. Organizations outside the immediate family (churches, states, offices, schools, etc.) trust married parents and deliver services to them. See *id.* at 9–10. Married parents also trust each other. See *id.* at 69. In all contexts the trust is created to mitigate direct transaction costs like measurement and monitoring. See *id.* at 2.

53 See Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households*, 11 REV. ECON. HOUSEHOLD 635 (2013); Douglas W. Allen et al., *Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld*, 50 DEMOGRAPHY 955 (2013); Robert K. Fleck & F. Andrew Hanssen, *"Rulers Ruled by Women": An Economic Analysis of the Rise and Fall of Women's Rights in Ancient Sparta*, 10 ECON. GOVERNANCE 221 (2009).

the reason comes down to transaction costs, and in implicitly recognizing this, Peg Brinig is implicitly using the Coasean institutional framework in her rejection of the contract metaphor.

Not only has Peg Brinig argued that the contractual notion of marriage is incomplete, but she has also argued that its direct implications are potentially destructive to marriage. For example, contractual theories of an “exchange relationship” equate marriage to domestic partnerships where scores are kept, debts are remembered, and suitcases are half-packed, leading to a lack of permanence and unconditional love.<sup>54</sup> In normal circumstances contracts can be breached, renegotiated, and reentered with little disruption to trade. However, in families, affection (utility) is seldom transferable, compensation for breach often impossible, and contracting behavior usually disruptive to successful family living. Rather, families “do not operate either as a ‘nexus of contracts’ or under continued pressure to sue if there is a breach. Large outstanding balances are encouraged, while faith in the other person and in the marriage keeps the marriage ‘business’ running . . . .”<sup>55</sup>

Peg Brinig has noted that contracting behavior “destroys family life.”<sup>56</sup> That is, anyone who tried to conduct a family along commercial lines, who kept score cards over who has done what and owes how much to others, would end up with a failed family, and this type of “exchange relationship is distinctly not the world of families that law ought to be interested in protecting.”<sup>57</sup> Over time, the contractual element of marriage has taken a backseat to Peg Brinig’s notion of marriage as a “covenant,” and perhaps this idea was fully developed in *What Does Covenant Mean for Relationships?*<sup>58</sup>

In Peg Brinig’s opinion, a covenant is an arrangement that is permanent, is characterized by unconditional love, involves the witness of God and/or community, and carries on even after the formal legal elements of marriage become nonbinding.<sup>59</sup> Given the definition above, a covenant is a type of *institution*: a complicated collection of formal and informal expectations, norms, laws, and other constraints that work together to influence the way family members interact with one another. Like other institutions, the family covenant is not constant over time, nor across jurisdictions. The family institution depends on formal legal rules, and so different jurisdictions can change the family, for better or for worse. Likewise, family, community, and general economic circumstances can influence the optimal family institution, and so families can vary (again for better or worse) across these

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54 See Brinig, *Domestic Partnership*, *supra* note 34, at 22–23.

55 Brinig, “*Money Can’t Buy Me Love*,” *supra* note 19, at 590.

56 Brinig, *The Family Franchise*, *supra* note 49, at 398.

57 Brinig, *Domestic Partnership*, *supra* note 34, at 23.

58 See generally Brinig & Nock, *What Does Covenant Mean*, *supra* note 5.

59 *Id.* at 139–40. “Covenant is a concept that takes us beyond contract.” Brinig & Nock, *Covenant and Contract*, *supra* note 5, at 25. Hence, after children are emancipated from their parents on reaching the age of majority, or support potentially terminates on divorce, the family continues to bind the actions of its members, encourage investments in personal relationships, and allocate resources.

dimensions. And families existed before the law and continue to exist after the law is no longer binding on family members. An institution is designed to solve social problems, and in Peg Brinig's eyes, the marriage covenant does just this; it aspires to good marriages, good parenting, and loving and happy relationships that extend beyond the nuclear family. A covenant, therefore, is an institutional foundation that generates loving, functional, and productive relationships within and across generations.<sup>60</sup>

It is difficult to understate how different this view of the family is from secular, feminist, or traditional economic notions of marriage. As noted, within the Becker approach marriage is little more than a matching game based on exogenous complementarities within a household production framework. Modern secular views are very similar, with marriage being nothing more than a celebration affirming the discovery of a soulmate. And feminists, with their Marxist notions of patriarchy and exploitation, see little positive in the institution.

Loving relationships under the covenant view, however, are not exogenous outcomes that depend on the matching of soulmates. Successful families are not a matter of the luck of the draw. Rather, they are *outcomes* of the endogenous choices made by family members subject to the constraints of the institutional environment of the covenant. Thus, Peg Brinig states:

For families, I would argue that the usual economic limitations of efficiency are too narrow. In my view, couple relationships seem most "efficient" when they produce intimacy, and parenting relationships are most "efficient" when they allow children to flourish. How does a family develop this efficiency? To get to the "efficient" or in my view "covenantal" relationship, you first need permanence or at least a very long time horizon.<sup>61</sup>

Here we see that the covenant is based on wealth broadly defined (intimacy, flourishing relationships); it is created in light of the selfish motivations of its individual members (concern for efficiency); these loving behaviors are the *outcomes* of the covenant and not the foundation; and the covenant is based on institutional details (permanence or a long time horizon: "until death").<sup>62</sup>

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60 Thus, when Nock and Brinig state that "covenant is faith that is not based on rationality," they do not mean that it is irrational. Brinig & Nock, *Covenant and Contract*, *supra* note 5, at 26. As with the language Brinig used to write about the Becker model, this language indicates that covenant is a constraint, in the same way an institution is a constraint. No individuals would constrain themselves in this way on their own. In this very private, self-centered sense, the covenant or institution is not based on narrow rationality.

61 Brinig, *Domestic Partnership*, *supra* note 34, at 22 (footnotes omitted).

62 Peg Brinig's concept of covenant marriage has been articulated by her in religious terms as well. Brinig and Nock explicitly note the biblical origins of the covenant. See Brinig & Nock, *What Does Covenant Mean*, *supra* note 5, at 137. The idea of "becoming one" is a means of eliminating transaction costs in a relationship. Once again, the economic notion of an institution fits well here because economics is a description of the "natural man" found in the Bible.

This view of marriage is quite Coasean and heavily related to the economic view of institutions.<sup>63</sup>

Peg Brinig's economic training shows up in two further ways in her analysis of marriage. Given her theory of marriage as a covenant, she naturally understands that changes to any element of this covenant will lead to predictable changes in behavior. More importantly, to the extent that these changes are driven by other false theories of marriage, the outcomes are likely to be unanticipated and unsuccessful.

In several pieces of her scholarship, Peg Brinig makes the general case that court decisions from the 1960s onward often placed the concept of individual rights related to contraception, privacy, pursuit of happiness, and support above the institution of marriage.<sup>64</sup> Children as well became "individuals" outside the institution of marriage, and the family was defined in terms of spouse income level, degree of "equality," and function.<sup>65</sup> As a result, alternative arrangements (divorce, cohabitation, single parenthood, and same-sex marriage) became legitimate substitutes for marriage, and the rise of divorce, cohabitation, and children out of wedlock were predictable outcomes.<sup>66</sup>

Peg Brinig was one of the first people to point out that the actual outcomes of legal changes were often the opposite of what was intended.<sup>67</sup> No-fault divorce did not create a "clean break" and simply free dead marriages to terminate; it encouraged viable marriages to end, placed mothers and children at risk, and removed the concept of permanence from marriage.<sup>68</sup> Increases in welfare payments through the Aid to Families with Dependent Children (AFDC) program based on marital status and the number of children encouraged increases in single parenthood through unwed births.<sup>69</sup> Naïve attempts to make marriage more "equal" ended up being destructive to families.<sup>70</sup>

A common feature of Peg Brinig's understanding of the need for the institution of marriage is the reality that men and women are different—biologically, emotionally, and in terms of preferences and constraints. Gender in Peg Brinig's view is not fundamentally a matter of social construct, and

63 Although Peg Brinig occasionally cites Coase, her background and training were not explicitly in this tradition.

64 Allen & Brinig, *Child Support Guidelines and Divorce Incentives*, *supra* note 3; Allen & Brinig, *Joint Parenting Laws*, *supra* note 3; Margaret F. Brinig, *The Supreme Court's Impact on Marriage, 1967–90*, 41 *How. L.J.* 271, 286–87 (1998) [hereinafter Brinig, *The Supreme Court's Impact*]; June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 *TUL. L. REV.* 953, 960–61 (1991) [hereinafter Carbone & Brinig, *Rethinking Marriage*].

65 See Brinig, *The Supreme Court's Impact*, *supra* note 64, at 271, 280.

66 See *id.* at 280–81.

67 See Brinig, *Finite Horizons*, *supra* note 45, at 315.

68 Carbone & Brinig, *Rethinking Marriage*, *supra* note 64, at 958–59, 985 n.148.

69 Margaret F. Brinig & F.H. Buckley, *The Price of Virtue*, 98 *PUB. CHOICE* 111, 125 (1999).

70 See Allen & Brinig, *Child Support Guidelines and Divorce Incentives*, *supra* note 3, at 309.

to ignore this fact in altering the marriage covenant is to risk having negative outcomes.<sup>71</sup> On the one hand, biological differences allow husbands and wives to complement each other in the production of procreation and parenting. On the other hand, it is this difference and the fact that individuals have selfish interests that drives the need for a covenant to produce good family outcomes.<sup>72</sup> A well-defined marriage institution is one that mitigates the bad behaviors of the individuals in light of these differences to produce a joint outcome that benefits both family members and society at large.

Peg Brinig is an applied economist in that she always seeks to test her theories of the family. Her early ingenious paper *Rings and Promises* is an exemplar of this approach.<sup>73</sup> The paper is extremely clever in applying the concept of a sunk investment in a diamond ring as a bonding mechanism to act as a substitute for breach of promise laws.<sup>74</sup> It uses an observable change in a legal constraint as a testable explanation for the rise of diamond engagement rings, as opposed to an untestable (but common) explanation based on changing tastes.<sup>75</sup> And finally she uses both sophisticated econometrics on quantitative diamond data and a test on changing mores on virginity over time to test her idea.<sup>76</sup>

Throughout Peg Brinig's work on marriage the same methodology is used time and again: in the context of annulments,<sup>77</sup> out-of-wedlock births,<sup>78</sup> sexual behaviors,<sup>79</sup> domestic partnerships,<sup>80</sup> cohabitation,<sup>81</sup> covenant marriage,<sup>82</sup> and adoption.<sup>83</sup>

71 This idea is found throughout Peg Brinig's work. See, e.g., Allen & Brinig, *Sex, Property Rights, and Divorce*, *supra* note 2, at 211–12 (noting differences in sex drives over the lifecycle); Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 311 (2001) (noting differences in earning capacities) [hereinafter Brinig, *Feminism and Child Custody*]; Brinig, *In Search of Prince Charming*, *supra* note 18, at 325–26 (same); Brinig, *Rings and Promises*, *supra* note 37, at 205 (noting differences in expectations of virginity); Brinig, *The Influence of Marvin v. Marvin*, *supra* note 21, at 1316–17 (noting differences in ability to benefit from marriage); Carbone & Brinig, *Rethinking Marriage*, *supra* note 64, at 969–70 (identifying economic and cultural pressures that make motherhood a defining component of a woman's life).

72 See Brinig, *Domestic Partnership*, *supra* note 34, at 22–23.

73 Brinig, *Rings and Promises*, *supra* note 37.

74 *Id.* at 213.

75 *Id.* at 211–13.

76 *Id.*

77 Brinig & Alexeev, *supra* note 47, at 46–48, 51–54.

78 Brinig & Buckley, *The Price of Virtue*, *supra* note 69, at 115–21.

79 Allen & Brinig, *Sex, Property Rights, and Divorce*, *supra* note 2, at 217–18.

80 Brinig, *Domestic Partnership*, *supra* note 34, at 24–31.

81 Brinig & Nock, *Marry Me, Bill*, *supra* note 5, at 408–09.

82 Brinig & Nock, *What Does Covenant Mean*, *supra* note 5, at 137.

83 Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137, 142–43 (2009) [hereinafter Brinig & Nock, *One-Size-Fits-All*].

### B. Divorce

In the mid-1980s the conventional economic wisdom on divorce was that laws regulating divorce should have no long-run (or even short-run) impacts on the divorce rate.<sup>84</sup> Two influential papers made this case. The first was by Gary Becker, Elisabeth Landes, and Robert Michael in which the Coase Theorem was applied to the movement from fault to no-fault divorce.<sup>85</sup> The paper first noted that the change in law amounted to a change in the underlying control over the decision to divorce; that is, no-fault grounds made divorce unilateral rather than mutual, and this was equivalent to a “transfer of rights” from the one who least wanted a divorce to the one who most wanted it.<sup>86</sup> Becker, Landes, and Michael then argued that under the assumption that bargaining between spouses was costless, the law should have been neutral vis-à-vis the divorce decision because only inefficient marriages divorce, and these marriages are independent of the law.<sup>87</sup> Next, Becker’s student Elizabeth Peters published the first empirical paper using a large national data set, which seemed to show that there was no statistical or meaningful difference in divorce rates between no-fault states and fault states.<sup>88</sup> Together, these impressive papers had a large impact on the way average economists think about the long-run impacts of no-fault divorce.

One way to think about all of Peg Brinig’s work in the area of divorce is that she has demonstrated from multiple angles why divorce is deeply not “Coasean.”<sup>89</sup> That is, Peg Brinig shows repeatedly that changes in divorce laws have real consequences and are not always bargained around to a point of neutrality. One also sees in her work on divorce a similar evolution in her thinking about the institution of marriage and the nature of transaction

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84 At the time, no economist had thought beyond the consequences of changes in divorce grounds on the divorce rate. Since the models at the time were exclusively based on Becker, the only variable of choice was “quantity,” which only took on two values: the number of marriages and the numbers of divorces.

85 Becker et al., *supra* note 26, at 1144.

86 *See id.* I have argued that this is a misapplication of Coase. Douglas W. Allen, *Marriage and Divorce: Comment*, 82 AM. ECON. REV. 679, 679 (1992); Allen, *The Coase Theorem*, *supra* note 23, at 379–80. A common qualification is to state that the Coase Theorem holds if wealth is held constant. However, with zero transaction costs a transfer of rights must be accompanied by a compensation for the loss of rights, otherwise a theft has taken place and transaction costs could not have been zero. In the case of no-fault divorce, individuals who married prior to the change did so with the expectation that their marriage could not end without their consent. No-fault divorce took this right away without compensation. This is prima facie evidence that the legal change did not take place in a zero-transaction-cost environment, and therefore, the Coase Theorem does not apply.

87 Becker et al., *supra* note 26, at 1144–45. This line of reasoning—that the quality of a marriage was exogenous to the law—was common at the time. *See, e.g.*, THE REPORT OF A GROUP APPOINTED BY THE ARCHBISHOP OF CANTERBURY, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY 5, 9–12 (1966).

88 Peters, *supra* note 31, at 446, 452–53.

89 It should be pointed out that Coase would entirely agree with Peg Brinig on this point, and from personal conversations with him, I know that he was almost repulsed by the idea that marriage could be characterized as a “low-transaction-cost” environment.

costs. Her early work often examined narrow contractual elements of divorce where transaction costs were little more than legal fees. Later, Peg Brinig understood marriage as a covenant or institution, which led to nuanced divorce proceedings and difficulties in making simple predictions about the effects of changes in family law because the family is a multidimensional institution.

In a number of papers, Peg Brinig and her coauthors examined the effect of introducing no-fault divorce. In the first, Brinig and Michael Alexeev showed that bargaining over marital assets and child custody in a no-fault regime depends also on the statutes on custody, the rationale for alimony, and the rules of property division.<sup>90</sup> By examining the bargaining outcomes in two states with different default positions (Wisconsin and Virginia), they showed that the outcomes were different, including the incentives to bargain or litigate.<sup>91</sup> In a second paper, Brinig and Steven Crafton examined what happened when fault provisions were removed from property and support as well as the grounds and found that there was more abuse and bad behavior.<sup>92</sup> Brinig and F.H. Buckley argued that true “no fault” was a situation where fault was removed from the grounds for divorce as well as from property and custody decisions.<sup>93</sup> This led to a new way of classifying “no-fault states” for empirical work<sup>94</sup> and showed that divorce rates were higher in no-fault states (confirming the earlier findings of *Marriage and Divorce: Comment*).<sup>95</sup> All three of these papers showed directly and indirectly that the naïve Becker approach to divorce was wrong. Because marriage is a covenant (institution) designed to mitigate *positive* transaction-cost behavior, changes in the elements of this covenant (e.g., divorce laws), must necessarily have real consequences.

In terms of divorce mediation, Peg Brinig’s views have changed over time, mostly driven by her empirical findings. In 1995, Peg Brinig realized that the move to no-fault divorce had “energized the divorce mediation movement,” and wondered if this might hurt wives who, out of risk aversion or altruism, would trade off marital assets to assure child custody.<sup>96</sup> She concluded that there was no imbalance of power on these dimensions, and speculated that mediation might help in the divorce procedures.<sup>97</sup>

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90 See Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transactions Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279, 281–82 (1993).

91 *Id.* at 290–92.

92 See Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 892–95 (1994).

93 Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT’L REV. L. & ECON. 325, 327–28 (1998).

94 *Id.* at 328.

95 *Id.* at 339; see Allen, *Marriage and Divorce: Comment*, *supra* note 86, at 679.

96 Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1, 2, 4–6 (1995).

97 *Id.* at 6. She concluded:

Overall, I conclude that a divorce mediator must be conscious of power imbalances brought about by the difference in men’s and women’s earning

Peg Brinig has examined divorce settlements (“unhappy contracts” in her words), perhaps more than any other scholar. She has found repeated examples of divorce-bargaining-breakdown that generally violate the Becker notion of costless trade and do not seem to depend on the usual suspect of variables used to explain such breakdown (e.g., unequal wealth between spouses). This led her to explore the importance of *trust* in marriage. Trust, in Peg Brinig’s eyes, is a form of capital—an asset that yields service over time. Trust is a type of quasi-social capital that involves one’s spouse, but also the law, the community, and sacred elements.<sup>98</sup>

In my opinion, Peg Brinig came to her idea of trust in an attempt to understand asymmetries in the way men and women approached both marriage and divorce. Consider her own words:

For the last several years, I have noticed a puzzling phenomenon in American marriage and divorce. American women primarily file for divorce, even though they all too frequently end up in poverty following marital dissolution. Yet women are also the prime motivators in getting married as opposed to staying in less binding relationships.

Assuming that people are not systematically fooled, I have thought of two possible reasons that explain why both of these observations might hold true. One deals with payoffs from marriage that differ between men and women. The other pertains to different views of courtship and their implications on married life.<sup>99</sup>

For Peg Brinig, men and women think and approach courtship differently, and this influences differences in expectations and behavior during marriage.<sup>100</sup> Furthermore, men and women generate value from marriage differently, and these values often depend on social and community norms.<sup>101</sup>

These norms, in turn, depend on the behaviors and legal living arrangements of the couple. These features can make bargaining appear unstable. For example, a husband who offers his wife dollars to perform more housework may find that his wife no longer considers herself a “wife,” and the same

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power and by physical abuse if present in the relationship. Given this awareness, mediation remains a fair, as well as an inexpensive and time-saving, process for marriage dissolution. There is nothing inherent in being a woman that precludes a successful mediation of marital problems.

*Id.* What is interesting here is that Peg Brinig is implicitly directing the mediator to be aware of situations of high transaction costs, cases where one party has more “power” and might be able to “steal” from the other. In this context, the mediator is a mitigator of transaction costs.

98 See BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 2; Margaret F. Brinig, *Belonging and Trust: Divorce and Social Capital*, 25 *BYU J. PUB. L.* 271, 271–72 (2011) [hereinafter Brinig, *Belonging and Trust*]; Brinig & Nock, “*I Only Want Trust*,” *supra* note 20, at 473–74.

99 Brinig, *In Search of Prince Charming*, *supra* note 18, at 325–26 (footnotes omitted).

100 *Id.* at 325–30, 332–33, 336.

101 For example, Peg Brinig argues that the variance in marriage payoffs are higher for women. *Id.* at 326–28. Likewise, because men receive more social benefits from marriage, they can benefit from an unhappy marriage, while women need happiness within the marriage to benefit from marriage goods. *Id.*

husband might find that his social status as a father changes significantly when he becomes a “noncustodial” parent. Both examples point to the fact that the observable aspects of a marriage seen by social scientists are not sufficient for understanding divorce behavior.<sup>102</sup> For Peg Brinig, to understand the values that husbands and wives place on their marriages, one must understand the complicated nature of trust that is working behind the scenes.<sup>103</sup>

Brinig has explored some consequences of trust in her work.<sup>104</sup> When trust is broken, the values of the various marital assets (the home, the children, the lifestyle) all change and change differently for husband and wife.<sup>105</sup> Furthermore, they change for the custodial versus noncustodial parent.<sup>106</sup> This means that divorce bargaining is fundamentally different from bargaining over other assets and is likely never lacking passion (at least for one side). Recognizing the role of trust in determining value helps explain why equal work duties around the home (a feminist goal for stability) is not that stabilizing.<sup>107</sup> Rather, it is the appreciation given to unequal duties that generates trust that encourages stability.<sup>108</sup> Likewise, recognizing the role of trust explains why noncustodial parents (mostly fathers) suffer depression from the loss of trust social capital normally given by the community at large.<sup>109</sup>

All of Peg Brinig’s work on divorce is complementary to her institutional work on marriage. Her divorce work points to the institutional character of marriage: the role of norms, beliefs, and rules in mitigating bad behavior.<sup>110</sup> She has found and explored the interesting puzzle of why bargaining at divorce often breaks down and why wives so often seek divorce even though they are financially hurt by it.<sup>111</sup> And she has shown the problems that can arise when the law tries to impose simple, but ultimately nonimplementable, solutions to the problem of marriage breakdown.<sup>112</sup>

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102 Peg Brinig’s views on trust also point to more examples where she recognizes differences in men and women that are hardwired, and not social constructs. See Brinig & Nock, “*I Only Want Trust*,” *supra* note 20, at 473–85. In *These Boots Are Made for Walking*, we found that the best explanation for differences in filing behavior was the nature of the marital asset being split at divorce. Brinig & Allen, “*These Boots Are Made for Walking*,” *supra* note 3, at 158. When children were at stake, wives were much more likely to file in an effort to establish sole custody. *Id.* at 155–56. This reflects the fact that divorce drastically lowers the value of children for fathers. See *id.* at 133. On the other hand, the opposite happens when the financial assets are the major marital good being split. *Id.* at 131–36.

103 See Brinig & Nock, “*I Only Want Trust*,” *supra* note 20, at 484–85.

104 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 2; Brinig, *Belonging and Trust*, *supra* note 98, at 271–72; Brinig & Nock, “*I Only Want Trust*,” *supra* note 20, at 484–85.

105 See Brinig & Nock, “*I Only Want Trust*,” *supra* note 20, at 471–73.

106 See BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 72–74.

107 *Id.* at 53.

108 *Id.* at 53–57.

109 Brinig & Nock, “*I Only Want Trust*,” *supra* note 20, at 484–85.

110 See, e.g., BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 9–15.

111 Brinig & Allen, “*These Boots Are Made for Walking*,” *supra* note 3, at 126–27.

112 See, e.g., BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 125–26.

### C. Children

One of the fundamental ideas in the early Beckerian economic view of the family is that children do not matter. Parents, if they love their children, take the utility of their children into account in making their decisions.<sup>113</sup> Parents also can transfer wealth from one family member to another and can thus internalize any bad behavior being conducted by rotten children.<sup>114</sup> The result of this is that it is sufficient to model the family from the viewpoint of a single head of the household and ignore the fact that families are made up of several individuals, each interested in their own ends.

Such a view of the family is antithetical to Peg Brinig's understanding. Because family members live in the real world where information is not perfect, others' utility functions unknown, transfers of wealth are costly, and generally the allocation of rights matter—the rotten-kid theorem does not hold.<sup>115</sup> Sometimes the worst forms of behavior can take place inside a family, and sometimes the family is not the best institution for solving family problems.

As I have stated, Peg Brinig sees the family as an institution—as a covenant, a set of constraints that depend on the law as well as private and social norms, expectations, and beliefs.<sup>116</sup> Social institutions are created for social benefits, and Peg Brinig would hold that this benefit is mainly children.<sup>117</sup> Every society needs to produce enough children of a sufficient quality in order to survive, and this is the ultimate reason for the existence of marriage as the heart of the family. What makes Peg Brinig's writings on children slightly different is that she considers the happiness of children to be a major marker of success. For example, consider: "If our system had all of the money in the world, I would wish to spend it to guarantee happy, healthy children";<sup>118</sup> "The best world allows a child to grow to adulthood with biological parents, or at least one parent, who love the child unconditionally and who have resources to support the child";<sup>119</sup> and "I am also not one to 'abandon children to their "rights"' or otherwise suggest that children should fend for themselves without their parents' help. For me, a childhood without the

113 See Becker et al., *supra* note 26, at 1141–45.

114 See *id.* at 1144–45.

115 See Allen, *Marriage and Divorce: Comment*, *supra* note 86, at 684

116 See BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 16.

117 See Margaret F. Brinig, *Moving Toward a First-Best World: Minnesota's Position on Multiethnic Adoptions*, 28 WM. MITCHELL L. REV. 553, 553 (2001) [hereinafter Brinig, *A First-Best World*]. Peg Brinig may consider herself some type of "feminist," but in my opinion her belief in the idea that marriage is coupled with children, that this relationship naturally leads to gender roles based on biological differences, and that marriage is an institutional (covenant) way to protect women, makes her not a stereotypical feminist scholar. See BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 19; Carbone & Brinig, *Rethinking Marriage*, *supra* note 64, at 1006–07.

118 Margaret F. Brinig, *Promoting Children's Interests Through a Responsible Research Agenda*, 14 U. FLA. J.L. & PUB. POL'Y 137, 137 (2003) [hereinafter Brinig, *Promoting Children's Interests*].

119 Brinig, *A First-Best World*, *supra* note 117, at 553.

nurturing environment of loving parents (or at least one parent) is dismal.”<sup>120</sup>

Of course, the way to achieve this is through covenant marriage: “I have argued elsewhere that child flourishing depends upon parental autonomy and involvement of the community (though not as rights-holders). Children do best when they, and their parents, see their relationships as permanent.”<sup>121</sup>

Peg Brinig is a strong believer in the traditional nuclear family, and some of her empirical research has shown that children, on average, perform best in life when they are raised by their biological parents.<sup>122</sup> However, most of Peg Brinig’s research on children focuses on the issue of what should be done when this type of family is not possible, or, if possible, dysfunctional and dangerous to children.

This line of research comes in two forms. In one stream, Peg Brinig and her coauthors have examined what factors influence when a child will be abused or neglected.<sup>123</sup> In the other, Peg Brinig and coauthors have examined alternatives to the family such as adoption and kin care.<sup>124</sup> Generally speaking, Peg Brinig has argued that when the traditional family fails, adoption is the best substitute because adoption best mimics the traditional biological family.<sup>125</sup>

Adoption mostly places children in a family where marriage is present, and therefore, where trust social capital is present and able to grow.<sup>126</sup> Adoptive parents have the full support of legal parenthood, and they are

120 Margaret F. Brinig, *From Family to Individual and Back Again*, 51 *How. L.J.* 1, 13 (2007) (footnote omitted) (quoting Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights,”* 1976 *BYU L. REV.* 605, 607).

121 Brinig, *Feminism and Child Custody*, *supra* note 71, at 319 (footnotes omitted).

122 See BRINIG, *FAMILY, LAW, AND COMMUNITY*, *supra* note 7, at 24 (“I am convinced that the children ought to do better when parents have legal responsibility for each other and all the other benefits and obligations of marriage.”); Brinig, *A First-Best World*, *supra* note 117, at 553.

123 See, e.g., Margaret F. Brinig, *Explaining Abuse of the Disabled Child*, 46 *FAM. L.Q.* 269, 269 (2012); Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 *IND. L.J.* 393, 405, 423 (1998) [hereinafter Brinig & Buckley, *Joint Custody*].

124 See, e.g., Brinig, *A First-Best World*, *supra* note 117; Margaret F. Brinig, *Parents: Trusted but Not Trustees or (Foster) Parents as Fiduciaries*, 91 *B.U. L. REV.* 1231 (2011); Brinig, *Promoting Children’s Interests*, *supra* note 118, at 146–53; Margaret F. Brinig, *The Effect of Transactions Costs on the Market for Babies*, 18 *SETON HALL LEGIS. J.* 553 (1994); Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 *FAM. L.Q.* 449 (2002) [hereinafter Brinig & Nock, *How Much Does Legal Status Matter?*]; Brinig & Nock, *Legal Status and Effects on Children*, *supra* note 41; Brinig & Nock, *One-Size-Fits-All*, *supra* note 83; see also Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein’s Surrogacy: The Case for Full Contractual Enforcement*, 81 *VA. L. REV.* 2377 (1995) [hereinafter Brinig, *A Maternalistic Approach*] (discussing surrogacy arrangements as alternatives to the family).

125 Brinig & Nock, *One-Size-Fits-All*, *supra* note 83, at 138–40.

126 See *supra* text accompanying note 98.

presumed to be selected based on being loving parents with a strong interest in the child's development. The long-term nature of adoption creates incentives that reinforce the law and community norms around adoption.<sup>127</sup>

The alternative to adoption is some other type of union: kinship care, foster care, surrogacy, etc. Peg Brinig has a rather nuanced view of these forms because her empirical work shows that in some circumstances they can be functional.<sup>128</sup> For example, for some racial subgroups kinship care can work well.<sup>129</sup> However, overall, Peg Brinig concludes:

We suggest that kinship care, the alternative to adoption given by current legislation, be further studied; but unless racial distinctions are made, kinship care should not generally be viewed as a viable option to adoption by the kin caregiver. Legal status in family law matters a great deal. Particularly when children's interests are involved, society should choose the status that will make children's lives as happy and healthy as possible.<sup>130</sup>

What drives this conclusion is the understanding that marriage is a covenant or institution that is designed to mitigate transaction costs. No institution is first-best optimal in all situations, but marriage is one that is second-best efficient in the context of raising children.<sup>131</sup> Thus, children will do best when biological parents have the authority to make decisions for their children, but these decisions are made in the context of the general institution of marriage. That is, they are informed by the trust social capital formed out of community involvement, family commitments, and unconditional love.<sup>132</sup> It follows that the rights of parents (or children) as individuals should not be supreme, and individual parental rights (which is almost an oxymoron for Peg Brinig) should not trump the "rights of the family."<sup>133</sup>

#### D. *Joint Parenting*

Joint parenting laws are one stream of Peg Brinig's research that combines her work on divorce and children.<sup>134</sup> Issues of joint parenting almost always only arise in the context of divorce and are necessarily a matter related to children. As legislatures became aware of the problem no-fault divorce caused with matters of custody, joint parenting seemed to be a Pareto optimal solution.<sup>135</sup> Although some worried about the incentives mothers might

127 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 31–39.

128 Brinig & Nock, *One-Size-Fits-All*, *supra* note 83, at 139–40.

129 *Id.*

130 Brinig & Nock, *How Much Does Legal Status Matter?*, *supra* note 124, at 471–72 (footnote omitted).

131 See Brinig & Nock, *One-Size-Fits-All*, *supra* note 83, at 139–40.

132 BRINIG, FAMILY, LAW, AND COMMUNITY, *supra* note 7, at 2, 21–24.

133 For these reasons, Peg Brinig does not support marriage alternatives driven by individual rights. Brinig would rather see discussions about surrogacy, same-sex marriage, and foster care consider the well-being of families. See Brinig, *A Maternalistic Approach*, *supra* note 124, at 2377, 2381; Brinig, *Promoting Children's Interests*, *supra* note 118, at 146–51.

134 See Brinig & Buckley, *Joint Custody*, *supra* note 123, at 393.

135 See Allen & Brinig, *Joint Parenting Laws*, *supra* note 3, at 307–08.

have to trade off financial resources to maintain full custody, joint custody appeared as a reasonable compromise between the demands of fathers, the best interests of the children, and the norm of mother custody.<sup>136</sup> Indeed, in an early paper, Peg Brinig and her coauthor argued that joint parenting could have two major benefits.<sup>137</sup> First, it could allow better bonding of the noncustodial parent with the children.<sup>138</sup> Second, the closer legal ties between the parents could allow for better monitoring of support payments and ensure that dollars intended for children actually end up landing there.<sup>139</sup> However, as Peg Brinig continued to investigate joint parenting, her conclusions changed.

In later works, Brinig, sometimes accompanied by a coauthor, examined the movement to joint parenting and mediation in the states of Iowa and Oregon.<sup>140</sup> In both cases, the actual outcomes were unexpected based on a naïve approach to divorce.<sup>141</sup> Imposing mediation and joint custody does not remove the acrimony of divorce, nor does it lead to more joint custody.<sup>142</sup> Rather, the fighting switches to different margins, with spouses making accusations of abuse, resulting in longer divorce periods.<sup>143</sup> The transfer of rights to joint custody increased the bargaining power of most fathers, who then used this to gain sole or split custody.<sup>144</sup> Not too surprisingly, the main beneficiaries of mediation were the mediators.<sup>145</sup>

In *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence*, Peg Brinig and her coauthors examine two default situations with joint custody.<sup>146</sup> In one case, the joint parenting statute denies custody in cases where abuse has been found.<sup>147</sup> In the second case, the default is joint custody.<sup>148</sup> The distinction is a matter of the burden of proof, and therefore the chance of abuse and violence actually impacting the outcome in a case depends on the situation.<sup>149</sup> In the end the authors conclude that the presumptions of joint custody discourage good parenting and do not meet the best interests of the child: “Joint custody presumptions, with or without

136 See Brinig & Buckley, *Joint Custody*, *supra* note 123, at 396–98.

137 *Id.* at 393.

138 *Id.*

139 *Id.*

140 Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L. & ECON. 241 (2005) [hereinafter Brinig, *Unhappy Contracts*]; Allen & Brinig, *Joint Parenting Laws*, *supra* note 3.

141 See Brinig, *Unhappy Contracts*, *supra* note 140, at 259–61; Allen & Brinig, *Joint Parenting Laws*, *supra* note 3, at 322–23.

142 Allen & Brinig, *Joint Parenting Laws*, *supra* note 3, at 304, 322.

143 *Id.* at 322–23.

144 *Id.* at 320.

145 *Id.* at 316.

146 Margaret F. Brinig, Loretta M. Frederick & Leslie M. Drozd, *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 271, 271 (2014).

147 *Id.*

148 *Id.*

149 *Id.* at 271–72.

exceptions for domestic violence cases, operate to discourage this individualized approach to structuring parenting postseparation and fail to promote the child's best interests."<sup>150</sup>

At the end of the day, joint parenting amounts to a default rule on bargaining starting points. Had the world been a zero-transaction-cost Coasean one, this would have made no difference. But:

[S]ome states have realized that continual moving between households may be harmful to children, that the bulk of newly divorced spouses cannot remain as positively involved with each other on an everyday basis as joint physical custody requires, or that the presumption is causing more litigation to already crowded dockets.<sup>151</sup>

Joint custody ends up providing a default rule that no one wants.<sup>152</sup>

#### CONCLUSION

*But could youth last and love still breed,  
Had joys no date nor age no need,  
Then these delights my mind might move  
To live with thee and be thy love.*<sup>153</sup>

Like Raleigh, Peg Brinig's lifetime of experience dealing with family matters, along with her economic training, makes her see the "dark side" of sexuality,<sup>154</sup> and that left alone as "sovereign nations" family members "would attempt to look out for their own interests rather than for the family's as a whole. They would think in short- rather than long-range terms, and misunderstandings and intolerance would abound . . ." <sup>155</sup> What is required to combat this is a "covenant," which I have argued is more generally thought of as an "institution." An institution is a set of constraints that are both formal and informal, designed with the purpose of solving human interactions in light of transaction costs.

As a consequence, informal norms like "reunions, Christmas giving to and by extended relatives, visiting cousins when one is in town, and even the custom of retaining the family name when one becomes an adult . . . are 'union-building' devices."<sup>156</sup> Likewise, family reputations, intergenerational investments, implicit joint consent and decision rules, baby dedications, and

150 *Id.* at 278.

151 Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 782 (2006) (footnotes omitted).

152 *See id.* at 799 ("We generalized that 'if the endowment point (or anticipated judicial outcome) bears very little relationship to what the parties really want, they are more likely to be forced to resolve their disputes themselves. They are, in effect, cast upon their own resources, because the threat of litigation is not credible.'" (quoting Brinig & Alexeev, *supra* note 90, at 291)).

153 Raleigh, *supra* note 1, at 106.

154 Brinig, *In Search of Prince Charming*, *supra* note 18, at 336.

155 Brinig, *The Family Franchise*, *supra* note 49, at 401, 403.

156 *Id.* at 405.

family milestone events all promote individuals connected by blood to act in the interests of the broader family.<sup>157</sup> And the formal entry, exit, and sexual rules we call family law are (and should be) designed to encourage good family behavior. Thus, even when a formal marriage breaks down, Peg Brinig holds that “[a]s I learn about families I become more and more convinced that close involvement by divorced parents with their children encourages more responsive (and responsible) behavior on the part of these parents.”<sup>158</sup>

When Peg Brinig started teaching Family Law, the family was mostly taken for granted. It was something in the background that no longer mattered in a postmodern world, except perhaps to hold back miserable folks trapped in a loveless union or women with career aspirations beyond motherhood. Canada was the first Western country to adopt no-fault divorce, but a reading of the parliamentary debates or reports shows that the members of Parliament thought no significant social harms would follow.<sup>159</sup>

But there were negative consequences. Poverty became “feminized,” marriage and children were delayed, divorce rates increased, different types of people married or put off marriage, labor-force participation rates changed, total hours of work increased for women, virtually every other aspect of family law adjusted, same-sex marriage followed, and on and on.<sup>160</sup>

Peg Brinig’s work has helped us understand why the legal transformation over the past fifty years had the effects it did. Her work has delved deep into the nature of family and shown a complicated, multidimensional institution that was only taken for granted because it generally had been working well. And over the years, she has become a champion for the covenant of marriage and has argued that the “family franchise” needs to remain intact as much as possible (even in marriage breakdown). She has called for the maintenance of the special social status of married couples over cohabitating ones; believes that families should work out their own divisions of labor using the concept of “gift” over “exchange”; argues that parent-child relationships should be maintained over strict custody allocations and the legal rights of outsiders; and contends that trust should be encouraged and built toward the communities and organizations that are on the fringe of the marriage institution. My hope is that others listen to her words.

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157 See *id.* at 405–06.

158 *Id.* at 421.

159 Allen, *supra* note 27, at 133 n.16 (citing REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE 56, JOURNALS OF THE SENATE OF CANADA, 27th Parliament, 2d Sess. app. (1967)).

160 See generally ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? (1992).

