You probably got the idea that I’m something of an interdisciplinary junkie, and anybody that really knows anything about my career undoubtedly is asking the question of why I am sandwiched between two legitimate professors of law talking about family within the context of family law, and it is a good question. I hope that the presentation will eliminate that to some extent.

But it does raise the question what am I, and from what angle am I coming as this presentation on – I like to think that on Mondays and Wednesdays, I call myself a practical theologian; and on Tuesdays and Thursdays, I call myself a theological or religious ethicist; and on the weekends, I go back to what I used to be for 20 years, and that it was a professor of religion and psychological studies.

Today is Thursday. So it’s going to be a theological ethics perspective, but you’ll see a little taste of these other dimensions.

And I’ll say a couple of nice things about my colleagues here. This is totally an accident. I’ll say a couple of negative things about some other aspects of family law, and I’m not deferring to them because I’m sitting close to them. I trust them. It just happens to be that I have a couple of nice things to say about them.

And Mr. Witte has had a different kind of effect on me than he has other people. He functions to terminate the speech of other people on time. His effect on me is to keep me going when I should have shut up on some topics a long time ago.

Much of my early scholarly work was dedicated to analyzing cultural, ethical implications of the modern psychologies and psychotherapies. Some of this involved reviewing and assessing what social theorist Phillip Rieff called “the triumph of the therapeutic.”

My studies convinced me that the models of health often projected by these modern psychologies unwittingly gave rise to norms of hedonic and nonhedonic ethical egoism. They implied that
being psychologically healthy entailed an implicit moral obligation to make one’s own
satisfactions and self-actualization central to one’s life. Although I was interested in the broad
ethical implications of the therapeutic model of health, I did not anticipate that I would some day
be studying the impact of the therapeutic on law.

It was around 1998 that I read an article by Carl Schneider arguing that family law not long ago
advanced moral arguments to support its positions as pronouncements, but that more now – more
frequently – it puts forward psychological and therapeutic arguments. I was slow to comprehend
what a society does to heal, to exercise the therapeutic, a very legitimate thing to do, can
influence not only culture and ethics, but even law. This process of influence, however, is
complex and works in concert with other cultural forces and social trends. The individualism of
Western culture, their fondness for what Max Weber called technical rationality, and the rational
choice logics of economic liberalism all interact with – and reflect and feed – the triumph of the
therapeutic.

In family law today, one can see the confluence of these forces in the growing dominance of two
guiding principles: the principle of what is called “private ordering” for adults, and the concept
of the “best interests of the child” or infants, children, and youth. The idea of private ordering
applies primarily to family formation, and the doctrine of the best interests of the child, as I
understand it, applies mainly to family dissolution. Private ordering holds that adults know their
needs and goals, and their intimate family lives, better than government, religion, tradition, or
law. Therefore, law should have the flexibility to allow, follow, and support the sexual and
procreative arrangements that grown men and women believe are best for them.

The best interests of the child come into play when adult family formation, decisions – often
guided by the principle of private ordering – lead to family dissolution and make salient the
issues of child custody, parental guidance, residence of the child, and financial support. The
principle of private ordering increasingly guides family law dealing with what I call the “front
door” of family formation, and the principle of best interests of the child functions more and
more to guide family law at the moment of divorce, the dissolution of cohabiting couples, the
complex issues facing legal and informal families using artificial reproductive technology.
Maybe one of the best examples of this drift of legal theory can be found in the American Law
Institute’s not too long ago report designed to codify emerging trends in family law called The
Principles of the Law of Family Dissolution. I wondered, when I first read that, I wondered why
it wasn’t The Principles of Family Law. But it mainly has to do with codifying the entire scope
of family law around the principles of dissolution.

My thesis is this: more and more family law, in both theory and practice, is legally defining the
front door of family formation in light on the contingencies, strains, and emergencies of family
dissolution – the back door of family life. The triumph of the therapeutic significantly, although
not exclusively, appears in a wonderfully positive-sounding rule of the best interests of the child.
Or to say it differently, the principle of the best interests of the children functions almost
exclusively at the moment of family dissolution and hardly at all around the legal and moral
channeling of family formation, at least with regard to massive trends of contemporary legal
theory. Furthermore, the concept of best interests of the child often rebound on the principle of
private ordering to create even more variety and complexity in family formation. All of these
dynamics have at least one overlooked major consequence for children: *the growing tendency of law to channel, and even exacerbate, the likelihood that children will not live with and be raised by the parents who conceived them.*

Although these are not the only principles guiding family law today, they enjoy growing prestige. They are accompanied by two additional assumptions: that family law should be morally neutral and that it should be liberated from the influence of religion, especially Christianity. Many legal historians acknowledge that Christianity has had massive influence on Western family law up to the recent past, although legal scholarship on this point generally goes back no further than the 18th century. On the whole, legal theorists today consider this influence to have been negative. Boston University legal scholar Linda McClain and others have charged that Christianity is based upon faith and is therefore unable to pass the rationality test of law. Christian jurisprudence is variously viewed as “grounded on mystery,” for instance, Maria V. Antokolskaia, a European scholar; or “blind sacramental authority,” Harry Krause at the University of Illinois; “patriarchy and rigid hierarchy,” our good friend Martha Fineman of this school; “unrealistic moral demands,” Richard Posner of the University of Chicago and now sitting judge; and many more such characterizations.

Contemporary law’s rejection of a place – and that’s all I’m talking about is a place – for Christian jurisprudence in shaping, or being in the conversation about contemporary family law is not, I believe, well grounded. It’s based on a poor grasp of history and an inadequate understanding of the many dimensions of rationality found in Christian family theory. Law today is insufficiently aware of the multidimensional ways in which Christian marriage theory weaves together – or has in the past woven together – observations of the rhythms of nature, understandings of the needs of children, moral principle, and indeed, finally, integrating metaphors of covenant and one-flesh union.

Christian jurisprudence has, over the centuries, advanced an integrational view of marriage and family formation. It is concentrated on the front door of family life, the matter of family formation, rather than the back door of family dissolution. Its rationality can be seen in the range, validity, and mutually reinforcing character of the goods it has sought to integrate. The classic statement of this integrational view of marriage can be found in St. Augustine’s essay titled "The Goods of Marriage." He explicitly listed *proles* – having and raising children; *fides* – faithfulness between husband and wife; and *sacramentum*, by which he meant simply covenantal commitment and permanence. He discussed other goods as well, such as mutual helpfulness and the channeling of sexuality.

These goods were integrated by two narratively elaborated metaphors – and I’ll make quite a little bit out of that word metaphors before we’re over – that were subject to multiple commentaries in both theology and Western law down through the ages. One comes from Genesis 2:24, and says that marriage is a one-flesh union, and the other comes from Ephesians 5:25 and asserts that the commitments and sacrificial self-giving of marital partners should recapitulate the unbreakable covenant love of Christ for church, Israel, and the world. The fact that there’s a demand for sacrificial love is addressed more to the husband, and then the wife constituted, as historians can now see a striking contrast in these early Christian scriptures to the aristocratic and hierarchical ideal of the husband and father projected by Aristotle and his
influence on the civic culture of Roman Hellenism that surrounded early Christianity in the early
days.

This integrational view was elaborated at the naturalistic level, the rational moral level, and the
symbolic metaphorical level by various later Christian writers. It received its clearest, and I
think the most forceful articulation – I like to say this since I’m a liberal Protestant – by the
medieval Dominican Roman Catholic scholar Thomas Aquinas. Before Aquinas developed an
explicit theology of marriage, he asked a naturalistic question, asking why male humans – in
contrast to males of other species – formed families and developed long-lasting relationships
with the mothers of their offspring. His answer was this: matrimony, which Aquinas defined as
the male remaining with the mother-infant dyad, occurs at the human level because, principally,
the long period of human infant childhood and childhood dependency. Aquinas believed that
when the human male comes to recognize that the fragile child is his offspring, and the product
of his seed, flesh, and substance – the connection that the mother recognizes immediately
through the labors of gestation and birth – the human father, having capacities of discernment
that exceed males of other species, is more inclined to assist his consort and care for the infant as
he cares for his own body. It’s interesting to observe today that Aquinas got most of the
naturalistic conditions for family formation at the human level in a way that’s consistent with the
bulk of evolutionary theory about family formation as we find it in that literature today. But in
addition to this naturalistic level of analysis, which I’d say is at least a kind of rational argument,
Aquinas’ Christian theory said that marriage should be long-lasting because of the vulnerabilities
of both infancy and motherhood. Furthermore, it should be a matter of friendship because both
male and female enjoy the dignity of being made in the image of God, and some of the
dimension of rationality that his mentor Aquinas also talked about.

And finally, to strengthen the durability of this one-flesh trinity of mother, father, and infant,
Aquinas added to these naturalistic philosophical, ethical, and rational arguments the
distinctively Christian or theological note that marriage should be modeled after Christ’s
enduring covenant relationship to church, Israel, and the world. And notice that the more
theological argument comes at the very tail end of this elaborate, multidimensional argument.
Aquinas serves as an example of the multidimensional integrational view of Christian marriage.
It is integrational in that its dominant metaphors have covenant and one flesh bring together and
stabilize a mutually supporting unity of sexual exchange, conception, and needs of dependents;
the procreative and relational inclinations of men and women; and their right to equal respect and
mutual friendship in an enduring, socially sanctioned institution. This view overcomes the
dichotomy between adult private ordering at the front door of family formation and the
situational best interest of the child at the back door of family dissolution. It does this by
bringing culture, religion, and law into a cooperative relation that promotes an integrative
pathway to family formation.

It is short-sighted, I believe, to say that Christian jurisprudence and marriage fails the rationality
test, is clouded in mystery, is based upon hegemonic sacramentality, is incurably patriarchal,
impossibly demanding, without more carefully examining its integrative view of matrimony and
its complex synthesis and naturalistic moral and metaphorical arguments.
The prominence in family law today of the doctrine of private ordering means that most legal theory – not all, but most – has given up on the integrational view of family formation. The idea that law, in cooperation with other parts of culture, should channel the integration of adult sexual expression, parenthood, and the dependency needs of children into a publicly sanctioned institutional commitment. Private ordering gives adults the autonomy to separate the historic goods of marriage. Sexuality from procreation. Procreation from marriage. Parenthood from marriage. And the rearing of children from the parents who conceived them.

This is then done in the name of a false view of the neutrality of law. It reflects rather a watered-down Kantianism that posits an equality if another democracy of all adult desires and all adult choices.

This ethic of adult private ordering is a lead principle shaping family law today. I could give countless additional examples besides the allusion to the law, the principles of family formation. It is a dog that’s increasingly wagging the tail of the best interests of the child. However, it distorts the otherwise laudable best interest principle into a situation ethic designed to make the most of difficult circumstances which adult choices present to dependent and vulnerable children.

The Christian integrational view of marriage directs law’s attention to the front door of marriage law, the law of family formation. Law should not dismiss this historic voice of Christianity simply because of its theological metaphors and narratives. The issue is not whether any theory of marriage – religious or secular – contains such metaphors, but rather how they relate, how these metaphors relate, to other levels of rationality that a particular perspective exhibits. Careful analysis of the leading secular legal theories reveals that they are not without their own deep metaphors that serve as faith assumptions on critically held presumptions about how life is grounded. The University of Utah legal scholar, Martha Ertman, intentionally grounds the doctrine of private ordering in the metaphor of the “handshake.” Marriage is like a handshake. In her view, covenant and one flesh union are out, and the metaphor of the handshake should suffice to order private, intimate relations in today’s world of autonomous individuals. One can find metaphor in “molecules” and “individual atoms” in the marriage law proposals of Stanford University law professor Lawrence Friedman; deep metaphors of “symbiosis” and “nurturance” in the work of Martha Fineman; “free market” and agonistic metaphors in the University of Chicago’s Richard Posner; and “status” metaphors in Georgetown University law professor Milton Regan.

There is, however, at least one exception – there are more – in law today to this trend in substituting alternative metaphors for the classic ones of Christian jurisprudence. This is the case of Margaret Brinig, from whom you’ve heard, who – add this – who has creatively blended what I call a phenomenology – not a metaphysical defense of, but a phenomenology of the central Christian metaphors of “covenant” and “one-flesh” union with a subordinate and quite rational theory of marriage and family drawn from the field of institutional economics. I can recommend her work.

Future dialogue between secular law and religion will center on charging the relationship between the respective focal rationalities and their respective gate metaphors. Both sides have
their rationalities. Both sides have their faiths metaphorically articulated. When this charging becomes more advanced, religious perspectives will emerge as far more rational than generally perceived and allegedly secular theories will be revealed to have their own unwitting foundations in some kind of faith. When this day comes, religious perspectives will be more carefully consulted, and so-called secular theories rendered more balanced and less dogmatic.

Thank you.