

## ESSAYS

### LINDA MCCLAIN'S *THE PLACE OF FAMILIES* AND CONTEMPORARY FAMILY LAW: A CRITIQUE FROM CRITICAL FAMILISM

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#### INTRODUCTION

This Essay critiques Linda McClain's important new contribution to family law, *The Place of Families* (2006).<sup>1</sup> In the process, it also touches on various trends in contemporary family law. I review McClain from the perspective of "critical familism." Critical familism is the term I use to describe certain constructive implications of the Religion, Culture, and Family Project. The Division of Religion of the Lilly Endowment, Inc. funded this multiyear and multivolume research project that we conducted at the Divinity School of the University of Chicago.<sup>2</sup> I write this Essay to bring critical familism into conversation with various trends in family law theory, especially as exemplified by *The Place of Families*. It is relevant that McClain also has engaged critical familism at considerable length.<sup>3</sup> Therefore, it seems natural to extend our conversation and in the process address other aspects of contemporary family law as well.

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<sup>1</sup> LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006).

<sup>2</sup> The phrase critical familism, however, does not represent the views of all the scholarly contributions to that project. The term is largely my own, and I have developed it extensively in prior publications. See generally DON S. BROWNING ET AL., *FROM CULTURE WARS TO COMMON GROUND: RELIGION AND THE AMERICAN FAMILY DEBATE* 306–34 (2000) (introducing the concept of "critical familism"); DON S. BROWNING & GLORIA G. RODRIGUEZ, *REWEAVING THE SOCIAL TAPESTRY: TOWARD A PUBLIC PHILOSOPHY AND POLICY FOR FAMILIES* (2002) (summarizing findings commissioned by the American Assembly); DON S. BROWNING, *MARRIAGE AND MODERNIZATION: HOW GLOBALIZATION THREATENS MARRIAGE AND WHAT TO DO ABOUT IT* (2003).

<sup>3</sup> See Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 *HOFSTRA L. REV.* 379, 392–403 (2004) (analyzing critical familism).

Although the concept of critical familism is significantly informed by past Jewish and Christian contributions to family law theory in Western societies, these traditions when properly interpreted and critically reconstructed are relevant even today to the modern law of families and marriage. Hence, this Essay does not only address family law, but it also addresses the more general question of the relation of religion to the law in a pluralistic and democratic society.

According to critical familism, several trends in contemporary American family law are not productive for the well-being of families, children, parents, and the wider society. For example, family law exhibits an uncritical understanding and acceptance of certain disruptive forces of modernization as they are played out in the marital, sexual, and reproductive fields. Modern family law is weak at the theoretical level in assessing how modernization, understood as the synergism between technical rationality and cultural individualism, has brought about a wide range of separations in the sexual field. Among these trends are the separation of sex from marriage, marriage from procreation, parenting from marriage, and with the advent of assisted reproductive technology (“ART”), the separation of parenting from reproduction. Many of us would affirm some of these separations under certain conditions. Frequently, however, contemporary legal theory has dubbed these separations as largely benign social changes or productive expressions of family diversity without assessing their full implications for the family, especially the well-being of children and our cultural and legal understanding of parenthood.<sup>4</sup>

Contemporary family law also has taken the short historical view of the interaction of religion and law in shaping Western marriage and family patterns.<sup>5</sup> Related to this perspective is family law’s failure to understand that religious traditions are carriers of practical legal rationalities that are informed by religious narratives but can gain elasticity from them for debate in law and public policy.<sup>6</sup> As a consequence of the law’s limited understanding of both modernization and inherited religio-philosophical legal traditions, it has

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<sup>4</sup> See BRENT WATERS, REPRODUCTIVE TECHNOLOGY: TOWARD A THEOLOGY OF PROCREATIVE STEWARDSHIP (2001) (discussing the various separations that have evolved in the sexual and reproductive fields).

<sup>5</sup> See generally MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA (1985) (identifying trends in nineteenth century family law).

<sup>6</sup> See generally DON S. BROWNING, A FUNDAMENTAL PRACTICAL THEOLOGY: DESCRIPTIVE AND STRATEGIC PROPOSALS (1991) (discussing the practical nature of religion).

functioned to deepen dislocations in the reproductive field and produced both cultural individualism and technical rationality. These include sanctioning cohabitation by promoting its legal equivalence to marriage, dealing with marital strain by either disestablishing or delegating marriage, addressing social welfare needs by broadening the definition and privileges of marriage to cover problems not generally remedied with this institution (thereby rendering marriage indistinguishable from other living arrangements), and normalizing the unregulated use of reproductive technologies that further divides parenthood from procreation and marriage. All of these trends arguably work to the disadvantage of children and their human rights. To put it bluntly, in an effort to be progressive, recent family law theory arguably is in fact conformist; it both capitulates to and promotes the dislocations of modernization in the realms of sex, marriage, and family.

Although this Essay discusses these trends mainly in terms of how they appear in the careful work of Linda McClain, it also comments on other leading positions in family law theory. In particular, the Essay references recent reports from the American Law Institute,<sup>7</sup> the Canadian Law Commission,<sup>8</sup> and the theoretical writings of distinguished legal scholars such as Margaret Brinig,<sup>9</sup> June Carbone,<sup>10</sup> Martha Fineman,<sup>11</sup> Lawrence Friedman,<sup>12</sup> Richard Posner,<sup>13</sup> and Milton Regan.<sup>14</sup> Although none of these additional theoretical perspectives will get the full attention that they deserve, references to them will clarify Professor McClain's distinctiveness and help convey the full force of her differences with critical familism.

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<sup>7</sup> AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

<sup>8</sup> LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001).

<sup>9</sup> MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000).

<sup>10</sup> JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000).

<sup>11</sup> MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991) [hereinafter FINEMAN, THE ILLUSION OF EQUALITY]; MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) [hereinafter FINEMAN, THE NEUTERED MOTHER]; MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) [hereinafter FINEMAN, THE AUTONOMY MYTH].

<sup>12</sup> LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW (2004).

<sup>13</sup> RICHARD A. POSNER, SEX AND REASON (1992).

<sup>14</sup> MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993).

## I. THE MEANING OF CRITICAL FAMILISM

Critical familism is based on an ecumenical reading of the central ecclesial and legal implications of the Christian tradition on marriage and family. The theory is familistic in that it supports the centrality of marriage for family formation and child rearing. It does this even though it follows the Protestant view that understands marriage as a highly important but relative good not to be confused with Christianity's more ultimate categories of salvation or redemption.<sup>15</sup> Critical familism is not familistic in the early modern sense, in that it does not view marriage and family as organized around the divided spheres of male work in the wage economy and female investment in the domestic sphere.<sup>16</sup>

Although critical familism grants a decisive role to a variety of Christian themes for framing the meaning of marital and family relations, it is also attentive to the way Christianity interacted with, absorbed, and reconstructed Hebrew, Greek, Roman, German, and Enlightenment philosophical family influences. For example, critical familism tries to unpack the statement now found in biblical scholarship that the early Christian family was the "Greco-Roman family with a twist." This means that what early Christian marriage and family meant can only be seen in dialectical relationship to the normative ideals of Greco-Roman family mores and law.<sup>17</sup> Critical familism also affirms the statement made by legal historian John Witte, Jr. that twelfth century Roman Catholic canon law provided the cultural "genetic code" of Western family theory at both the cultural and legal levels.<sup>18</sup> Critical familism views Christian marriage and family as thick and multidimensional, both historically and logically. It is historically multidimensional because it synthesizes in unique ways several historical strands, such as Hebrew scriptures, Greek philosophy, Roman law, and aspects of German law. It is logically multidimensional because it contains several levels of practical rationality that

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<sup>15</sup> See BROWNING, *supra* note 2, at 22–23 (describing how Luther considers marriage a central religious and secular good, but does not treat it as a sacrament or equivalent to salvation or justification).

<sup>16</sup> See BROWNING ET AL., *supra* note 2, at 231–38 (describing traditional familial roles and the role of the "Christian Right" in defending them as the ideal Christian family arrangement).

<sup>17</sup> See CAROLYN OSIEK & DAVID L. BALCH, *FAMILIES IN THE NEW TESTAMENT WORLD: HOUSEHOLDS AND HOUSE CHURCHES* 48–87 (1997) (discussing the effect that Greco-Roman family patterns had on the development of early Christian families).

<sup>18</sup> JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 15 (1997); *see also id.* at 30–36 (describing Roman Catholic canon law of marriage).

are both informed by, yet identifiable independently of, its surrounding religious narratives.<sup>19</sup>

Critical familism is critical in two senses. First, a critical reading of early Christian history has led me to argue that it was projecting what Paul Ricoeur called a “trajectory”<sup>20</sup> of meaning toward an equal-regard view of marital relations between husband and wife.<sup>21</sup> When the New Testament materials are read in context, we now see that the Jesus movement was in tension with the Greco-Roman honor-shame codes and Aristotelian aristocratic views of the relation of the father to wife and children that dominated the urban centers of Roman Hellenism and constituted the social context of early Christian communities.<sup>22</sup> The Jesus movement and the apostle Paul brought forth the ethic of equal regard (“husbands should love their wives as they do their own bodies,” Ephesians 5:28), and instructed husbands to be servants rather than Aristotelian rulers of their families (“Husbands, love your wives, just as Christ loved the church and gave himself up for her,” Ephesians 5:25). Second, in taking the equal-regard impulse of early Christianity seriously and developing its logical implications, critical familism has important implications for social theory as well. It brings the equal-regard ethic not only into the dyadic relations of husband and wife, but also to the criticism and reorganization of social institutions in the public world. It proposes supporting the mother-father team with equal, although not necessarily identical, privileges and responsibilities in both the public worlds of politics and paid employment as well as the more private realms of home, child rearing, and intergenerational care.<sup>23</sup> Critical familism’s support for an equal-regard ethic is evident in its proposal of major reorganizations of the common wage system, whereby married couples with children would need to work only a combined sixty hours each week to earn an adequate living and have time for children and each other.<sup>24</sup>

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<sup>19</sup> For an analysis of the levels of practical reason in Christian marriage, see BROWNING ET AL., *supra* note 2, at 335–41. See generally WITTE, *supra* note 18 (analyzing development of Christian marriage).

<sup>20</sup> ANDRE LACOCQUE & PAUL RICOEUR, THINKING BIBLICALLY: EXEGETICAL AND HERMENEUTICAL STUDIES 54 (David Pellauer trans., 1998).

<sup>21</sup> See Louis Janssens, *Norms and Priorities of a Love Ethics*, 6 LOUVAIN STUDIES 219–20 (1977) (discussing the meaning of equal regard).

<sup>22</sup> See generally Halvor Moxnes, *Honor and Shame*, 23 BIBLICAL THEOLOGY BULL. 167–76 (1993) (describing the concept of honor and shame and its application to early Christian communities).

<sup>23</sup> BROWNING ET AL., *supra* note 2, at 2.

<sup>24</sup> See *id.* at 316–18 (developing the idea of a sixty-hour work week for married couples in the workforce with children); see also BROWNING, *supra* note 2, at 190 (proposing a similar concept in the consensus statement on families produced by the Final Report of the Ninety-Seventh American Assembly).

### A. McClain's The Place of Families

This Essay develops further dimensions of critical familism as it critiques *The Place of Families*. McClain's position should be interpreted as mediating between the critical feminist theories of Martha Fineman or June Carbone and the more promarriage perspectives of Margaret Brinig and Milton Regan. Fineman and Carbone share the belief that marriage should be either delegalized, as Fineman proposes,<sup>25</sup> or disestablished to place more emphasis on parenthood rather than the conjugal couple, as Carbone advocates.<sup>26</sup> Whereas Fineman would delegalize what she calls the "sexual family,"<sup>27</sup> and Carbone would shift legal regulations from marital partners to parents, regardless of marital status,<sup>28</sup> McClain differs from both and retains marriage.<sup>29</sup> But she would broaden its definition to protect same-sex couples<sup>30</sup> and extend most of its privileges to cohabiting couples, domestic partnerships,<sup>31</sup> unmarried singles with children (including those giving birth by elective ART),<sup>32</sup> and a variety of cohabiters who are codependent though not sexually involved.<sup>33</sup> In advocating near legal equivalence in privileges and responsibilities between married couples, domestic partnerships, cohabiting partners, and various additional patterns of adult interdependencies, McClain is close to the positions advocated by the recent proposals in the American Law Institute's *Principles of the Law of Family Dissolution* (2002) and the Canadian Law Commission's *Beyond Conjuality* (2002).<sup>34</sup>

In short, McClain shares a widespread assumption found in contemporary family law theory. This is the rather uncritically held commitment to the idea that supporting family diversity should be a fundamental moral commitment of present-day family law.<sup>35</sup> This belief—or maybe we should call it a "pre-commitment"—stands out with stunning clarity when viewed along with

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<sup>25</sup> FINEMAN, THE AUTONOMY MYTH, *supra* note 11, at 134.

<sup>26</sup> CARBONE, *supra* note 10, at 236–37.

<sup>27</sup> FINEMAN, THE NEUTERED MOTHER, *supra* note 11, at 145.

<sup>28</sup> CARBONE, *supra* note 10, at 236–37.

<sup>29</sup> MCCLAIN, *supra* note 1, at 7, 191–93; *see also* REGAN, *supra* note 14, at 123 (discussing the retention of marriage and extension of it to same-sex couples, while not extending its benefits to cohabiting couples and other intimate relations, as does McClain).

<sup>30</sup> MCCLAIN, *supra* note 1, at 156.

<sup>31</sup> *Id.* at 202.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.* at 197–98.

<sup>34</sup> *See generally* AM. LAW INST., *supra* note 7, at 907–43; LAW COMM'N OF CAN., *supra* note 8, at ix, x, 34, 118 (discussing the benefits of various nontraditional cohabitation relationships).

<sup>35</sup> MCCLAIN, *supra* note 1, at 32, 178–81.

another widely held belief that contemporary family law should be morally neutral and avoid value judgments to the extent possible.<sup>36</sup> Although the view that law should be morally neutral is the majority view in contemporary family law theory, McClain, like Margaret Brinig<sup>37</sup> and Milton Regan,<sup>38</sup> is not a champion of this moral-neutrality legal philosophy. In fact, she advocates a proactive, morally articulate vision of law and government that would foster both equality in intimate relations and the extension of marriage-like privileges to a wide range of relationships beyond the conjugal husband-wife couple, as is the case with the relatively recent European *pact civile de solidarite*.<sup>39</sup> She does not go as far in her moral view of law as Brinig, who rehabilitates the concept of covenant, in contrast to contract, as the reigning trope governing legal marriage agreements.<sup>40</sup> But she does make use of views espoused by Milton Regan. Like Regan, McClain retains the institution of marriage although not necessarily doing so by attempting to redefine, as does Regan, certain aspects of the Victorian view of marriage as a legal status.<sup>41</sup>

McClain, however, goes beyond Regan in wanting to grant features of the marital status to a wide range of living arrangements, regardless of whether the people intend to marry.<sup>42</sup> In promoting this philosophy, McClain is once again close to views in *Principles of the Law of Family Dissolution*.<sup>43</sup> She is also aligned with Martha Fineman and *Beyond Conjuality*, both of which argue that the law should sanction, support, and protect a wide range of dependent relationships with marriage-like privileges.<sup>44</sup> Hence, McClain is party to a

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<sup>36</sup> AM. LAW INST., *supra* note 7, at 912; FRIEDMAN, *supra* note 12, at 9; LAW COMM'N OF CAN., *supra* note 8, at xvi, 1; POSNER, *supra* note 13, at 4, 181–99.

<sup>37</sup> Brinig develops a secular covenantal model of marriage and family law based on a kind of phenomenology of classical Jewish and Christian models of covenant. BRINIG, *supra* note 9, at 1, 4, 6, 7.

<sup>38</sup> Regan tries to develop for family law what he calls a “relational ethic” that enables him to restore a status model of marriage, in contrast to a narrow contractual one. REGAN, *supra* note 14, at 90–93, 179–80.

<sup>39</sup> McClain’s use of the word “fostering” in the subtitle of *The Place of Families* suggests an active, although noncoercive, role for law and government in promoting these virtues. See, e.g., MCCLAIN, *supra* note 1, at 118 (advocating “facilitative governmental measures” as a means of promoting healthy relationships).

<sup>40</sup> BRINIG, *supra* note 9, at 130.

<sup>41</sup> MCCLAIN, *supra* note 1, at 217; see also REGAN, *supra* note 14, at 105–17 (arguing that the concept of status is important and not necessarily detrimental to equality within marriage).

<sup>42</sup> MCCLAIN, *supra* note 1, at 210–16.

<sup>43</sup> *Id.* at 210; AM. LAW INST., *supra* note 7, at 924.

<sup>44</sup> FINEMAN, THE AUTONOMY MYTH, *supra* note 11, at 123 (proposing that a generalized caretaker-dependent relationship replace the traditional notion of marriage); LAW COMM'N OF CAN., *supra* note 8, at 113 (discussing the appropriate governmental role and noting that many adult relationships would benefit from laws according them benefits traditionally reserved for married couples); MCCLAIN, *supra* note 1, at 191 (focusing on homosexual relationships).

distinct movement in contemporary family law to extend the privileges and protections of marriage to a variety of dependent relationships as a strategy for mediating welfare benefits in a rapidly changing, disrupted, and insecure society.

### *B. McClain and Liberal Social Theory*

As discussed, McClain does not believe that law can be morally neutral. More specifically, she is part of a small legal movement that recognizes that law needs some kind of social theory or philosophy to get oriented to its task. McClain opts for a form of liberal feminism. John Rawls and Susan Moller Okin are two of her leading lights. Rawls's concept of justice as fairness without regard to different views of the goods of life is, according to McClain, the key to the moral substance of law in a liberal society.<sup>45</sup> Yet McClain also combines a liberal theory of justice with a more Aristotelian theory of the virtues required for citizenship in a liberal society. These virtues are the capacity for equality, responsibility, respect, tolerance, and liberty.<sup>46</sup> McClain builds on Okin's reconstruction of Rawls to apply justice as fairness to the inner life of families as well as to government and law. The family, for both Okin and McClain, must be an arena of fairness, especially in relation to the situation of women and the socialization of children.<sup>47</sup>

But there are additional twists worth noting in McClain's use of Rawls and Okin. Although Okin holds that the family has a powerful influence on shaping future generations to have the virtues of democratic citizenship, McClain goes further and argues that government and law have the right and obligation to directly form families to develop these skills of citizenship.<sup>48</sup> In McClain's social theory, the order of influence flows from government to

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<sup>45</sup> See MCCLAIN, *supra* note 1, at 10, 19, 25, 31–33. These goods would pertain to views of sexual behavior, wealth, happiness, and requirements for development such as attachment, empathy, cognitive stimulation as well as more comprehensive visions of the ends of life, i.e., goods other than the moral good of justice as fairness. Rawls has a theory of primary social goods but defines them as goods of moral agency needed to support justice as fairness. He has been criticized for having an underdeveloped view of natural goods for humans. WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 144–45 (1991).

<sup>46</sup> MCCLAIN, *supra* note 1, at 3 (questioning the appropriate place of these virtues in defining society and families' values).

<sup>47</sup> See *id.* at 25 (commending Okin's focus on domestic violence and inequality in the division of household labor).

<sup>48</sup> *Id.* at 19–22 (supporting the concept of an affirmative governmental responsibility to shape values through regulation); see also *id.* at 156–57 (advocating the legalization of same-sex marriage based on the view that the government should).

families and families to children, without much mediation by institutions of civil society. More specifically, in contrast to those advocating a mediating role for civil society such as William Galston, Jean Elshtain, Francis Fukiyama, and the Institute for American Values,<sup>49</sup> McClain has little trust in the capacity of churches, schools, community organizations, and the business world to shape families for democratic citizenship without the directives, reinforcements, and persuasion of legally sanctioned governmental interventions.<sup>50</sup> Although she does not advocate the use of force by government and law in producing gender equality in families, she does advocate a place for governmental “persuasion” through education and other inducements.<sup>51</sup>

McClain, however, carries Rawlsian justice to still another level. According to *The Place of Families*, not only should law insist on justice *within* families, but it should actively advocate justice *between* families, regardless of family form or marital status.<sup>52</sup> Her Rawlsian skepticism about different views of the good being amenable to rational mediation leads her to believe that all forms of family are equally beneficial for adults and children as long as they exhibit the abstract features of justice in gender relations.<sup>53</sup> This position ends, I contend, in a possible contradiction that I address more fully later. McClain rejects the position of legal theorist Carl Schneider, who contends that law traditionally has had, and should continue to have, a channeling function that shapes behavior into responsible sexual interaction within legal marriage.<sup>54</sup> How does McClain distinguish her theory of legal persuasion from Schneider’s view of legal channeling? Why does McClain believe it is wrong for government to channel sexual interaction into legal marriage but perfectly proper to persuade all family forms to exhibit gender equality? And how does she justify doing so while, at the same time, bracketing from family law what moral philosophers deem questions about the premoral or nonmoral goods of life, especially as they relate to the goods

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<sup>49</sup> See generally INST. FOR AM. VALUES, *A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS* (1998) (advocating a role for society in shaping democratic citizenship); NAT’L COMM’N ON CIVIC RENEWAL, *A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT* (1998) (same).

<sup>50</sup> MCCLAIN, *supra* note 1, at 51, 62–63.

<sup>51</sup> *Id.* at 46–47.

<sup>52</sup> *Id.* at 5–6, 193.

<sup>53</sup> See *id.* at 151–54 (discussing virtues of gender equality in marriage).

<sup>54</sup> *Id.* at 23 (citing Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992)).

typically enacted by various forms of the family in meeting the needs of children?

McClain's distaste for discussing the category of premoral or nonmoral goods raises questions about her understanding of tolerance, one of her central virtues (along with the capacity for respect, equality, responsibility, and liberty) required for democratic citizenship. McClain believes that much of our tolerance in the United States today is "empty toler[ance]."<sup>55</sup> It may be, however, that she has replaced empty tolerance with empty yet official approval and legitimation. Empty tolerance, she claims, is mere civility that often cloaks deeper moralistic judgments and harmful rejections.<sup>56</sup> She advocates a more robust toleration—following, she assumes, the leads of Locke, Mill, and Rawls—which respects what she calls "reasonable moral pluralism."<sup>57</sup> This kind of toleration refrains from imposing any one comprehensive view of the good on its citizens.<sup>58</sup> Instead of one faction of society imposing its conception of rights and ideal goods on others, she insists that citizens engage in "reason-giving" deliberations about the right and the good.<sup>59</sup> Only the policies supported by the best reasons merit gaining persuasive power and the sanctions of law.<sup>60</sup> I will contend that without a more sophisticated theory of the premoral goods of life, including the premoral goods relevant to the well-being of families and children, society has no rational way of entering into the "reason-giving" for which she calls. Hence, without this element of moral theory, her Rawlsian view of justice and list of democratic virtues become empty. In addition, her call for toleration becomes a blanket approval of an indiscriminate variety of life styles—an approval that would also gain the channeling, sanction, coercive protections, and rewards of the law. In fact, her theory of toleration goes beyond respect and persuasion to give the normalization of law to all kinds of diversities that she has not actually critically assessed or defended.

McClain, it must be acknowledged, is partially correct when she calls for the law to go beyond unrealistic neutrality and enter the moral field to persuasively promote the moral point of view. But in her position, this means government using its moral persuasion to promote what McClain calls the

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<sup>55</sup> *Id.* at 29, 38–40.

<sup>56</sup> *Id.* at 38–40.

<sup>57</sup> *Id.* at 31.

<sup>58</sup> *Id.* at 31–32.

<sup>59</sup> *Id.* at 32.

<sup>60</sup> *See id.* at 32.

power of “self-government” by and among citizens.<sup>61</sup> Yet this laudable viewpoint is marred by her incomplete, if not empty, theory of justice and virtue—a theory that she develops without indices of the premoral goods that justice should organize and virtue should serve. In short, McClain has taken law to the doorstep of moral and political philosophy. Although law should go beyond moral neutrality, it should do so with caution, humility, and outside assistance. As legal philosopher Brian Bix has so aptly pointed out, law may have no special competence in moral and political philosophy.<sup>62</sup> I argue that McClain exhibits some of the inadequacies Bix is suggesting.

## II. SOME WEAKNESS IN LAW ON THE NATURE OF PREMORAL GOODS

When moral philosophy and theology use the concepts of premoral or nonmoral goods, they are speaking of the countless ways we refer to the various goods of life that are not directly moral goods. I follow discussions of the premoral good found in the neo-Thomistic moral theologian Louis Janssens and the nearly identical concept of the nonmoral good developed by moral philosopher William Frankena.<sup>63</sup> For example, if I say that this water is good, I am not saying it is morally good. I am making a premoral judgment. I am saying it is clean, has a nice taste, and is likely to be healthy to drink. If I say that the mayor and the commissioner of sanitation *should* provide clean water for the citizens of their communities, I am making a moral judgment. Finally, if I say that these authorities should provide clear water *equally* for everyone—not just the elite, the wealthy, or those who live on the right side of the tracks—I am making a moral statement about justice or fairness. Yet notice, although water is not directly a moral good, it is a premoral good. It is unclear what my moral statement about justice actually means unless we all know that these statements are about the distribution of a premoral good for human beings—something like water—but which itself is not inherently a moral good. Water does not have a will and cannot itself act, either morally or immorally. The distinction between premoral and directly moral judgments runs throughout our everyday moral and legal discourse regardless of whether we are talking about health, wealth, beauty, efficiency, warmth, housing, safety, or the well-being of children and adults. McClain fails to attend to the question of premoral goods, making her effort to drag the family law into moral and

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<sup>61</sup> *Id.* at 8–9, 46–47.

<sup>62</sup> See Brian H. Bix, *Law as an Autonomous Discipline*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 975, 981 (Peter Cane & Mark Tushnet eds., 2003).

<sup>63</sup> See WILLIAM K. FRANKENA, *ETHICS* 14 (1963); Louis Janssens, *supra* note 21, at 210–16.

political theory highly problematic. She begs the question of how family form affects the well-being of children and adults—both mothers and fathers—and tries to accomplish the entire moral, legal, and political task with a rather thin theory of justice. In the end, we do not know what goods her theory of justice is attempting to fairly distribute with regard to families.

There are several ways in which McClain's failure to develop the category of premoral goods within family law weakens her otherwise laudable effort to overcome the alleged neutrality of law and bring it closer to moral and political theory. This is first seen in her discussion of the possible link between marriage and fatherhood. McClain rejects the idea that marriage is important to preserve because it channels male sexual activity into commitment to a wife and attachment to their offspring.<sup>64</sup> Unfortunately, McClain does not understand the main thrust of the historic arguments for the link between marriage and stable fatherhood. McClain directs some of her arguments to my own writings, as well as those of David Popenoe,<sup>65</sup> David Blankenhorn,<sup>66</sup> Steven Nock,<sup>67</sup> and George Gilder.<sup>68</sup> Because there are important differences between these various positions, I only will speak to her critique of my position and the way she confuses it with the views of Gilder.

Although McClain captures my strong commitment to gender equality and the idea of the equal-regard marriage in both the public and private aspects of life,<sup>69</sup> she mistakenly believes I argue that in marriage, wives domesticate the erratic and polygamous sexual inclinations of men. She ascribes to this view the idea that in a marriage, the wife should be the gatekeeper to sexual access and morality.<sup>70</sup> This view holds, she argues, that to have sex with a woman the man must first marry her and thereby become the father of any offspring resulting from their union. McClain disparages this position, thinks it puts an unfair socializing burden on women, and insults the moral self-governing capacities of both men and women.<sup>71</sup> In addition to believing this is my position, she suggests that it is the position, implicit or explicit, of other scholars who argue for the link between marriage and responsible

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<sup>64</sup> MCCLAIN, *supra* note 1, at 5, 136–37.

<sup>65</sup> *Id.* at 121, 148–49.

<sup>66</sup> *Id.* at 62–63.

<sup>67</sup> *Id.* at 135–38.

<sup>68</sup> *Id.* at 140.

<sup>69</sup> *Id.* at 142.

<sup>70</sup> *Id.* at 135–36.

<sup>71</sup> *Id.* at 278–79.

fatherhood—especially the work of sociologist Steven Nock in his book *Marriage in Men's Lives*.<sup>72</sup>

Her characterization of the link between marriage and fatherhood probably only fits the theory of George Gilder. It certainly does not fit my views. In addition, there is no reference to Gilder in any of my writings on marriage and family even though McClain associates my view with those such as Gilder. Gloria Albrecht also makes this mistake in her recent review of my work.<sup>73</sup> Rather than emphasizing the gate-keeping role of the woman, my argument puts weight on the *channeling power of marriage as a public institution*. Marriage as an institution integrates men into the *care* of their children through the channeling power of public expectations, legal sanctions, institutional signaling, and, historically, the religious ideas of sacrament and covenant.<sup>74</sup> The affections of the wife are certainly a factor, but it is not this alone that integrates men. Certainly, the argument does not rest on the narrow idea of girlfriend and wife as gatekeepers of sexuality. It is the institutional patterning and reinforcement plus emerging emotional attachments with spouse and child that integrate men into responsible fatherhood and care. Both McClain and Albrecht miss the institutional argument.

My argument is not so much about how women domesticate men as about how the institution of marriage helps actualize a father's capacity for care. Marriage is more likely to channel males into recognizing their offspring as part of their own being and hence lead them to invest in the care of their child

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<sup>72</sup> *Id.* at 137; STEVEN L. NOCK, *MARRIAGE IN MEN'S LIVES* (1998).

<sup>73</sup> Gloria H. Albrecht, *Ideals and Injuries: The Denial of Difference in the Construction of Christian Family Ideals*, 25 J. SOC'Y CHRISTIAN ETHICS 169, 173 (2005).

<sup>74</sup> My analysis of how marriage integrates a variety of male and female human tendencies is based significantly on the views of Thomas Aquinas. BROWNING ET AL., *supra* note 2, at 113–38. Here the emphasis is on the institution of marriage and not simply on the moderating powers of women. In fact, the argument is precisely that without the institution, sanctioned by covenant and sacrament, individual human appeal alone will not work in integrating either men or women. *See id.* at 118–24; *see also* BROWNING, *supra* note 2, at 84–94. Additionally, Linda Waite and Maggie Gallagher have analyzed marriage from an institutional perspective. *See generally* LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* (2000). They state,

[M]arriage as an institution entails public commitments not only between the husband and wife but also between them and their friends, extended families, the state and the church. Make this public commitment as a promise—possibly even as a covenant or sacrament—and these benefits are likely to follow from it. This may be true even if the benefits themselves were not what motivated these public promises and commitments in the first place.

*Id.* at 22. A criticism of their analysis can be found in Don Browning et al., *Marrying Well*, CHRISTIAN CENTURY, Feb. 21, 2001, at 20.

as a continuation of their existence. This paternal care argument for marriage goes back, at least in the West, to the biblical command to men and women to “be fruitful and multiply” and regard their offspring as children of God, made in the image of God, that are therefore subjects worthy of a parent’s stewardship, care, nurture, and cherishing.<sup>75</sup>

In the eleventh and twelfth centuries, this biblical story of parental responsibility became philosophically reinforced by the Aristotelian-Thomistic view of the relation of parental care and the conjugal relationship. In *Politica*, Aristotle says both humans and animals have “a natural desire to leave behind them an image of themselves.”<sup>76</sup> Aristotle argues the same when he states that that the parents who beget children should raise them, in contrast to Plato, who thought state nurses should bring up children.<sup>77</sup> Aristotle argues for the power of natural parental care when he asserts that “[o]f the two qualities which chiefly inspire regard and affection—that a thing is your own and that it is your only one—neither can exist” in Plato’s ideal republic where children are raised without knowledge of who their actual parents really are.<sup>78</sup> These two strands from Genesis and Aristotle were picked up by Thomas Aquinas, with the Aristotelian naturalistic story being subordinated to the Hebrew-Christian view of fathers and mothers as God’s stewards of their children.<sup>79</sup> From there, these reinforcing biblical and philosophical insights into the link between conception and care entered the family law of early modern European countries, the ecclesial and legal theory of subsidiarity found in modern Roman Catholic social teaching,<sup>80</sup> and finally the family theory implicit in the Universal Declaration of Human Rights.<sup>81</sup>

The Protestant Reformation disseminated this synthesis of biblical deontology and Thomistic-Aristotelian teleology to early modern secular law.

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<sup>75</sup> *Genesis* 1:28.

<sup>76</sup> ARISTOTLE, *Politica*, in *THE BASIC WORKS OF ARISTOTLE* 1113, 1128 (Richard McKeon ed., Benjamin Jowett trans., 1941).

<sup>77</sup> PLATO, *THE REPUBLIC* bk. V (Benjamin Jowett trans., 1901).

<sup>78</sup> ARISTOTLE, *supra* note 76, at 1150.

<sup>79</sup> V THOMAS AQUINAS, *SUMMA THEOLOGICA* supp. 2699–706 (Fathers of the English Dominican Province trans., Christian Classics 1981).

<sup>80</sup> See, e.g., Pope Leo XIII, *Rerum Novarum*, in *PROCLAIMING JUSTICE AND PEACE* 15, 25, 29 (Michael Walsh & Brian Davies eds., 1991); Pius XI, *ON CHRISTIAN MARRIAGE* (1930); Pius XI, *Quadragesimo Anno*, in *THE PAPAL ENCYCLICALS: 1903–1939*, at 415, 428 (Claudia Claren ed., 1981).

<sup>81</sup> Don Browning, *The Meaning of the Family in the Universal Declaration of Human Rights*, in *THE FAMILY IN THE NEW MILLENNIUM* 38–59 (A. Scott Loveless & Thomas Holman eds., forthcoming 2007). See generally Don S. Browning, *The United Nations Convention on the Rights of the Child: Should It Be Ratified and Why?*, 20 *EMORY INT’L L. REV.* 157 (2006).

In spite of Martin Luther's rejection of the Roman Catholic sacramental view of marriage, Brian Gerrish and John Witte, Jr. remind us that Luther retained much of the Aristotelian-Thomistic view of the rights and importance of the fathers, mothers, and the natural family.<sup>82</sup> Luther did this even though he assigned this level of thinking to the practical reason and institutional law of the left hand Kingdom of God—the Kingdom of this world.<sup>83</sup> He especially emphasized the importance of married fatherhood when he ridiculed the disparagement of paternal care for their children that came from the monks and priests of the early sixteenth century.<sup>84</sup> This entire line of argument about the importance of marriage as an institution functioning to enhance paternal care is a classic perspective carried and advanced by the Christian tradition. It is actually, however, a mixed argument that blends and balances a Christian ontology of creation and covenant with a subordinate biophilosophical, teleological, and Aristotelian argument about the premoral goods of parental investment in their children through the integrations of marriage as a sanctioned institution.<sup>85</sup>

McClain, with her more Platonic sensibilities about the heightened role of the state in directing the care of children, misses the point of this massive religio-philosophical and legal tradition. This tradition mainly conveys an argument about the sources of the premoral investment of paternal care for offspring. It is the public institution of marriage—reinforced by law, covenant, or sacrament—that channels the investments of males in their offspring, not just the enticements of women, as McClain seems to think. Because of the powerful premoral good of paternal care and investment, both law and religion have traditionally emphasized the moral channeling of legal marriage as a way of organizing and enhancing this energy. Religion also has sanctioned the institution of marriage because it helps integrate the premoral good of paternal investment with a variety of other reinforcing goods, such as sexual exchange and reciprocal care between husband and wife. This is the argument for

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<sup>82</sup> BRIAN A. GERRISH, *GRACE AND REASON* 13 (1962); JOHN WITTE, JR., *LAW AND PROTESTANTISM* 92 (2002).

<sup>83</sup> GERRISH, *supra* note 82, at 13; WITTE, *supra* note 82, at 92.

<sup>84</sup> See MARTIN LUTHER, *The Estate of Marriage*, in 45 *LUTHER'S WORKS* 17, 21 (Walther I. Brandt ed. & trans., 1962).

<sup>85</sup> For a detailed historical summary of how Christian marriage combines Christian deontological and covenantal symbols of marriage with Greek teleological justifications of the institution, see John Witte, Jr., *The Goods and Goals of Marriage: The Health Paradigm in Historical Perspective*, in *MARRIAGE, HEALTH, AND THE PROFESSIONS* 49 (John Wall et al. eds., 2002).

matrimony found in Augustine's *The Good of Marriage*<sup>86</sup> and subsequent theological and legal formulations that it influenced throughout Western history.<sup>87</sup> Integrating the investment of fathers into the care of their offspring is not the only good of marriage, but it may be one of its central goods. The premoral goods of sexual exchange and reciprocal aid between spouses help reinforce and integrate the premoral good of parental, and especially *paternal*, investment.

Parental investment in and attachment to children, whether paternal or maternal, is a premoral good. It is morally relevant but not morally exhaustive of parental obligations to their children. Parental investment is an index of their emotional identification with, commitment to, and endurance in caring for offspring. This investment is not fully moral unless it is guided by respect for the growing selfhood of the child, integrated into a wide range of other premoral goods of life, *and* balanced with the needs of other children who are not one's own. From a Christian perspective, this premoral attachment and investment in one's offspring is subordinate to an even deeper reason to care for one's children, that is, because they are children of God and reflections of the divine good. Thomas Aquinas formulated it well: Christians should love their children because (1) they are continuations of their own existence and (2) they are created in the image of God.<sup>88</sup> Aquinas taught that the latter reason was the more profound.<sup>89</sup> Furthermore, he held that because all children are made in the image of God, we have the obligation to love all of them in analogy to our own offspring. This grounds the Christian obligation to adopt and cherish needy and abandoned children and orphans.<sup>90</sup> It was Aquinas, more than anyone else, who gave Western Christians a way of reconciling the demands of the love and justice of the Kingdom of God with the important yet subordinate good of loving and emotionally investing in our own children. This legacy is deep and is likely to remain in the sensibilities of Western societies unless dislodged by contemporary legal theory and the logics of modernization. Together, these two forces may unwittingly function to undermine the means by which the institution of marriage reinforces deep

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<sup>86</sup> Augustine, *The Good of Marriage*, in 27 THE FATHERS OF THE CHURCH 9, 13–16 (Roy J. Deferrari ed., Charles T. Wilcox trans., 1955).

<sup>87</sup> Charles J. Reid, *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. 449 (2004).

<sup>88</sup> AQUINAS, *supra* note 79, at 2704.

<sup>89</sup> *Id.*

<sup>90</sup> See Don S. Browning, *Adoption and the Moral Significance of Kin Altruism*, in THE MORALITY OF ADOPTION 52, 65–66 (Timothy P. Jackson ed., 2005).

attachments between fathers, mothers, and their children. The forces may also be functioning to ignore or actively reject the way religious symbols balance and reinforce these inclinations.

### III. KIN ALTRUISM, CHILD WELL-BEING, AND DOMESTIC VIOLENCE

Because McClain does not accurately understand the classic philosophical and theological arguments for the link between marriage and paternal attachment, she does not understand the relation between family diversity and violence. As I have pointed out above, McClain, along with *Principles of the Law of Family Dissolution*<sup>91</sup> and *Beyond Conjugal*,<sup>92</sup> holds an a priori dedication to the goal of family diversity.<sup>93</sup> These works all hold a strict analogy, if not identity, between the moral good of ethnic, racial, and cultural diversity, which we would all affirm, and the much more problematic concept of the alleged good of diversity in family form.

Yet there are several defects to this presumption. First, it overlooks growing evidence on the comparative capacity of various family forms to enhance the premoral goods of health and wealth, especially for children. It overlooks growing evidence of the increased violence against children by cohabiting couples, domestic partnerships, single-parent homes, and even married stepfamilies. New empirical evidence supports the intuitions of the classic tradition that are outlined above. The presumption in favor of diversity in family form overlooks the fact that today many liberal social scientists who on several issues would otherwise agree with McClain are now willing to support marriage promotion as public policy as long as it does not replace other needed public support for families and children.

It is efficient to start with the last point and work backward to the others. Why are previously skeptical liberal social scientists gradually moving toward supporting marriage as public policy? It is because strong emotional investments by parents in children are the presupposition for creating the emotional health required to form democratic virtues in the youth. McClain agrees that strong and warm attachments create a foundation for democratic citizenship; however, she denies that in this endeavor the two-parent intact

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<sup>91</sup> AM. LAW INST., *supra* note 7.

<sup>92</sup> LAW COMM'N OF CAN., *supra* note 8.

<sup>93</sup> MCCLAIN, *supra* note 1, at 24, 32, 178, 292.

family has an advantage.<sup>94</sup> One of the most peculiar features of this otherwise careful book is the lack of discussion regarding the emerging consensus in the social sciences that children raised in married, two-parent families measure better in health and well-being.<sup>95</sup> To the contrary, she holds that a “close parent-teen relationship does not, in and of itself, vouchsafe good citizenship.”<sup>96</sup> In this regard, McClain is doubtless partially correct; close attachments may not be sufficient, but they may be essential in the sense of foundational to all other socializing measures. Democratic citizenship is not likely to emerge in young people without the healthy attachments of the kind that stable and married parents can, on average, provide better than other familial arrangements. The growing evidence of this truth accounts for why the liberal social sciences are turning to what some call a policy of “marriage-plus”—the idea of the cultural and public support of marriage but without undercutting a variety of other important governmental family supports, especially for children.

Such evidence is found in a recent edition of the journal *The Future of Children* titled *Marriage and Child Wellbeing*.<sup>97</sup> In a special issue, the most authoritative summaries of the connection between marriage and child well-being are reported. Much of this scholarship builds on evidence from *A Generation at Risk*, research from the Center for Law and Social Policy, and the research institute called Child Trends. A recent literature review from Child Trends concludes with the following striking statement: “[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage.”<sup>98</sup> Recent reviews of the literature by the Center of Law and Social Policy<sup>99</sup> and the Institute for American Values reach similar conclusions.<sup>100</sup>

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<sup>94</sup> MCCLAIN, *supra* note 1, at 67.

<sup>95</sup> McClain makes no mention, discussion, or attempt to refute the landmark social science studies on the correlation between married, intact families and child well-being. See generally SARA MCLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT* (1994); PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK* (1997).

<sup>96</sup> MCCLAIN, *supra* note 1, at 67.

<sup>97</sup> 15 *THE FUTURE OF CHILDREN* (2005).

<sup>98</sup> KRISTIN ANDERSON MOORE ET AL., *MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN BE DONE ABOUT IT?* 6 (2002), [http://www.childtrends.org/Files/Child\\_Trends-2002\\_06\\_01\\_RB\\_ChildsViewMarriage.pdf](http://www.childtrends.org/Files/Child_Trends-2002_06_01_RB_ChildsViewMarriage.pdf).

<sup>99</sup> MARY PARKE, *CTR. FOR LAW & SOC. POLICY, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN?* 2–3 (2003), [http://www.clasp.org/publications/Marriage\\_Brief3.pdf](http://www.clasp.org/publications/Marriage_Brief3.pdf).

<sup>100</sup> INST. FOR AM. VALUES, *supra* note 49.

Is there a new and unambivalent consensus in the social sciences on the importance of marriage for children? Not quite, but there are indications of a trend toward this direction. In a recent review of 266 articles addressing the issue of family structure from 1977 to 2002, Norval Glenn and Thomas Sylvester rated these articles on a one to five scale as to whether they were either “sanguine” about the role of family structure for child well-being or “concerned,” meaning promarriage.<sup>101</sup> They found a major shift from 1977 to 1987 toward scientists who were “concerned” and a discernible but less dramatic movement in this direction from 1987 until 2002.<sup>102</sup> Even in this later period, with all other relevant factors controlled, 3.64% of the articles believed that married biological parents made a measurably positive difference to child well-being.<sup>103</sup> What is intriguing about the Glenn-Sylvester survey is the logical analysis they make of how some social scientists have downplayed or denied the family-structure effect.<sup>104</sup> This was done by using various forms of the “not in-and-of itself” or the “per se” argument of the kind McClain used in denying the link between family structure and democratic virtues. These arguments try to deflect attention from structure to causal factors such as income or family process. According to Glenn and Sylvester, such maneuvers are illogical because of existing research demonstrating that family structure and father absence are factors that themselves contribute to loss of income and poor family process.<sup>105</sup>

Such evidence, largely ignored by McClain, challenges her a priori commitment to family diversity. In view of this mounting evidence, one can appreciate the direction of the articles in the special issue of *The Future of Children* titled *Marriage and Child Wellbeing*, the introduction of which states, “The articles in this volume confirm that children benefit from growing up with two married biological parents. The articles also support a more active government role in encouraging the formation and maintenance of stable, low-conflict, two-parent families.”<sup>106</sup> The authors and editors of this issue seem not to fear the prospect of government, churches, and civil society channeling human sexuality and child rearing towards marriage as long as it does not

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<sup>101</sup> NORVAL GLENN & THOMAS SYLVESTER, INST. FOR AM. VALUES, *THE SHIFT: SCHOLARLY VIEWS OF FAMILY STRUCTURE EFFECTS ON CHILDREN, 1977–2002*, at 5–6 (2006), <http://www.familyscholarslibrary.org/assets/pdf/theshift.pdf>.

<sup>102</sup> *Id.* at 7–8.

<sup>103</sup> *Id.* at 8.

<sup>104</sup> *Id.* at 10.

<sup>105</sup> *Id.* at 8–9.

<sup>106</sup> Sara McLanahan et al., *Introducing the Issue*, 15 *THE FUTURE OF CHILDREN* 8–9 (2005).

trump or neglect other important job, tax, welfare, and justice supports for families and their children.<sup>107</sup> This position is entirely consistent with and directly advocated by the perspective of critical familism and first introduced in the last full chapter of *From Culture Wars to Common Ground*<sup>108</sup> and repeated in *Reweaving the Social Tapestry*, the background book for the consensus statement achieved on family public policy sponsored by Columbia University's American Assembly.<sup>109</sup> Although we did not use the term, for all practical purposes it was a "marriage plus" policy consistent with the editorial in the *Future of Children*.<sup>110</sup>

The issue at stake here is channeling, something McClain is quite happy to aggressively use law to accomplish with regard to equality *in and between* families. But she is reluctant to act similarly to enhance the likelihood that children will be raised by the parents who conceive them. This particular issue is increasingly seen as a question of children's rights, well-protected in the Universal Declaration of Human Rights.<sup>111</sup> In addition, new evidence from both sociology and evolutionary psychology shows significantly higher levels of sexual and physical violence to children (especially daughters) in post-divorce single-father and single-mother families,<sup>112</sup> stepparent families,<sup>113</sup> cohabiting families with a nonbiological parent,<sup>114</sup> never married single-mother families,<sup>115</sup> and de facto parenting situations.<sup>116</sup> There are also higher levels of adult partner abuse in cohabiting couples.<sup>117</sup> McClain fears that promoting marriage in law and public policy will trap women in violent homes.<sup>118</sup> Unfortunately, she disregards evidence, collected by sociologist Linda Waite

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<sup>107</sup> *Id.* at 8–10.

<sup>108</sup> BROWNING, *supra* note 2.

<sup>109</sup> BROWNING & RODRIGUEZ, *supra* note 2.

<sup>110</sup> McLanahan et al., *supra* note 106.

<sup>111</sup> See Universal Declaration of Human Rights, G.A. Res. 217A art. 16(3), at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>112</sup> Robin Fretwell Wilson, *Fractured Families, Fragile Children—The Sexual Vulnerability of Girls in the Aftermath of Divorce*, 14 CHILD & FAM. L.Q. 1 (2002).

<sup>113</sup> MARTIN DALY & MARGO WILSON, THE TRUTH ABOUT CINDERELLA: A DARWINIAN VIEW OF PARENTAL LOVE (1998).

<sup>114</sup> Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251 (2001).

<sup>115</sup> RICHARD J. GELLES & CLAIRE P. CORNELL, INTIMATE VIOLENCE IN FAMILIES 57 (1985).

<sup>116</sup> Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90 (Robin Fretwell Wilson ed., 2006).

<sup>117</sup> LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 157–58 (2000).

<sup>118</sup> MCCLAIN, *supra* note 1, at 131–33.

and others, demonstrating that violence to both adults and children is far less likely in intact marriages than in cohabiting couples, domestic partnerships, and other nonlegal arrangements.<sup>119</sup>

All of this evidence indicates that an uncritical, if not a priori, commitment to placing the channeling and sanctioning power of law and government policy behind family diversity is not justifiable. Nor is it a wise construal of liberal social policy. Liberal social policy must not simply concentrate on the procreative and intimacy rights of adults. A genuinely liberal social philosophy must express itself in a life-cycle theory of justice and equal regard. It must include the interests of children behind Rawls's original position, or veil of ignorance, where he thought justice as fairness could best be exercised—the veil that, in principle, McClain implicitly honors so profoundly. Because small children cannot fully articulate their own interests, adults must exercise empathic imagination on their behalf. Increasingly young adults, who were themselves children of divorce or conceived through the aid of anonymous donors, are wondering how it happened that the public policies of their societies have so carelessly disregarded their rights to be raised by the parents who conceived them.<sup>120</sup> Certainly, they want loving parents and may in fact have had them in the various adult arrangements that raised them. They also are saying, however, that they want this love thickened as nearly as possible by the deep identifications, attachments, investments, mutual recognitions, and sense of family belonging that comes from knowing and having been raised, if possible, by their parents of procreation and conception.

The dynamics of modernization are such that we can be certain there will be family diversity in the form of divorce, nonmarital births, cohabiting couples, and other so-called nontraditional family formations. Critical familism has no systematic animosity toward these families and acknowledges that public policy in the form of welfare, tax strategies, and medical supports is required to address their needs, especially those of their children. Indeed, critical familism has offered a long list of such supports. Critical familism has proposed something like the G.I. Bill of Rights for parents, married and unmarried alike. It would guarantee to parents the possibility of joining the job market they left for several years in order to care for their children.<sup>121</sup> For

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<sup>119</sup> WAITE & GALLAGHER, *supra* note 74, at 150–60.

<sup>120</sup> Canadian medical ethicist Margaret Somerville has put forth provocative writings on this issue. *See, e.g.,* MARGARET SOMERVILLE, *THE ETHICAL CANARY* 36–53 (2004); Margaret Somerville, *What About the Children*, in *DIVORCING MARRIAGE* 63, 63–78 (Daniel Cere & Douglas Farrow eds., 2004).

<sup>121</sup> BROWNING ET AL., *supra* note 2, at 331.

single parents on welfare, it has proposed no more than a thirty-hour work week, significantly increased medical insurance, childcare supports, transportation supports, and huge increases in tax exemptions and earned-income allowances for all families with children, regardless of form.<sup>122</sup> Whereas McClain would meet the dislocations of modernization and cultural individualism by championing them in the name of diversity, critical familism addresses them with a strong reliance on reconstructed religious traditions, a social policy guided by an ethics of equal regard within families, and a differentiated welfare policy targeted to meet the needs of families with children without redefining legal and cultural institutions in ways that would further aggravate, if not channel, social fragmentation.

Critical familism resists the proposals found in McClain, *Beyond Conjugality*,<sup>123</sup> *Principles of the Law of Family Dissolution*,<sup>124</sup> and several other leading family law theorists. These perspectives would institute a broadened definition of marriage and family and invent a wide range of legal equivalents to marriage as a way of addressing the dependency and welfare needs of modern societies. With equal regard to both adults and children, I propose fashioning both civil society and the law to promote more equal regard and justice in both the public and domestic spaces of marriages and families, without dismantling the use of law to channel through the institution of marriage the integration of sexuality, kin altruism, and extended family solidarity and the value of these integrations for the good of children.

Critical familism brings together a program for the reconstruction of religious tradition, law, and public policy toward the equal-regard marriage and family and adds to it the emerging concept called “marriage plus.” It does this in ways that maintain continuity between public policy and a critical hermeneutic retrieval of the marriage traditions of the dominant theological and philosophical strands of the Christian tradition. Through a similar task of reconstruction, the methodology of critical familism can doubtless bring the modern law of families into at least a rough congruence with other major religious traditions as well. This is a task and discussion that I have begun in

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<sup>122</sup> *Id.* at 325–26, 330–31. Many of the ideas proposed in *From Culture Wars to Common Ground*, *supra* note 2, were discussed in *Reweaving the Social Tapestry*, *supra* note 2, at 114–17, which was written as the background book for the year 2000 American Assembly on family policy. Several of these proposals were adopted by the consensus statement approved by the 53 participants of the Assembly. BROWNING & RODRIGUEZ, *supra* note 2, at 193–95.

<sup>123</sup> LAW COMM’N OF CAN., *supra* note 8.

<sup>124</sup> AM. LAW INST., *supra* note 7.

other places but must be carried further at another time and in other contexts.<sup>125</sup>

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<sup>125</sup> Beginning efforts toward this dialogue between the major world religions and law can be found in BROWNING, *supra* note 2, at 99–128, 211–44; SEX, MARRIAGE, AND THE FAMILY IN THE WORLD RELIGIONS xvii–xxix (Don Browning et al. eds., 2006); and AMERICAN RELIGIONS AND THE FAMILY (Don Browning & David Clairmont eds., 2007).

