

PERFECTIONIST POLICIES IN FAMILY LAW

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*Linda McClain's book, *The Place of Families: Fostering Capacity, Equality, and Responsibility*, offers a thoughtful approach to government policy in family matters, grounded on what McClain calls "toleration as respect," in which the government has a role in improving individuals and social institutions, while valuing personal and collective self-government and making a range of choices available. McClain's approach combines elements of liberalism, feminism, and civic republicanism.*

In the context of considering McClain's proposals regarding marital equality, same-sex marriage, abortion, and sex education, this review essay considers the problem of persuasion and social reform. In a country where many voters and officials do not share the values and proposals McClain endorses, how would one go about effecting the reforms she wants? This review essay, using examples from sex education and same-sex marriage, considers the possibilities, and limits, associated with finding points of agreement, or seeking the common ground of consequentialism.

The Place of Families: Fostering Capacity, Equality, and Responsibility, by Linda C. McClain. Cambridge, Mass., Harvard University Press, 2005. pp. 364. \$45.00.

Linda McClain's *The Place of Families*¹ is a paradigm of what family law scholarship should look like: thoughtful, balanced, open-minded, and grounded in a thorough knowledge of policy, empirical scholarship, and theoretical argument. At the same time, this book does not shy away from controversial topics. In fact, it is hard to come up with any divisive family-related topic that is *not* covered—topics discussed at length in-

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1. LINDA A. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006).

clude same-sex marriage, proposals to end civil marriage, federal marriage-promotion programs, welfare reform, abortion, and sex education.

There is not enough space here to discuss all these topics in appropriate detail, but what follows will sample from the issues McClain discusses. Part I considers the prescriptive tone of McClain's book and its connection with civic republicanism and perfectionism. Part II looks at its discussion of marital equality. Part III analyzes some aspects of the book's view on abortion. Part IV summarizes McClain's view on the marriage debates. Finally, Part V returns to the problems of consequentialism and law reform.

The review finds little to disagree with in the book substantively, but notes possible problems that would occur if and when efforts are made to reform law and practice to follow the book's prescriptions.

I. PRESCRIPTION, POLICY, AND PERFECTIONISM

The Place of Families is primarily about government programs: ones that are currently underway, and are or are not working; others that have been proposed and are or are not good ideas; and ones that are not currently under serious consideration, but perhaps should be. This is not a work *about theory* (family law theory, feminist theory, or otherwise)—though the author does not hesitate to bring in theory and theorists in the course of discussing or justifying possible courses of action.

On the relationship between government, law, society, and the individual, McClain is a civic republican,² arguing that the state has a role in making individual citizens and social institutions better. She writes: "Government, I contend, has an important responsibility to carry out a formative project of fostering persons' capacities for democratic and personal self-government."³ The themes of the book are summarized as follows: "I propose a framework based on three salient ideas for thinking about the place of families: *fostering capacity*, *fostering equality*, and *fostering responsibility*."⁴ At the same time, both here⁵ and elsewhere,⁶ McClain also affirms an affiliation with political liberalism.

2. On civic republicanism, see generally J. G. A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); Francis Lovett, *Republicanism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2006), <http://plato.stanford.edu/entries/republicanism/>. On McClain's views, see generally Linda C. McClain, *Care as a Public Value, Linking Responsibility, Resources, and Republicanism*, 76 *CHI.-KENT L. REV.* 1673 (2001); Linda C. McClain, *The Domain of Civil Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617 (2001).

3. MCCLAIN, *supra* note 1, at 15.

4. *Id.* at 4.

5. *E.g., id.* at 17.

6. See, e.g., Linda C. McClain, *Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations*, 72 *FORDHAM L. REV.* 1569, 1569 (2004) ("I consider myself a liberal feminist . . ."). As the text just quoted indicates, McClain considers herself a liberal and a feminist, as well as a civic republican, which is an interesting combination given the tendency of some theorists to consider each a basis for rejecting one or both of the other two. Part of the interest of *The Place of Families* is the

The reference to “self-government”⁷ is key, as are related references to “fostering responsibility.”⁸ The government’s objective, at least in the short term, is not to ensure that individuals do the right thing, but that they make the decisions for themselves and are well placed to do this competently. According to this view, families have dual roles as both “a site of private life and institution of public importance because of the goods they foster and the functions they serve.”⁹

Does the government have a role in making us better people, or at least better citizens? The question is as old as political thought. The view that government does have a proper role in improving its citizens, known as “perfectionism,” has supporters across the political spectrum: from the liberal Joseph Raz¹⁰ to the cultural conservative Robert George.¹¹ There is a strong intuitive or commonsense appeal to this position: as James Fitzjames Stephen wrote, “How can the State or the public be competent to determine any question whatever if it is not competent to decide that gross vice is a bad thing?”¹²

In contrast to “perfectionism,” the tradition of political liberalism is in part grounded on the view that government should have no such role: that the government should be “neutral” between individuals’ competing conceptions of the Good and that there is a strong presumption against State interference with liberty except to prevent harm to third parties.¹³ One suspects that some of the people who argue for nonintervention, noninterference, and neutrality are doing so not because they have a principled belief in such a stance, but because they distrust the current government and any government likely to be elected or installed in the near future.

McClain rejects any such strategic reading of nonintervention and instead posits “toleration as respect”: in certain areas, one must not merely condone what one concludes to be improper, but rather one must recognize and respect a range of choices.¹⁴ At the same time, however, government is allowed a role for persuasion—persuasion that falls short

way McClain makes the three perspectives coexist harmoniously within her approach to family matters.

7. McClain equates “personal self-government” with “autonomy” and defines it as “a person’s capacity to deliberate about his or her conception of the good, including self-determination and personal decision making with respect to forming, acting on, and revising a conception of a good life.” MCCLAIN, *supra* note 1, at 17.

8. *Id.* at 223.

9. *Id.* at 22.

10. See, e.g., Joseph Raz, *Liberty and Trust*, in *NATURAL LAW, LIBERALISM AND MORALITY: CONTEMPORARY ESSAYS* 113, 113 (Robert P. George ed., 1996).

11. See generally ROBERT P. GEORGE, *MAKING MEN MORAL* (1993).

12. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 84 (Stephen D. Warner ed., Liberty Fund 1993) (1873).

13. The most important source or inspiration for this view is JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed., Penguin Books 1974) (1859), though many other theorists, before and since, have advocated this view. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191 (1985). McClain repeats some of Mill’s arguments for noninterference. MCCLAIN, *supra* note 1, at 30–31.

14. MCCLAIN, *supra* note 1, at 29–43.

of compulsion, thus continuing to respect the individual's self-government.¹⁵ Through the idea of "toleration as respect," McClain is able to combine a perfectionist view of government with a liberal notion of broad individual liberties, even if the two views remain in an uneasy tension.

II. EQUALITY IN MARRIAGE AND GOVERNMENT SUBSIDY

Among the strongest and most persistent themes in the book is the importance of equality within and among families.¹⁶ In regards to equality within families (equality among families will be discussed in Part IV), McClain is particularly concerned with how the moral (and constitutional) ideal of sex equality should be supported and reinforced by public/governmental standards that will have private repercussions.¹⁷ However, she would have government stop far short of any sort of imposed dogma regarding how day-to-day family life is to be led.

The Place of Families responds to a federal government that has, in recent years (particularly under Republican control, but not only then), been active in trying to improve individual and social life through regulation of family matters.¹⁸ Although the book agrees in principle with the idea that the government should be active, it nonetheless disagrees at numerous points regarding the particular policies and directions that our government has taken.

McClain accepts a role for marriage and family in shoring up civil society, but she parts ways with the theorists and policymakers who believe that it is traditional morality and traditional marriage that would be best for society.¹⁹ This disagreement connects with one of McClain's more controversial claims: the government not only should, as a policy

15. *Id.* at 43–48.

16. "Equality within families" refers to sex equality. *E.g., id.* at 5. Equality among families in this book means primarily that the State should—through legal recognition and/or benefits—treat traditional opposite-sex couple households no better than same-sex couple households, single-parent households, and the like. *E.g., id.* at 5–6. However, upon seeing the phrase "equality among families," a reader might expect the author to say something about the problem of sharp and increasing resource inequality among families in the United States—a natural topic, one might have thought, for someone attuned to questions about how private life might affect the structure and vitality of public life. *See, e.g.,* Craig Torres & Alexandre Tanzi, *Hourglass Economy*, HOUS. CHRON., Aug. 14, 2006, Business, at 1 (discussing the growing income and wealth gaps and how they are affecting individuals and families). However, the author, perhaps understandably, did not want to take on broad issues of equality and redistribution, preferring to focus on more specific issues relating to family law.

17. MCCLAIN, *supra* note 1, at 147–54.

18. *See, e.g.,* Wade F. Horn, *Wedded to Marriage*, NAT'L REV. ONLINE, Aug. 9, 2005, available at <http://www.nationalreview.com/script/printpage.p?ref=/comment/horn200508090806.asp> (defense of government marriage policy by Assistant Secretary for Children and Families); U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Healthy Marriage Initiative, <http://www.acf.hhs.gov/healthymarriage/index.html> (summarizing government marriage promotion program).

19. MCCLAIN, *supra* note 1, at 50–84.

matter, promote sex equality within marriage, but is constitutionally required to do so.²⁰

McClain argues that if marriage promotion or relationship education includes prescriptions of distinct gender roles or gender hierarchy (as some proposals have suggested), it “would offend the constitutional principle of sex equality,” if only by improperly “reinforc[ing] stereotypes about men and women.”²¹

The constitutional question is difficult: although the Supreme Court has held it unconstitutional for the government to enforce sex stereotypes through legislation that creates different rights and duties for men and women (including different rights and duties for husbands and wives), it is not obvious that government expression and government subsidy reflecting sexist views are similarly prohibited.²² As many writers have noted, the Court’s views on government speech and subsidy of speech are scanty and inconsistent, leaving little guidance.²³ However, on the whole, the Court has tended to uphold selective government funding that subsidizes some views but not others.²⁴ At the same time, these cases dealt mostly with content discrimination,²⁵ and one sympathetic with McClain’s position might argue that a more stringent standard would apply where the subsidy deals with matters of sex (or race) discrimination.

20. *Id.* at 60–61.

21. *Id.* at 149 (footnote omitted); *see also id.* at 151. In support of this view, McClain cites *Orr v. Orr*, 440 U.S. 268 (1979), and Mary Anne Case, *Reflections on Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 765 (2002). MCCLAIN, *supra* note 1, at 336 n.166.

22. McClain writes: “government may not promote [David] Popenoe’s gendered division of labor as a model of ‘healthy marriage,’ for that is tantamount to using law (as government once did) to enforce a gendered allocation of responsibilities that reinforces stereotypes about men and women.” MCCLAIN, *supra* note 1, at 149. As discussed in the text, precedent in this area, at the least, strongly questions an easy (“tantamount to”) equation of gender-based legal categories and government advocacy of gender hierarchy.

23. *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 151–52 (1996); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 544 (1996); *see also* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 89–91 (2005); DANIEL A. FARBER, THE FIRST AMENDMENT 208–10 (2d ed. 2003).

24. *See, e.g.*, Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998) (upholding NEA funding decisions to discriminate on the basis of content); *Rust v. Sullivan*, 500 U.S. 173, 178 (1991) (upholding government family-planning funding limited to organizations that did not discuss abortion as an option). In subsequent cases, the Court has come out the other way on occasion by distinguishing *Rust*. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (invalidating federal appropriations law barring LSC funding of organizations that challenged existing welfare law); *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (holding unconstitutional a state university program that excluded religious organizations from the category of student groups whose printing costs would be subsidized). In these cases, the Court reaffirmed the right to subsidize viewpoints selectively when the government itself is the speaker or when it uses private speakers to promote the government’s views. *Legal Servs.*, 531 U.S. at 541; *Rosenberger*, 515 U.S. at 833.

25. *See, e.g.*, *Finley*, 524 U.S. at 586–88 (upholding NEA funding decisions, noting that the government would not be allowed to use subsidies to suppress dangerous ideas, and explaining that the test would be whether the funding decision had a coercive effect).

McClain does not give great emphasis to the constitutional argument,²⁶ so perhaps neither should this review. There remains the question of policy. In very rough terms, McClain's argument is that it would be a good thing to encourage equality within marriages.²⁷ Even here, some conservative social scientists have raised doubts. In a study that was published after McClain's book came out, W. Bradford Wilcox and Steven L. Nock concluded that women in "traditional" (non-egalitarian) marriages were happier and more emotionally satisfied than those in egalitarian marriages.²⁸

In a response (co-written with Joanna Grossman), McClain reads the Wilcox and Nock study as being about expectations: women with low expectations of spousal contributions often had their expectations exceeded, whereas those with high expectations were often disappointed and frequently created a hostile or defensive reaction in their husbands.²⁹ Under this reasonable reading of the study, McClain does not see the data as grounds for refusing to encourage equality within marriage.³⁰

III. ABORTION

McClain's defense of the right to abortion is consistent with the book's rubric of individual and family self-government and the government's role in facilitating those objectives: "[a] fundamental component of fostering responsibility and respecting personal self-government with regard to family life is protecting the freedom to decide whether or not to exercise one's capacity to reproduce."³¹ When considering the communitarian argument that abortion involves women refusing to help the helpless unborn children they are carrying, McClain responds with the equality argument that in a society that generally does not impose "Good Samaritan" obligations,³² it is sexist to single out pregnant women to carry that obligation, and it effectively denies such women "personal self-

26. It appears twice, in single-sentence references each time. See MCCLAIN, *supra* note 1, at 149, 151.

27. *Id.* at 151-54.

28. W. Bradford Wilcox & Steven L. Nock, *What's Love Got to Do With It? Equality, Equity, Commitment and Women's Marital Quality*, 84 SOC. FORCES 1321, 1340 (2006).

29. Joanna Grossman & Linda McClain, "Desperate Feminist Wives": *Does the Quest for Marital Equality Doom Marital Happiness?*, FINDLAW, Apr. 4, 2006, http://writ.corporate.findlaw.com/commentary/20060404_mcclain.html.

30. *See id.*

31. MCCLAIN, *supra* note 1, at 223.

32. Similarly, Judith Jarvis Thomson's argument on abortion compared women who were pregnant without fault or intention (e.g., victims of rape) to being medically hooked up against one's will to save the life of a dying violinist. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48-50 (1971), *cited in* MCCLAIN, *supra* note 1, at 227, 348 n.12. The moral question alters at least somewhat when the woman bears a greater level of responsibility for having become pregnant, though it is still the case that carrying a pregnancy to term involves bearing a significant burden for the benefit of another.

government.”³³ For McClain, the right to abortion fosters responsibility, not in the sense of “responsibility” that means acting according to socially prescribed duties, but rather in the sense of the opportunity and necessity of making basic life choices for oneself.³⁴ In particular, women facing unwanted pregnancies must evaluate their circumstances and their relationships and obligations towards others, in determining whether they are “capable of, or ready to assume the responsibility for, nurturing a fetus and, ultimately, mothering a child.”³⁵

These are important points to offer and a corrective to those who accept a negative stereotype of most abortions as being done on “a whim” or for “aesthetic reasons.”³⁶ At the same time, even if those points are taken seriously, I suspect that committed opponents of abortion would not be persuaded or appeased. These are, after all, on the whole, reasons for not raising a child, not reasons for refusing to carry a child to term. The opponents would point out that, given the current supply and demand for children for adoption, there is every reason to believe that a baby given up immediately after birth would have no trouble finding a loving home.³⁷ That leaves the view (likely unpersuasive to abortion opponents) that a woman’s autonomy in decisions regarding

33. MCCLAIN, *supra* note 1, at 228. This is basically an equality argument, and like similar equality arguments, it “risks” the response that equalizing actions can go in either of two directions. The assumed prescription of the argument that women forced to carry pregnancies to term would have altruistic burdens for which men carry no comparable burdens, is that women should not be forced to carry pregnancies to term. However, one could argue the other way: that women *should* have to carry pregnancies to term, but that something roughly comparable should be imposed on men. In his (unpublished) 1997 DeVane Lectures at Yale University, Judge Guido Calabresi suggested that men might be placed in a lottery, such that a certain percentage of them would have to donate kidneys for others. Guido Calabresi, *Life, Death, and the Law*, Lecture at the Yale University DeVane Lecture Series (1997).

34. MCCLAIN, *supra* note 1, at 226–29.

35. *Id.* at 230.

36. The Guttmacher Institute reports: “On average, women give four reasons for choosing abortion. Three-fourths of women cite concern for or responsibility to other individuals; three-fourths say they cannot afford a child; three-fourths say that having a baby would interfere with work, school or the ability to care for dependents; and half say they do not want to be a single parent or are having problems with their husband or partner.” GUTTMACHER INST., *FACTS ON INDUCED ABORTION IN THE UNITED STATES 1* (2006) (footnote omitted), available at http://www.guttmacher.org/pubs/fb_induced_abortion.pdf.

37. An article from 1991 cited a figure of one million U.S. couples looking to adopt and only about 33,000 infants available domestically for adoption. Lisa Gubernick, *How Much Is That Baby in the Window?*, *FORBES*, Oct. 14, 1991, at 90. There is little reason to believe that the domestic supply or demand has altered significantly since that date. See U.S. Dep’t of Health & Human Servs., Admin. for Children & Families, *Trends in Foster Care and Adoption—FY 2000–FY 2005*, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm (last visited Feb. 28, 2007) (showing that around 50,000 adoption were completed annually during fiscal years 2000–2005); cf. Child Welfare Info. Gateway, *Persons Seeking to Adopt: Numbers and Trends* (2005), http://www.childwelfare.gov/pubs/s_seek.cfm (showing that, according to a 1995 survey, “there were nearly 10 million ever-married American women ages 18 to 44 who had ever considered adoption, and this number amounted to more than one-fourth (26.4 percent) of all ever-married women,” but less than 500,000 had completed an adoption). However, foreign adoptions have increased to well over 20,000 each year. See Lynette Clemetson & Ron Nixon, *Breaking Through Adoption’s Racial Barriers*, *N.Y. TIMES*, Aug. 17, 2006, at A1 (presenting a graphic showing numbers of international adoptions, 1990–2005).

whether to nurture the fetus is more important than the life of the fetus, as well as the equality argument that forcing women to carry pregnancies to term is an extraordinary burden—involving pain, discomfort, significant interruption to life and career, and so on—and a burden that is imposed only on women.

IV. MARRIAGE: ABOLITION, EXTENSION, OR STATUS QUO?

Martha Fineman has for some time argued that civil marriage should be abolished.³⁸ A variety of commentators have since taken up this suggestion.³⁹ Fineman argues that the state should not subsidize some forms of sexual/romantic intimacy and not others, and that marriage tends to privatize (and feminize) the cost of dependency.⁴⁰ In this book, and elsewhere,⁴¹ McClain has opposed this view, arguing that marriage plays an important role in creating “intimate, committed bonds between adults” and “fostering goods as well as interdependencies.”⁴² She doubts that comparable benefits could be created from Fineman’s alternative of private contract, which, for example, would deny couples “the expressive benefit of public recognition of—and validation of—their commitment.”⁴³

As McClain sees advantages of marriage to individuals and to society, and does not see homosexuality as immoral, it is not surprising that she broadly supports extending marriage to same-sex couples.⁴⁴ She argues that exclusion of same-sex couples involves “an unjust imposition of governmental orthodoxy about gender roles and sexuality,” while also excluding them from “cultural resources” useful for their development.⁴⁵ Civil union laws, domestic partnership laws, and enforceable private contracts are seen as inadequate substitutes for marriage, valuable primarily as stepping-stones towards the full protection of same-sex marriage.⁴⁶

38. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 226–33 (1995); see also Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS 29, 29–31 (Anita Bernstein ed., 2006) (arguing for abolishing civil marriage); Dorian Solot & Marshall Miller, *Taking Government Out of the Marriage Business: Families Would Benefit*, in MARRIAGE PROPOSALS, *supra*, at 70, 71.

39. This includes the British theological think tank Ekklesia. Simon Barrow & Jonathan Bartley, *What Future for Marriage*, EKKLESIA, June 17, 2006, http://www.ekklesia.co.uk/content/article_abolishmarriage.shtml; see also Michael Kinsley, *Abolish Marriage*, SLATE, July 2, 2003, <http://www.slate.com/id/2085127>; Stephen B. Presser, *Marriage and the Law: Time for a Divorce?*, CHRONICLES: MAG. AM. CULTURE, Mar. 2004, at 20, available at <http://www.heartland.org/pdf/14855.pdf>.

40. See FINEMAN, *supra* note 38, at 226–33.

41. See, e.g., Mary Lyndon Shanley & Linda McClain, *Should States Abolish Marriage?*, LEGAL AFF., May 16, 2005, http://legalaffairs.org/webexclusive/debateclub_m0505.msp.

42. MCCLAIN, *supra* note 1, at 193.

43. *Id.* at 217.

44. *Id.* at 155–90.

45. *Id.* at 170.

46. *Id.* at 182–90.

V. PERSUASION, DATA, AND COMPROMISE

If one's purpose is to recommend legal reform, it is, of course, useful to take into account the lay of the political landscape. Pundits disagree on what is likely to happen in the 2008 national elections, but it seems a fair bet that we are still a long way away from having a federal government that would work actively to make marriage available to same-sex couples. We may also be some time way from a federal government that would advocate strongly for egalitarian marriage.

In order to discuss what government should do in regards to families, one needs to have some notion of how to persuade the not-already-persuaded. Persuasion is a topic onto itself, in which I claim no particular expertise, but there are a few things worth noting. First, there are obvious difficulties where the people one is trying to persuade do not share one's starting point, or one's foundational normative beliefs and commitments.⁴⁷ There is a lot of that going around: between people of different religious faiths (accepting different religious texts or different interpretations of those texts as authoritative) or even between consequentialists⁴⁸ and deontologists.⁴⁹

One possible basis for persuasion in such cases is to find some point of agreement.⁵⁰ McClain gives just such an example in her book: how people with quite a different view on teenage sexuality (and sexuality generally) might agree that it would be a good thing if the number of unwanted pregnancies and abortions among teenagers declined.⁵¹ One should then consider the empirical data regarding which strategy has proven most successful in reducing the number of unwanted pregnancies and abortions. However, McClain effectively shows how public policy discussions about sex education have allowed rhetoric to overcome empirical evidence. If reducing teenage pregnancy and teenage sexual activity is our objective, "abstinence plus" programs have been shown to be

47. If one accepts the conventional philosophical view that one cannot derive a normative ("ought") conclusion from purely factual ("is") premises, then any normative claim (about what ought to be done) assumes a normative premise, and that premise its own normative premise, and so on, until one comes to a foundational normative axiom (perhaps "act to maximize social welfare" or "do what God commands") for which, by definition (as a foundational axiom), no further direct proof can be offered. On the is/ought distinction, see, for example, Warren J. Samuels, *You Cannot Derive "Ought" from "Is,"* 83 *ETHICS* 159 (1973).

48. "Consequentialism" is the "view that the value of an action derives entirely from the value of its consequences. This contrasts both with the view that the value of an action may derive from the value of the kind of character whose action it is . . . , and with the view that its value may be intrinsic . . ." SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 77 (1994).

49. "Deontology" or "deontological ethics" is an "[e]thics based on the notion of a duty, or what is right, or rights, as opposed to ethical systems based on the idea of achieving some good state of affairs . . . or the qualities of character necessary to live well. . . . The leading deontological system is that of Kant." BLACKBURN, *supra* note 48, at 100.

50. John Rawls thought that there were so many points of agreement among major theories of the good that a modern society might construct theories of justice—structures of society—from that "overlapping consensus." JOHN RAWLS, *POLITICAL LIBERALISM* 133–72 (1993).

51. MCCLAIN, *supra* note 1, at 259–63.

more effective than “abstinence only” programs.⁵² Yet there is little indication that such evidence has nudged social conservatives from their support of “abstinence only.”⁵³

An alternative (and perhaps related) strategy to persuasion when there is no shared normative foundation is to speak in broadly utilitarian⁵⁴ or consequentialist⁵⁵ terms. That is, one speaks to advantages in happiness, general welfare, basic goods, or some other matters in which there is an assumed consensus that these are things worth pursuing and increasing. Policy arguments in family law, as in most other areas, tend to be grounded in a kind of unarticulated, general consequentialism—an assumption that we should choose those rules and principles that are most likely to maximize the welfare, happiness, or well-being of the greatest number.

One persistent problem of this approach is that we rarely have data adequate enough to make conclusions on these matters. The above example of data on the effects of alternative approaches to sex education is the exception rather than the rule. For most policy questions, there is no significant social science data at all. Moreover, for the few areas where there is data, the studies tend to be both doubtful and in sharp disagreement.

For example, regarding same-sex marriage, much of the debate has been about the effect on children of having same-sex parents. The first thing to note is the awkward fit of such data to the conclusions it is being used to support.⁵⁶ The question is who should marry, not who should be allowed to parent. We no longer (openly at least) take away children

52. *Id.* at 256–65. It should be noted, though, that conclusions regarding the effects of (different forms of) sex education remain controversial. One expert in the area recently concluded that sex education has not been proven to have significant effects (either positive or negative). See KRISTIN LUKER, *WHEN SEX GOES TO SCHOOL* 243–59 (2006).

53. See, e.g., Samuel G. Freedman, *Muzzling Sex Education on Anything but Abstinence*, N.Y. TIMES, July 19, 2006, at B7 (describing the political blocking of sex education legislation that goes beyond “abstinence only” in New York, Illinois, and Minnesota).

54. “Utilitarianism” is an “ethical theory . . . that answers all questions of what to do, what to admire, or how to live, in terms of maximizing utility or happiness. As well as an ethical theory, utilitarianism is, in effect, the view of life presupposed in most modern political and economic planning, when it is supposed that happiness is measured in economic terms.” BLACKBURN, *supra* note 48, at 388.

55. See *supra* note 48.

56. This has not prevented courts from focusing on parenting when considering the constitutionality of excluding same-sex couples from marriage. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 982–83 (Wash. 2006). In defense of these courts, they were asking the highly deferential question of whether distinguishing in legal treatment between same-sex and opposite-sex couples could be *rational*, and it may not be entirely insane, even if not in the end wise, to regulate couples differently with attention to perceived differences in parenting ability. However, on its own terms, as other commentators have pointed out, the connection is neither obvious nor strong. See, e.g., Dan Savage, Op-Ed., *Same-Sex Marriage Wins by Losing*, N.Y. TIMES, July 30, 2006, at 13 (criticizing the reasoning of the Washington and New York courts).

from their parents just because the parents are homosexual.⁵⁷ Furthermore, not being married has not stopped many same-sex couples (and a vastly larger number of heterosexual couples) from having and raising children.⁵⁸ It is, of course, more than possible that the number of same-sex couples raising children is reduced somewhat by refusing such couples the option to marry, along with other legal barriers, like refusing second-parent adoption and refusing to enforce co-parenting agreements, barriers that create uncertainty in the legal relationship of one or both partners to children they might raise. Still, there is certainly no data on the effect of those legal barriers (let alone some way of “balancing” the purported benefits of that prevention against the unmeasured, but real harm to children who are being raised by same-sex parents without lasting legal bonds to both parents).

Even if this were the right question to focus on, the data at this point appears to be both too scarce and too controversial for grounding a confident conclusion.⁵⁹ The main problem appears to be that social scientists are coming relatively late to the study of children of same-sex couples. Thus there has not been a sufficient quantity—or an adequately scientific selection among the sample—and the studies have not been able to track effects well over the long term.⁶⁰

The proper question should be the effect of same-sex marriages on marriage as an institution generally. Opponents of same-sex marriage claim that it will undermine the institution, but their claim is usually about long-term effects—effects that, should they occur, probably would be hard to discern at this early stage in Massachusetts (the one state that currently allows same-sex marriage).⁶¹ Even over time, it may be hard to

57. See, e.g., IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 579 (4th ed. 2004) (“The judicial trend is to require that homosexual behavior, like heterosexual behavior, be shown to be harmful before a court may take it into account.”).

58. Based on the 2000 Census data, it is estimated that same-sex couples are raising more than two hundred and fifty thousand children under the age of eighteen. R. BRADLEY SEARS, GARY GATES & WILLIAM B. RUBENSTEIN, *SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES: DATA FROM CENSUS 2000 (2005)*, available at <http://www.law.ucla.edu/williamsinstitute/publications/USReport.pdf>. However, that is only a small fraction of the number of children being raised outside of marriage. Focusing on only nonmarital births, in 1999, over 1.3 million children were born out of wedlock. U.S. NAT'L CTR. FOR HEALTH STATISTICS, TABLE 1-17: NUMBER AND PERCENT OF BIRTHS TO UNMARRIED WOMEN, BY RACE AND HISPANIC ORIGIN: UNITED STATES, 1940–99 (1999), available at <http://www.cdc.gov/nchs/data/statab/t991x17.pdf>.

59. Compare William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 *THE FUTURE OF CHILDREN*, Fall 2005, at 97, 102–03, available at http://www.futureofchildren.org/usr_doc/06_FOC_15-2_fall05_Meezan-Rauch.pdf (arguing that the data support conclusions that children of same-sex couples are doing well), with MAGGIE GALLAGHER & JOSHUA K. BAKER, INST. FOR MARRIAGE & PUB. POL'Y, *DO MOTHERS AND FATHERS MATTER? THE SOCIAL SCIENCE EVIDENCE ON MARRIAGE AND CHILD WELL-BEING 1* (2004), available at <http://www.marriedebate.com/pdf/MothersFathersMatter.pdf> (arguing that social science data support the clear superiority of children raised by opposite-sex parents).

60. See sources cited *supra* note 59 (making reference to these problems).

61. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that the Massachusetts Constitution requires extension of marriage to same-sex couples).

disentangle same-sex marriage from the myriad social and cultural factors impinging on the experience and perception of marriage.⁶²

At this point, opponents of same-sex marriage might accept that the social science data is uncertain. They may also accept that same-sex couples (along with single parents, and other “suboptimal parents”) will continue to have and to raise children, but that all of this is beside the point. These opponents will say that the reason why they are against same-sex marriage, without regard to the long-term effects on children and (at least for some) with no opposition to a comparable “civil unions” option,⁶³ is that it is all about the message expressed by state law.⁶⁴ Like the laws prohibiting adultery that stay “on the books” despite little or no legal enforcement (and no public pressure for enforcement), laws excluding same-sex couples from marriage can be seen as expressing a public sentiment (regarding marriage, same-sex relationships, or both), regardless of their real-world consequences.⁶⁵ One would obviously need a different, nonconsequentialist, line of argument to persuade those seeking only to “express” a certain “message.”

Returning to the topic of consequentialism and the scarcity of data: even if one were unhappy about the terms of debate in these areas, the problem is that there are few good alternatives to deciding on the basis of consequences (even if the consequences on which we base our decisions are nothing more than our own unschooled armchair speculations). Outside of consequentialism, one tends to be left only with appeals to foundational values or religious views that are themselves highly controversial. The current debates about marriage may be good examples both of the weak grounding of consequentialist arguments and the disadvantages of any alternative discourse.

One can see the potential impasse also in the area of sex education. One theorist discusses why evaluation of empirical effects (or other con-

62. For a debate about whether anything can be learned about the effects of same-sex marriage from the experience of various Scandinavian countries (who have had marriage or marriage-like relationships open to same-sex couples for some years), see Stanley Kurtz, *The End of Marriage in Scandinavia*, WKLY. STANDARD, Feb. 2, 2004, at 26 (arguing that the Scandinavian experience shows the deleterious effects of same-sex marriage); William N. Eskridge et al., *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, 5 ISSUES IN LEGAL SCHOLARSHIP art. 4 (2004), <http://www.bepress.com/ils/iss5/art4/> (critiquing Kurtz's views); Stanley Kurtz, *No Nordic Bliss*, NAT'L REV. ONLINE, Feb. 28, 2006, available at <http://www.nationalreview.com/kurtz/kurtz200602280810.asp> (responding to Eskridge et al.).

63. See, e.g., *Civil Unions for Gays Favored, Polls Show*, MSNBC.com, Mar. 12, 2004, <http://www.msnbc.msn.com/id/4496265/> (summarizing an opinion poll that found gay marriage opposed by 59% of Americans, but that 54% favored civil unions).

64. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (defending expressive theories of law).

65. A different sort of “expression” occurred when 40% of the Alabama voters in 2000 opposed a referendum to remove the prohibition of interracial marriages in the state constitution. See State of Alabama 2000 Election Information, <http://www.sos.state.al.us/election/2000/2000.htm>. It was a constitutional provision that had already been rendered void by the Supreme Court decision in *Loving v. Virginia*. 388 U.S. 1, 11–12 (1967). People want their marriage laws to “make statements,” and these statements are not always morally worthy ones.

sequences), discussed earlier in this Part, may *not* be enough to bring different sides to compromise:

[One side] hold[s] that sex is natural and unmysterious, a healthy pleasurable, quasi-recreational activity. [The other side] consider[s] sex sacred but dangerous, transformative when contained by marriage but destructive outside it. Sex education, [to the first side], involves nothing more than helping young people manage the risks of having sex by giving them the facts. It's information, not values. [To the other side], conventional sex education is chock-full of values, but all the wrong ones.⁶⁶

The same commentator speculates that our different “expressions” about sex education in fact hide different “expressions” about marriage⁶⁷—or, perhaps, about the good life generally.

Although persuasion is a central concern in social reform, it is neither sufficient nor necessary for effecting change. It is not sufficient because a large majority can be in favor of something, but if that majority is not well organized or is only weakly committed, well-entrenched or well-financed interests can easily block change.⁶⁸ Persuasion is also not necessary, in the sense that a minority can get its interests served if it can find a common cause with others, through the usual tools of politics—horse trading and compromise.

Some of the issues McClain discusses seem well suited for compromise. As already noted, conservatives and liberals might be able to find common ground in sex education programs that are proven to reduce premarital sex and abortions.⁶⁹ Also, many opponents of same-sex marriage seem willing to accept comparable protections for same-sex couples as long as the institution carries a different name (e.g., “civil union” or “domestic partnership”).⁷⁰

Supporters of same-sex marriage sometimes have mixed feelings about civil unions and similar institutions, viewing them as granting same-sex couples “second-class status.”⁷¹ Further, one can understand proponents for gay rights responding the same way the Civil Rights leaders did when that movement's leaders were cautioned for patience and

66. Judith Shulevitz, *Teach Your Children Well*, N.Y. TIMES, Aug. 27, 2006, Sunday Book Review, at 8 (summarizing LUKER, *supra* note 52).

67. *See id.* at 9.

68. Some would say that this has been the case for gun control and healthcare reform and within family law recently, divorce reform in New York. *See* Editorial, *The Long Divorce*, N.Y. TIMES, Mar. 26, 2006, at 13 (discussing proposals for reforming New York divorce law and the resistance they have met).

69. *See supra* notes 51–53 and accompanying text.

70. *See supra* note 63 and accompanying text.

71. *See, e.g.*, Editorial, *What's So Scary About Love?*, HARTFORD COURANT, July 20, 2006, at A8 (describing the difference between recognizing same-sex marriage and a civil union law as “the difference between legitimate recognition and second-class citizenship”). McClain largely adopts this criticism. MCCLAIN, *supra* note 1, at 182–89.

moderation in the face of grave injustice.⁷² At the same time, the normal progress of politics is that of half measures, and there are pragmatic reasons for favoring compromise over principle.⁷³

CONCLUSION

There are few things harder than writing effective normative scholarship: one needs to find the right answer to difficult social problems, justify one's conclusions, persuade those who are initially in disagreement or simply suspicious, and then galvanize sufficient support for change to happen. It is vastly easier to sit on the sidelines and comment about what needs to be done than actually to do those things. *The Place of Families* is a great achievement, and if there is still work to be done by way of persuasion and mobilization, that is only the faintest of criticisms.

72. See, e.g., Martin Luther King, Jr., *Letter from Birmingham Jail*, Apr. 16, 1963, available at <http://stanford.edu/group/king/frequentdocs/birmingham.pdf>.

73. See, e.g., Dale Carpenter, *Are Civil Unions a Dead End?*, INDEP. GAY FORUM, <http://www.indegayforum.org/news/printer/26686.html> (reprinting a column from the Feb. 17, 2005 *Bay Area Reporter*, making a similar point about civil unions and compromise).