COMMENT ON LINDA MCCLAIN, THE PLACE OF FAMILIES

Brian Bix, University of Minnesota, U.S.A.*

The Place of Families1 is a most impressive book: learned, yet accessible; courageous in taking positions, but always careful to consider and present alternative views and concerns. In a relatively short space, the book manages to cover many of the most pressing issues relating to Family law and policy: the question of whether marriage should be extended to same-sex couples, the proper role of government in promoting marriage and in shaping the terms of marriage; the connection between marriage and poverty; how to think about equality within the family and between families; and the issues of abortion and sex education. And the book does not simply take positions on issues; it grounds those positions on a connecting mid-level theory: about the role of government in promoting self-government in its citizens, the role of intermediate institutions in a healthy society; and the proper understanding of equality, justice, and tolerance.

The book weaves together a position borrows elements from liberalism, feminism, communitarianism, and civil republican thought, while being willing to disagree with each tradition on particular issues. There is nothing of the “party line” in this work; rather, it is throughout a careful working through by a thoughtful open-mined author. In the course of developing her distinctive perspective, the author shows that the different

* Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota.
traditions and schools of thought from which she learns and borrows are not as incompatible – in application to particular issues – as is usually assumed.

Among the strongest and most persistent themes in the book are: (1) the importance of equality within and among families\(^2\); and (2) the moral and practical importance of supporting care work. Both topics relate to how the moral (and constitutional) ideal of sex equality should be supported and reinforced by public/governmental standards that will have private repercussions, but stopping far short of any sort of imposed dogma regarding how day-to-day family life is to be led.

An occasional quibble aside, there is little in this book with which I would disagree. Rather than going on at length about all the general arguments with which I agree (or the quite picky points with which I might quibble), what I will talk about is what I would like to see in the author’s next book (no rest for the weary!).

As I will explain in a moment, what I want the next book to be about is dialogue and persuasion, and this does touch on one small weakness in the present text. While *The Place of Families* is generally exemplary in indicating the existence of opposing views (be they from marriage promoters, the Bush Administration, abortion opponents, anti-marriage feminists, etc.), and both quoting and explaining relevant portions of their works, there is still sometimes a sense that opposing views, or the contexts in which policy debates will go on, are not entirely represented. However, especially in the debates about marriage and abortion, even where opponents of gay marriage and legal

\(^2\) 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. 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. However, this too must await a future book.
abortion are quoted at length (and always fairly), this reader sometimes got a sense that however hard the author was trying, she was not quite able fully to get across (or to take on board) their point of view or their concerns.

There is a problem that grows out of the variety of possible readers of a book like this. Speaking for myself, I had no trouble being persuaded that same-sex couples should be treated with the same dignity, and the same rights and duties, as opposite-sex couples, and that the state should promote, in a non-coercive and non-intrusive way, the idea that men and women should have egalitarian roles within opposite-sex marriages. However, this was no great trick, as I was at or near those positions to begin with. And this is probably true of the author’s peers in the legal academy generally: the vast majority of us started off agreeing with most, if not all, of her positions before even opening the book. The difficulty is that outside the legal academy, in the general public, and among state and federal lawmakers, there would be significant resistance to many of the book’s positions, as the author well knows.

The concern I have is with the practicality of dialogue, persuasion, politics. I speak of all of this as being for the next book, for it seems unduly greedy for anyone to expect a single book to do more than “simply” giving a persuasive analysis and reasonable prescriptions for some of the most contentious debates of our time. At the same time, there is something, shall we say, “academic” about prescribing positions that, in a number of areas, seem so far afield of what the current Administration, Congress, most state legislatures, and the general public seem willing to accept.

It is not the main purpose of The Place of Families to discuss the political project of having its prescriptions accepted and brought into effect. The scattered comments –
for example, that a new social contract on supporting care work “should result from
communications and deliberations, in which different affected groups … have a
voice”\(^3\) or the rhetorical question, “Is it unrealistic to hope that critical reflection not only
upon the place of civil marriage and how the federal government might best ‘defend’ it,
but also upon constitutional commitments, could alter this stance?”\(^4\) – certainly are not
adequate responses, nor could they have been intended to be.

Perhaps we should be satisfied with something like what Tom Regan said in his
defense of animal rights: that he did not know how to bring his radical prescriptions
(because, he argued, animals have moral rights, there should be no use of animals for
food, scientific experimentation, hunting, zoos, etc.) into effect, but those were political
questions beyond his expertise; his work as a philosopher was merely to show the
rightness of the moral position requiring these changes.\(^5\) And we also have the prominent
example of John Rawls, who largely let his work on moral and political theory speak for
itself, rarely venturing into the public space to persuade either the general public or
lawmakers, and leaving mostly to others the task of figuring out what the implications of
his theory of justice might be for particular disputes and how to persuade others. There
are worse things than being the John Rawls or Tom Regan of one’s field, but I can still
hope that the author will, in time, do even more.

Whatever one should reasonably expect from an author, this reader found that the
insightful and incisive arguments in *The Place of Families* constantly led to the

\(^3\) Chapter 4, man. at 167 (footnote omitted).
\(^4\) Epilogue, man. at 471. During recent pessimistic moods, I am inclined to respond – “yes, that is
unrealistic!”
\(^5\) Tom Regan, “The Case for Animal Rights,” in *In Defence of Animals* (Peter Singer ed., Blackwell,
consideration of how, if at all, those prescriptions could be realized. (This, I assume, is a standard burden of prescriptive writing – which is one reason many of us confine ourselves to more descriptive or analytical work!)

In debates about same-sex marriage or about equality within marriage, one could simply hope for a kind of Whig-history progress: that tendencies seem to be on the side of the positions the author promotes; the younger generation seems more supportive (or at least less resistant) than older generations; and there is some pressure from legal movements in other countries. One could just assume and hope that these tendencies will continue, and that the policies we think best will inevitably prevail. However, one cannot but have nagging doubts: (1) the general attitude towards homosexuals and same-sex couples may have changed significantly in recent decades (though more so in some places than others), but the opposition to same-sex marriage remains large and active, as recent referenda across the country have consistently shown; and (2) while equality of the sexes has similarly made great strides, the data collected in *The Place of Families* shows that in a number of ethnic and racial communities a large percentage of men remain strongly resistant to egalitarian marriage (even when this resistance seems to block the likelihood of marriage, or their attractiveness as a marriage partner).

To focus for a moment on same-sex marriage: How does one begin to have the necessary discussion to persuade those who are not already persuaded? This is not a situation like the discussion of sex education (Chapter 9 of *The Place of Families*). There, the advocates of different approaches can largely agree on objectives: that it

---

6 For example, just this year, Canada and Spain have joined (or are in the process of joining) the Netherlands and Belgium in recognizing same-sex marriages.
would be a good thing to reduce the rate of teen-age pregnancy (especially when it is in the early teen-age years, and extra-marital); and similarly for a reduction in the rate of extra-marital sex, at least for the those too young to be emotionally ready for the experience. Given overlapping objectives, one can in principle test the different approaches empirically by their results. The author indicates that “abstinence, plus” programs have had demonstrably better results in these objectives than have “abstinence only” programs. Though the author also laments that at times the advocates of “abstinence only” programs have seemed indifferent to obtaining empirical outcomes, or considering the data that is already present, at least in principle the data would provide a basis for discussion and persuasion (and might at least persuade the general public, and most school board members and other lawmakers, even if it did not persuade the ideologues most fervently devoted to alternative approaches).

I do not think a comparable conversation could occur regarding the same-sex marriage debate. A supporter of same-sex marriage might say something like this: “We have had a year of same-sex marriage in Massachusetts and a number of years of same-sex Civil Unions in Vermont, and the fears of the opponents of same-sex unions have not been borne out – society has not been destroyed and opposite-sex marriages seem unaffected.” I have in fact heard similar comments from supporters, but I am not convinced that this would work the same way that the social sciences data would work in the sex education debate. For example, a reasonable response to the above comment by

---

7 The author indicates that the agreement about objectives between different approaches may not be complete: for example, that the advocates of “abstinence only” approaches might view all premarital sex as bad; while advocates of “abstinence, plus” might think that considering all premarital sex might either be unrealistic (for those who marry at a later age) or have bad effects (encouraging early marriages). However, where the overlap of objectives is substantial, as in this case, the slight divergence in objectives may not be significant.
an opponent of same-sex marriage would be: “The effects we fear – on children, on marriage as an institution, and on society generally – are subtle and difficult to measure, and are, in any event, long-term. By the time the evidence is clear about the consequences of same-sex marriage, it may well be too late to undo the damage done.”

Despite the limitations of dialogue, I at least remain open to optimism on same-sex marriage, for the reasons discussed earlier: the young seem more receptive than older people are, and this combined with the hope as greater exposure to same-sex couples has already led to greater acceptance; in time such couples perhaps may be a part of the social fabric unquestioned by all but a marginal few. I understand that optimism, even if the continuing solid support for state and federal “defense of marriage acts” gives me pause. What I have more trouble imagining is dialogue or progress on the abortion issue.

One doubts that someone who sincerely believes that a fetus is a human being, and thus that abortion is the murder of a human being, is going to be persuaded by some of the arguments mentioned in passing within the book’s discussion of abortion: e.g., the conclusion that fetuses are not “persons” for the purposes of the Fourteenth Amendment, the argument (whether grounded in the Constitution or in political theory) that the State should be neutral among comprehensive theories of the Good, and the value of moral autonomy. These are the sorts of arguments that tend to seem most persuasive to those who already support legal abortion; to those strongly opposed, such arguments often seem trivial compared to the interests at stake in preventing abortion. Also, while I think it is true that the obligation of carrying children to term would impose burdens on women unlike any affirmative obligation imposed on men (and that this is an important point to
notice), this argument for inequality is unlikely to persuade opponents of abortion that what they see as murder should therefore be allowed. (Arguments of equality can be pushed either way: the inequality in requiring women to carry pregnancies to term could simply be seen as a justification for imposing something comparably onerous on men.\(^8\))

This is not to say that there is not common ground among proponents and opponents of abortion. As the book points out, President Bill Clinton was good at emphasizing that all could agree, e.g., that it is better to avoid unwanted pregnancies, and that making affordable prenatal care and child-care available to all might reduce the abortion rate (by preventing carrying and raising a child a from being as onerous an alternative as it is for some) while conferring other benefits.

Additionally, in the next book, the one that talks practically and politically about bringing the arguments and proposals into effect, there will need to be much more talk of economics. When the book recommends shorter work weeks, more paid parental leave, higher compensation for care work, and the like,\(^9\) one predictable set of responses will be along the line that American businesses (and/or the United States government) cannot afford to do this, at least not in the current circumstances of global competition. Europe, which had been the example given by progressives for how these sorts of proposals could work, is now being given as an example for how such proposals are unsustainable in the

\(^8\) As the author points out, the original argument about inequality probably derives from Ruth Bader Ginsburg in her early writings and litigation on the subject. More recently, in his 1997 DeVane Lectures at Yale University, Judge Guido Calabresi suggested that equality might allow forcing women to carry pregnancies to term if and only if men were subject to some comparable burden – Judge Calabresi suggested a lottery by which a percentage of them would be forced to donate organs to the needy. This was meant as an argument illustrating the equality point, and indicating why abortion should be legal, but, as discussed, one could use the equality argument the other way, “equalizing up” (imposing affirmative duties on all – in this case, subjecting men to this “donation lottery”) rather than “equalizing down” (removing affirmative duties from all).

\(^9\) For example, in chap. 4 (e.g., man. at 169-70).
long term in the current economic climate.\textsuperscript{10} And we are now being told that the relative generosity American automakers displayed in the pension and health benefit promises of a prior generation are now hobbling those companies in world competition.\textsuperscript{11} I am not in a position to evaluate the economic claims for and against, but I can predict with some confidence that these are the sorts of complaints that would be raised in opposition to proposals like those in this book.

\textit{Conclusion}

It is churlish of me to write such a questioning discussion based on a book I enjoyed and admired so much. So let me repeat my real conclusion: \textit{The Place of Families} is a great book – send in your advance orders today! Give extra copies as gifts to your favorite faculty colleague, life partner, or congressional candidate. And then, try to help us think about how we can make progress in the hard work still to be done, in moral and political persuasion, on the matters where the author has so helpfully shown us the ultimate destination.