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THE “MALE PROBLEMATIC” AND THE PROBLEMS OF FAMILY LAW: A RESPONSE TO DON BROWNING’S “CRITICAL FAMILISM”

Linda C. McClain*

INTRODUCTION

I am grateful to Professor Don Browning for engaging with my book, *The Place of Families: Fostering Capacity, Equality, and Responsibility*.¹ Professor Browning is a prolific and thoughtful scholar as well as a prominent participant in the marriage movement, which aims to restore a “marriage culture” and promote the institution of marriage.² The “critical familism” approach to the American family debate, developed by Browning and his colleagues in the multiyear Religion, Culture, and Family Project,³ has contributed to the intellectual underpinning of the marriage movement. An aim of my book is to contribute to the ongoing conversation about the place of families—and of marriage—in our political order, as well as to enter into constructive dialogue about family law and policy. To that end, my book takes up and critically evaluates positions advanced by the marriage movement on issues ranging from governmental promotion of marriage to whether family law should extend protection to a broader range of family forms.

In this response to Professor Browning’s review,⁴ I will use the relationship between “the male problematic” and the problems of family law as an

* Rivkin Radler Distinguished Professor of Law, Hofstra University. B.A., Oberlin College; M.A., University of Chicago Divinity School; J.D., Georgetown University Law Center; LL.M., New York University School of Law. Thanks to Don Browning for a helpful discussion about his review and to Maxine Eichner and Elizabeth Glazer for valuable comments on some of the points made in this Essay. I thank *Emory Law Journal* for providing a forum for this exchange between Professor Browning and me.

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

² For this movement’s aims, see COAL. FOR MARRIAGE, FAMILY & COUPLES EDUC. ET AL., *THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES* (2000), <http://www.americanvalues.org/pdfs/marriagemovement.pdf>.

³ See generally DON S. BROWNING ET AL., *FROM CULTURE WARS TO COMMON GROUND: RELIGION AND THE AMERICAN FAMILY DEBATE* (2d ed. 2000).

⁴ Don S. Browning, *Linda McClain’s The Place of Families and Contemporary Family Law: A Critique from Critical Familism*, 56 *EMORY L.J.* 1383 (2007).

organizing theme. “The problem of fatherhood,” or what Browning calls “the male problematic,” is a central concern of the marriage movement: Marriage addresses a core societal challenge—binding men to the mothers of the children they foster and securing men’s paternal investment in those children.⁵ The problem of fatherhood is also a major topic in Professor Browning’s review. First, he contends that my critique in *The Place of Families* of the marriage movement’s appeals to restore marriage’s role in domesticating men and women’s role as sexual gatekeepers is too sweeping and does not adequately appreciate his account of “the male problematic” and of the purposes of marriage.⁶

Second, he argues that a limitation of *The Place of Families* is that it gives inadequate attention to what he calls “pre-moral or non-moral goods” that are relevant to the well-being of families and children, particularly the “pre-moral good of fatherhood.”⁷ This leaves my approach, he argues, vulnerable to becoming a sort of indiscriminate acceptance of any and all family forms in the name of “family diversity”⁸ or “equality *in and between* families.”⁹ Professor Browning views the supposed limits of my own engagement with this question of “pre-moral goods” as illustrative of a broader failing in contemporary family law and family law theory.¹⁰ One aim of his review, thus, is to ask whether and how theological accounts of contemporary families and the challenges they face, such as his model of “critical familism,” should inform family law and policy.¹¹

Third, Browning contends that my book’s supposed inattention to the good of fatherhood, coupled with my commitment to governmental promotion of equality *within* and *among* families, leads to an approach to family law and policy that is both too “top down” and too accepting of family diversity.¹² According to his view, I am too wary of relying on families and other institutions of civil society (particularly religious institutions) to generate virtues and too ready to employ government for the aggressive promotion—in

⁵ See *infra* Part I for discussion. Professor Browning introduces the term “male problematic” in BROWNING ET AL., *supra* note 3, at 68–69.

⁶ See Browning, *supra* note 4, at 1397–99.

⁷ *Id.* at 1393, 1394.

⁸ *Id.* at 1384.

⁹ *Id.* at 1402.

¹⁰ *Id.* at 1384–85.

¹¹ *Id.* at 1403–05.

¹² *Id.* at 1401–03.

families—of norms like sex equality.¹³ Yet, in the name of diversity, I am overly skeptical of governmental efforts to promote responsible fatherhood and marriage. This critique raises the question of how my approach and critical familism differ on the proper relationship among the family, other institutions of civil society, and the government. Because Professor Browning's own "critical familism" is notable within the marriage movement for its affirmation of the place of sex equality in marriage and family policy, it is worth exploring whether and how our approaches to sex equality truly differ.

This Essay will first address the contention that my account of "the male problematic" is itself problematic. I review what *The Place of Families* actually says on this matter. It is certainly true that Browning and many others in the marriage movement focus on the role of the institution of *marriage* as encouraging paternal investment. However, it is no caricature to say that at least some in the marriage movement also invoke the role of *women* as sexual gatekeepers to lead men to marriage and, thus, to responsible paternal investment.

Next, I ask whether *The Place of Families* contains its own version both of a "male problematic" and of a "good" of fatherhood. I ponder how that account compares with that offered in the marriage movement and how it bears on the problems of family law. In doing so, I also address the charge that *The Place of Families* eschews a discussion of the "pre-moral or non-moral goods" at play in the institution of the family. I will explain how my approach to family law recognizes certain goods of family life as well as important functions associated with families. Care will be my primary example since both my approach and critical familism stress the importance of parental care. I also explain that my commitment to equality within and among families does not inevitably lead to an indiscriminate pluralism. Here I suggest points of convergence and divergence with critical familism's own "marriage plus" approach.¹⁴

Finally, I will offer some preliminary thoughts about Browning's broader question about whether and how "critical familism" can contribute to family law and legal theory about families. In particular, I explain that my project in *The Place of Families*, by contrast to Professor Browning's critical familism project, was not to synthesize and critically retrieve religious tradition, but to offer a helpful framework, grounded in family law and liberal and feminist

¹³ *Id.*

¹⁴ *Id.*

political theory, for approaching contentious debates about the place of families in our political order and a number of issues of family law. My approach to family law is, by necessity, critical in substantial part because of the history of family law's embrace and perpetuation of inequality within the family. Just as "critical familism" has had to critique as well as synthesize tradition, feminist theory has had to critically assess traditions of family law as well as social practices. I reject, however, the charge that my approach is overly mistrustful of the institutions of civil society.

I. THE "MALE PROBLEMATIC" IN THE MARRIAGE MOVEMENT

"The problem of fatherhood," or what Browning calls "the male problematic,"¹⁵ has been a key theme in writings by the marriage movement. An influential text in launching the "responsible fatherhood" movement was David Blankenhorn's book, *Fatherless America: Confronting Our Most Urgent Social Problem*.¹⁶ Since the publication of that book in 1995, Blankenhorn's Institute for American Values (IAV) has included responsible fatherhood and marriage as core parts of its agenda. Over the last decade, Professor Browning's Religion, Culture, and Family Project has published many books addressing the issues of marriage and family.¹⁷ In 2000, the Religion, Culture, and Family Project and Blankenhorn's Institute cosponsored a document, *The Marriage Movement: A Statement of Principles*,¹⁸ which has become a reference point for the self-styled "marriage movement." Writings sponsored by the marriage movement continually argue that one key function marriage serves in society is to link fathers, who naturally have a weaker relationship to children than do mothers, to children.¹⁹

Professor Browning contends that my book misunderstands "the link between marriage and fatherhood," suggesting that the way I characterize this link "probably only fits the theory of George Gilder" and certainly does not fit

¹⁵ BROWNING ET AL., *supra* note 3, at 68–69.

¹⁶ DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995).

¹⁷ *See, e.g.*, HERBERT ANDERSON ET AL., *THE FAMILY HANDBOOK* (1998); BROWNING ET AL., *supra* note 3.

¹⁸ COAL. FOR MARRIAGE, FAMILY & COUPLES EDUC. ET AL., *supra* note 2.

¹⁹ INST. FOR AM. VALUES & INST. FOR MARRIAGE & PUBLIC POLICY, *MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES* 25–26 (2006), <http://law.nd.edu/news/marriagestatement.pdf>; INST. FOR AM. VALUES ET AL., *THE FUTURE OF FAMILY LAW* 13 (2005).

Browning’s own views.²⁰ In particular, he states that I mistakenly think that he and some others in the marriage movement argue “that in marriage, wives domesticate the erratic and polygamous sexual inclinations of men,” such that “[women] should be the gatekeeper[s] to sexual access and morality.”²¹ His argument, he counters, is not about “the gatekeeping role of woman,” but “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.”²² The point is to help to “actualize a father’s capacity for care.”²³

Browning helpfully distinguishes between two different arguments about how to secure responsible fatherhood. The first, which he and some others in the marriage movement make, is that it is through the *institution* of marriage that society attempts to encourage and secure responsible fatherhood.²⁴ Here they draw on Carl Schneider’s familiar idea of the channelling function of family law: A basic purpose of family law is to support fundamental social institutions, like marriage and parenthood, and to steer people into participating in them.²⁵ For example, family law supports the social institution of marriage as the proper place for men and women to form exclusive intimate attachments, reproduce, and parent, and it steers men and women into that institution. The second argument, which Browning disclaims, is that it is through the sexual gatekeeping of women (that is, by women exercising sexual modesty and restraint) that men are led into—channelled into—the institution of marriage.²⁶

To be sure, Browning’s account of the “male problematic” does not appeal to the gatekeeping role of women. But *The Place of Families* does not say that he does so. Some in the marriage movement do, however, make this sexual gatekeeping argument, and I do address those arguments in my book. To

²⁰ Browning, *supra* note 4, at 1395.

²¹ *Id.* at 1394.

²² *Id.* at 1395.

²³ *Id.*

²⁴ *Id.*

²⁵ Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992). I discuss the relevance of Professor Schneider’s notion of the channelling function to contemporary family law debates in a recent article. Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 101 (2007).

²⁶ Browning, *supra* note 4, at 1395–96.

clarify this point, I will revisit briefly the treatment in *The Place of Families* of these two lines of argument.

The Place of Families notes that the problem of fatherhood is one of several arguments made by the marriage movement as to why society should restore a marriage culture and why government should shore up the institution of marriage.²⁷ The book quotes from the testimony before Congress of David Popenoe, co-director of the National Marriage Project, given in a hearing on welfare and marriage: “[B]eing a father is universally problematic for men in a way [that being a mother] is not for women. . . . *Marriage is society’s way of engaging the basic problem of fatherhood—how to hold the father to the stronger mother-child bond.*”²⁸ It refers to Don Browning’s work, noting, “The marriage movement speaks of a ‘male problematic’ that promoting marriage is thought to address: men’s inclination toward procreating without taking responsibility for children.”²⁹ Browning identifies a complementary “female problematic”—“women’s inclination toward procreating and rearing children, even in the absence of adequate resources and commitment by fathers and at the expense of self.”³⁰ A third example offered is the arguments made in James Q. Wilson’s book, *The Marriage Problem*.³¹

Wilson, Browning, and other figures in the marriage movement have looked to evolutionary science’s teaching about differences in male and female parental investment as providing evidence of the “male problematic” and “female problematic.”³² The idea is that men and women have “asymmetric” reproductive strategies resulting in a naturally greater maternal than paternal investment in children.³³ Evolutionary science, Wilson contends, explains that men are inclined to “maximize” their reproductive fitness by following a pattern of having sex with many women, thus producing many children, rather than being monogamous.³⁴ Browning, similarly, discusses the work of evolutionary theorist Robert Trivers on parental investment and evolutionary

²⁷ MCCLAIN, *supra* note 1, at 119–20.

²⁸ *Id.* at 120 (quoting *Welfare and Marriage Issues: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways & Means*, 107th Cong. 44–45 (2001) (statement of David Popenoe, co-director of the National Marriage Project)) (emphasis added).

²⁹ *Id.* at 135–36 (citing BROWNING ET AL., *supra* note 3, at 22, 68–69).

³⁰ *Id.* (citing BROWNING ET AL., *supra* note 3, at 22, 68–69).

³¹ *Id.* (citing JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 28–31 (2002) (Society creates marriage to defeat men’s “natural tendency to depart from a relationship with a mother and child,” and to force men to provide necessary resources.)).

³² See BROWNING ET AL., *supra* note 3, at 68–69, 106–13; WILSON, *supra* note 31, at 25–27.

³³ See BROWNING ET AL., *supra* note 3, at 68–69, 106–13.

³⁴ WILSON, *supra* note 31, at 26.

psychologist David Buss on mate selection preferences.³⁵ The basic idea is that men are more inclined toward a strategy of multiple sex partners, whereas women tend to be more selective because they make a far greater investment in reproduction than do men.³⁶ This follows both from the fact that an egg is far larger than a sperm and that gestation involves a far greater investment than ejaculation.³⁷ Moreover, the biological connection between mother and child is clear in a way that the connection between father and child is not.³⁸

As a shorthand, my book refers to this set of ideas about the problem of fatherhood as the domestication argument: “[S]ociety requires marriage to domesticate men”³⁹ or, put otherwise, to “tame” or “civilize” men.⁴⁰ I raise several objections to the domestication argument as a justification for governmental promotion of marriage. First, I argue that “if men need not only marriage itself but also such hallmarks of traditional marriage as being head of the household, then promoting this form of marriage directly conflicts with respecting women’s equality.”⁴¹ Here, I am responding to sociologist Steven Nock’s argument, in *Marriage in Men’s Lives*, that marriage plays a very central role in how men establish a sense of masculinity and that one core idea that most Americans share about marriage is that “[t]he husband is the head, and principal earner, in a marriage.”⁴² Although Nock appears to intend the term “head of household” simply to connote primary earner, studies of gender roles within marriage, as my book explains, find that “head of household” connotes leadership and authority within the household.⁴³ I also point to some ethnographic studies suggesting that when men perceive that they are not economically able to establish themselves as head of the household, they may not marry.⁴⁴

Browning contends that I present an account of the domesticating power of marriage—and women—that is probably only true of George Gilder.⁴⁵ To set

³⁵ BROWNING ET AL., *supra* note 3, at 109–11.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 112.

³⁹ MCCLAIN, *supra* note 1, at 121, 136.

⁴⁰ *Id.* at 135–36.

⁴¹ *Id.* at 136–37.

⁴² *Id.* at 135–37 (quoting STEVEN NOCK, *MARRIAGE IN MEN’S LIVES* 6, 58–59 (1998)).

⁴³ *Id.* at 137 (discussing the well-known study, PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* (1983)).

⁴⁴ *Id.* at 139 (discussing ideal of the “decent daddy” in ELIJAH ANDERSON, *CODE OF THE STREET* 183, 189 (1999)).

⁴⁵ Browning, *supra* note 4, at 1395.

the record straight: I characterize George Gilder as a “conservative welfare pundit of the 1980s,”⁴⁶ not as a part of the contemporary marriage movement. My reference to his ideas is in the context of observing that “[s]ome argue that men will not accept the role of ‘responsible father’ and husband without the perks of head of household,”⁴⁷ namely, “a sense of masculine dominance.”⁴⁸ I counter this view by noting that some studies of engaged fathering suggest that such fatherhood need not rest on household dominance.⁴⁹ It is in this context that I state, “Constitutional norms of sex equality forbid government from using the law to reinforce a model of family responsibilities that installs men as leaders and providers and women as followers and dependents, or to advance similar schemes of unequal responsibility.”⁵⁰ My concern there and here is with the use of governmental funds to promote “healthy marriage.” I argue that any governmental funding of marriage education should be consistent with the constitutional and political value of sex equality.⁵¹

I raise other objections to the domestication argument. I note that “skepticism about appeals to ‘nature’ or to sex differences as a justification for policy is in order,” in view of the “long history of such appeals to justify sex-based restrictions on women’s citizenship and gender hierarchy in families and civil society.”⁵² I also suggest that studies of some men’s practices of responsible fatherhood outside of marriage “cast doubt on the claim that only marriage can secure such commitment.”⁵³ I reinforce this last argument by noting a conclusion in one federally commissioned report that “to the extent that social policy is constructed through the lens of the traditional nuclear family model, new forms of responsible fathering by biological fathers or stepfathers are likely to be constrained.”⁵⁴

Browning focuses in particular on my criticism that the portrait of men painted in the domestication argument “insults their capacity to be morally responsible agents” and “reinforces women’s familiar role as gatekeepers—

⁴⁶ MCCLAIN, *supra* note 1, at 140.

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting GEORGE GILDER, WEALTH AND POVERTY 136 (1981)).

⁴⁹ *Id.*

⁵⁰ *Id.* at 137.

⁵¹ *Id.* at 147–54.

⁵² *Id.* at 137.

⁵³ *Id.*

⁵⁴ *Id.* at 140 (quoting FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, NURTURING FATHERHOOD: IMPROVING DATA AND RESEARCH ON MALE FERTILITY, FAMILY FORMATION AND FATHERHOOD 146 (June 1998), <http://fatherhood.hhs.gov/CFSForum/NurturingFatherhood.pdf>).

morally responsible for themselves and for men in the areas of sexuality and family.”⁵⁵ He suggests that I do not appreciate his distinction between society’s reliance on the power of the institution of *marriage* as such in anchoring men’s paternal investment in offspring and its reliance on sexual gatekeeping *by women* to bring men to marriage.⁵⁶ I do recognize the distinction, but my point is that both of these lines of argument are made by figures in the marriage movement. And they have a logical connection, after all. If the institution of marriage exerts a salutary influence on men by anchoring paternal care and linking the father to the mother and child, it is women’s gatekeeping that brings men into marriage itself, instead of pursuing alternative paths of more unruly, irresponsible sexuality.

Browning does not make the gatekeeping argument but some prominent figures in the marriage movement do. Marriage movement leader David Popenoe looks both to the institution of marriage (as explained above)⁵⁷ and to the gatekeeping role of women as ways to address the problem of fatherhood. In pondering what it would take for society to establish a “strong marriage system,” Popenoe states that this will rest upon a more culturally restrictive sexual system, which in turn will depend on women’s “leadership” since women are “traditionally assumed to be the gatekeepers of sexuality.”⁵⁸ While Popenoe believes that a return to complete sexual restraint before marriage is probably not feasible in contemporary society, he does suggest that the old grandmotherly wisdom “dictates a measure of [a woman] playing hard to get,” such as refusing to cohabit without a clear plan to marry.⁵⁹

My book discusses Popenoe’s observation about gatekeeping in the context of a critique of contemporary calls to revive courtship as a better way to steer young women and men to marriage.⁶⁰ Courtship is on the marriage movement agenda. In a report critical of contemporary dating patterns on college campuses, authors Norval Glenn and Elizabeth Marquardt call for new models of courtship as a way to provide young women with helpful pathways to

⁵⁵ *Id.* at 137.

⁵⁶ Browning, *supra* note 4, at 1395.

⁵⁷ See *supra* text accompanying note 28.

⁵⁸ MCCLAIN, *supra* note 1, at 256, 286 (quoting David Popenoe, *A Marriage Research Agenda for the Twenty-First Century: Ten Critical Questions*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY 195, 197–98 (Alan J. Hawkins et al. eds., 2002)).

⁵⁹ *Id.* at 286 (quoting DAVID POPENOE & BARBARA DAFOE WHITEHEAD, NAT’L MARRIAGE PROJECT, SHOULD WE LIVE TOGETHER?: WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE 15 (2d ed. 2002)).

⁶⁰ *Id.* at 281–89.

marriage.⁶¹ My book contends that the current emphasis in federal policy on abstinence-only-until-marriage sex education and calls by some in the marriage movement to revive courtship both rely on a notion of women as sexual gatekeepers.

Sexual gatekeeping by women, for example, is a central element in the call to revive courtship by Amy and Leon Kass, both participants in the marriage movement.⁶² They argue that restoring “sensible sexual mores, pointing toward marriage” is only possible if a majority of women reassert the virtue of sexual self-restraint.⁶³ Their writing on courtship treats female chastity as a “reproductive strategy”—an attempt by a woman to “attach the man exclusively and permanently to the woman through erotic love and to make him thereby also love and care for her—their—children.”⁶⁴ Here, the complementarity of manly ardor and female modesty work in tandem to bring men to marriage: Kass and Kass identify as the “central truth about sexual manners and mores” that “it is women who control and teach them.”⁶⁵ In this vein, Leon Kass argues that when female modesty became the “first casualty” of the sexual revolution, “even women eager for marriage lost their greatest power to hold and discipline their prospective mates.”⁶⁶

I do not, therefore, mischaracterize the marriage movement when I observe that “prominent accounts of courtship assign women a special responsibility for gatekeeping: women, by exercising their feminine virtue of modesty, discipline male sexual appetite by insisting on marriage as the prerequisite for sexual access.”⁶⁷ Nowhere do I state that this is a uniform view within the marriage movement or that Browning advances it. But the examples of Popenoe and of Kass and Kass indicate that within the marriage movement, some do appeal to restoring sexual gatekeeping by women as a way to bring back a strong marriage culture.

⁶¹ NORVAL GLENN & ELIZABETH MARQUARDT, INST. FOR AM. VALUES, HOOKING UP, HANGING OUT, AND HOPING FOR MR. RIGHT: COLLEGE WOMEN ON DATING AND MATING TODAY 40–41 (2001).

⁶² See COAL. FOR MARRIAGE, FAMILY & COUPLES EDUC. ET AL., *supra* note 2, at 27 (showing that both Amy and Leon Kass signed *The Marriage Movement: A Statement of Principles*).

⁶³ MCCLAIN, *supra* note 1, at 286 (quoting Amy A. Kass & Leon R. Kass, *Proposing Courtship*, FIRST THINGS, Oct. 1999, at 32, 41).

⁶⁴ *Id.* at 285–86 (quoting Kass & Kass, *supra* note 63, at 40).

⁶⁵ *Id.* at 285 (quoting Kass & Kass, *supra* note 63, at 33).

⁶⁶ *Id.* at 282 (quoting Leon Kass, *The End of Courtship*, BOUNDLESS WEBZINE, 2005 <http://www.boundless.org/2005/articles/a0001154.cfm>).

⁶⁷ *Id.* at 283.

II. IS THERE A “MALE PROBLEMATIC”—OR A “GOOD” OF FATHERHOOD—IN
THE PLACE OF FAMILIES?

Browning contends that a major limitation of *The Place of Families* is that it does not offer an account of the category of what he calls the “premoral” or “nonmoral goods” of life, including those “relevant to the well-being of families and children.”⁶⁸ Indeed, he states that my “distaste” for such a discussion causes my call for toleration, or what I call toleration as respect,⁶⁹ to become “a blanket approval of an indiscriminate variety of life styles.”⁷⁰ Although my book has “taken law to the doorstep of moral and political philosophy,” Browning argues, my attempt to bring moral and political theory to bear on law falls short because I do not augment my theory of justice and virtue with “indices of the premoral goods [of life] that justice should organize and virtue should serve.”⁷¹ Here, Browning finds my approach illustrative of a larger-scale weakness in contemporary legal theory about families. Browning offers the “premoral good of fatherhood”—that is, responsible fatherhood and paternal care—as his primary example of what he finds missing in *The Place of Families*.⁷²

It is difficult to respond to this criticism because I am not certain what Browning means by the term “premoral goods.” The term is not one found in contemporary family law or, for that matter, in the political theory on which my book draws. The absence of “premoral goods” from my book is not, therefore, due to “distaste” on my part for the concept. Browning explains that he takes the idea from neo-Thomistic theology and suggests it is similar to the idea of a “nonmoral good” found in certain moral philosophy.⁷³ He suggests a distinction between saying something is a good of life, that is, important for human life, like water, and saying that something is in itself a direct moral good.⁷⁴ He maintains that if we say that public authorities “should provide clear water equally for everyone,” then we are making a moral statement, or judgment, “about justice or fairness.”⁷⁵

⁶⁸ Browning, *supra* note 4, at 1392.

⁶⁹ MCCLAIN, *supra* note 1, at 29–33.

⁷⁰ Browning, *supra* note 4, at 1392.

⁷¹ *Id.* at 1393.

⁷² *Id.* at 1394.

⁷³ *Id.* at 1393.

⁷⁴ *Id.*

⁷⁵ *Id.*

Trying to relate a term drawn from theology and moral philosophy to the concerns of family law presents a challenge to my ability to have a constructive conversation with Professor Browning about this issue. My book does not use the category “pre-moral goods,” but it does ask what sorts of goods are at stake in family life and what functions society expects family to fulfill. Is there common ground between my approach and critical familism on this issue? To explore this, I will reformulate Professor Browning’s argument slightly to assume he might be making this kind of criticism: My proposed framework for reflecting on contemporary family law and policy fails to offer an adequate account of the full range of goods that are relevant to family life. In particular, my book, in Browning’s view, fails to give sufficient weight to the good of fathers’ care for their children and to the importance of marriage in securing this care.

The Place of Families proposes an approach to family law that is attentive to the goods of family life, including the goods of marriage. Early on, I propose that “[i]n the political order, families are simultaneously a site of private life and an institution of public importance because of the goods they foster and the functions they serve.”⁷⁶ I explain that “[m]y approach to the place of families and how government should regulate them focuses not only on the goods associated with families and the functions they serve (for example, fostering relational responsibility and interdependence), but also on the relevant political values at stake.”⁷⁷

What goods, functions, and values are at stake when we speak of families? Borrowing an idea from John Rawls’s political liberalism, I suggest that a helpful point of departure is to reflect on political liberalism’s list of “primary goods” based on “what citizens need and require when they are regarded as [free and equal] persons and as normal and fully cooperating members of society over a complete life.”⁷⁸ I argue that families play a vital role in a formative project of fostering persons’ capacities for democratic and personal self-government. Further, I maintain that a focus on primary goods, human needs, or capacities “suggests at least three tasks for families.”⁷⁹ Two tasks that relate to the process of social reproduction—how society reproduces itself

⁷⁶ MCCLAIN, *supra* note 1, at 22.

⁷⁷ *Id.*

⁷⁸ *Id.* at 19 (quoting JOHN RAWLS, *POLITICAL LIBERALISM* 178 (1996)). To be sure, *The Place of Families* does not attempt to offer a detailed list of the goods of human life, by analogy to Martha Nussbaum’s account of basic human capabilities. *Id.*

⁷⁹ *Id.* at 20.

by “preparing persons to take their place as capable, responsible, self-governing members of society”—are providing care to dependent members and supporting the political order by cultivating important virtues.⁸⁰ A third task is “to afford adults the chance to realize the goods of intimate association” such as love, intimacy, mutuality, interdependence, and friendship.”⁸¹

What political or public values are at stake in the institution of family? Professor Browning suggests my account is skewed toward an uncritical embrace of family diversity and the aggressive promotion of sex equality. However, these are part of a broader family of relevant political values, resembling those listed by Rawls: “the freedom and equality of women, the equality of children as future citizens, the freedom of religion, and . . . the value of the family in securing the orderly production and reproduction of society and of its culture from one generation to the next.”⁸² To this list I add the political value of autonomy in intimate matters and equality among families.⁸³

Care, then, in my approach is a basic task of families. My book devotes a chapter to the importance of care—in particular, parental care for children—and so it seems odd to charge that I ignore the premoral goods of family life. How do my approach and critical familism compare on the issue of care? How does the “male problematic” feature in our analyses?

Care, I explain, is foundational and fundamental: “A just society must ensure that its members are able to meet their basic needs for nurture, care, food, shelter, and other material goods.”⁸⁴ Feminist analysis has helpfully focused attention on care as a precondition for civic and democratic life and revealed both how society locates the primary responsibility for providing care in families and how, within families, women continue to have disproportionate responsibility for providing such care.⁸⁵ Using the two practical examples of welfare-to-work policy and work/family or work/life conflict, my book argues that care should be seen as both a personal (and parental) and public

⁸⁰ *Id.*

⁸¹ *Id.* at 21.

⁸² *Id.* at 22 (quoting John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 793 (1997)).

⁸³ *Id.*

⁸⁴ *Id.* at 21.

⁸⁵ *Id.* at 21, 89–90 (discussing, for example, MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 284–87 (2004); Berenice Fisher & Joan Tronto, *Toward a Feminist Theory of Caring*, in *CIRCLES OF CARE* 35, 40 (1990); EVA FEDER KITTAY, *LOVE’S LABOR* 29–42 (Emily K. Abel & Margaret K. Nelson eds., 1999)).

responsibility and as a public value warranting governmental support.⁸⁶ I critique the continuing vestiges of the gendered economy of care, and I urge that responsibility for care be redistributed between women and men within families and that employers and government better recognize and support the work that families do in providing care to their members.⁸⁷

Using Browning's framework, I could be saying, in other words, that care is both a "pre-moral good" and that it is morally good that society support such care. Browning and I also seem to have considerable common ground with respect to the importance of care and society's interest in securing men's participation in providing it. *The Place of Families* critiques the gendered division of labor for care giving and points out that this has costs for men as well as for women and children. I propose to support and recognize care as a public value in ways that treat care giving as a responsibility for both mothers and fathers and that facilitate both mothers and fathers integrating family and work responsibilities. So, too, critical familism advocates that "fathers and mothers have in principle equal access to the responsibilities and the privileges of both the public and domestic realms" and calls for a reduced work week.⁸⁸ I support a reduced work week along with other policy reforms, and I argue that society should aim to foster child well-being without sacrificing gender equality.

How, then, do critical familism and my approach to care and parental responsibility differ? It is fair to say that critical familism and my approach to family law have some distinctive concerns. One important difference is that the motivational question that occupies critical familism and the marriage movement—i.e., how can society ensure that men will responsibly commit to their sexual partners and invest in their children?— is not the motivating concern of my book. Professor Browning's notion of the "male problematic," as noted above, is that society requires marriage as a mechanism to ensure paternal investment because of men's tendency not to invest in their offspring. Indeed, Browning expresses concern that embracing too much family diversity causes one to lose sight of the preferability of the marital family as the optimal form for securing such paternal investment in children.⁸⁹ As a guide to social policy, his "marriage plus" approach would continue to affirm marriage between a man and a woman as the normative family form but adopt some

⁸⁶ *Id.* at 89–91.

⁸⁷ *Id.* at 88–114.

⁸⁸ BROWNING ET AL., *supra* note 3, at 328.

⁸⁹ Browning, *supra* note 4, at 1401–02.

social welfare measures to accommodate a certain amount of inevitable family diversity.⁹⁰ By contrast, he charges that my approach to fostering not only equality *within* families but also equality *among* families would jeopardize the special place of marriage in the name of a more indiscriminate acceptance of diversity, regardless of the impact on paternal investment and thus on children.⁹¹

Equality is, admittedly, a central concern of my book. Indeed, one motivation for my book was the puzzle that those who call for stronger families and marriages tend to perceive tension between the goals of strengthening families and promoting sex equality. But equality is neither the book’s only animating concern nor an isolated value. My book attempts to make sense of the common intuition that a significant link exists between the state of families and the state of the nation. I argue that underlying this intuition is an important idea: Families have a place in the project of forming persons into capable, responsible, self-governing citizens.⁹² My book offers a framework for thinking about that formative project, stressing three salient ideas: fostering the capacity for democratic and personal self-government, fostering equality within and among families, and fostering the responsibility of individuals to make personal decisions about sexual intimacy, marriage, reproduction, and parenting.⁹³

To understand better how my approach and critical familism differ, it may be helpful to tease out how a notion of a “male problematic,” shaped by feminist sensibilities, features in my book and how this problematic relates to the problems of family law. Women’s disproportionate responsibility for care is one manifestation of a feminist “male problematic” identified in my book. As noted above, I offer proposals for how law and policy can best ameliorate the gendered economy of care. But there are other manifestations of such a problematic.

First, reflecting its feminist roots, *The Place of Families* critiques historical forms of inequality within the family linked to the hierarchy—sanctioned in family law and political theory—between husband and wife. Indeed, it argues that contemporary appeals to the important idea that families are “seedbeds of civic virtue” often fail to reckon with the history of sex inequality within the

⁹⁰ *Id.* at 1400–01.

⁹¹ *Id.* at 1401–02.

⁹² MCCLAIN, *supra* note 1, at 3.

⁹³ *Id.* at 4–9.

family.⁹⁴ Building on Susan Moller Okin's influential book, *Justice, Gender, and the Family*,⁹⁵ it identifies lingering forms of such inequality that pose continuing problems: domestic violence and women's disproportionate responsibility for care giving and housework within families. Identifying sex equality as a constitutional commitment relevant to family life, my book urges that government should more firmly embrace and support equality between women and men within families. It explains that a commitment to toleration, or governmental restraint, does not bar government from addressing the problem of violence and unjust domination within families.

Second, my book contends that contemporary calls to strengthen families and promote marriage are too often, at best, ambivalent about sex equality and, at worst, view greater equality between women and men within families as an obstacle to securing stable family life. I believe that critical familism has similar concerns, as evidenced by its criticisms of some religious groups' embrace of male headship of the family and of a traditional breadwinner-caregiver division of labor as important to strong families.⁹⁶ I am puzzled, therefore, that Browning regards my embrace of sex equality as overly aggressive or zealous and as too mistrustful of civil society's ability to support marriage or responsible fatherhood.

What I do say is that if government is to enter into public-private partnerships with religious organizations to carry out such tasks as promoting responsible fatherhood, marriage education, and sex education, the constitutional value of sex equality (to say nothing of the Establishment Clause) precludes it from funding, or otherwise lending its imprimatur to, religious conceptions of family that embrace gender hierarchy or a fixed vision of sex roles (such as women as sexual gatekeepers or men as "head of household"). I do not argue that these religious groups may not advance those conceptions in society. Rather, I argue that family law and policy have moved away from a model of marriage premised on gender hierarchy and fixed roles for husband and wife. Likewise, it would be wrong for government to enlist private actors to promote marriage by promoting such visions of family life. In other words, if government is to attempt to promote "healthy marriage," it must do so without promoting patriarchy. What is more, I have argued, drawing in part on Browning's own work, that a prudent way to support

⁹⁴ MCCLAIN, *supra* note 1, at 50–84.

⁹⁵ SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

⁹⁶ BROWNING ET AL., *supra* note 3, at 219–46.

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“healthy marriage” would be to recognize the important link between perceptions of marriage quality and sex equality.⁹⁷

Third, equality *among* families is a concern of *The Place of Families*. It is here, perhaps, that my approach and critical familism—and the marriage movement, more generally—may diverge the most. In contrast to the marriage movement, I strongly support extending marriage to same-sex couples. I do this not due to an indiscriminate embrace of diversity, but rather based on an argument appealing to the goods of family life, the capacities of gay men and lesbians, and relevant political values.⁹⁸ Another proposal I make, of which Professor Browning is quite critical, is to develop a registration system, which would allow persons in close relationships to have a formal status attached to some set of benefits, obligations, and protections. I do not say, contrary to his critique, that *all* close relationships should receive the protective umbrella linked to marriage; rather, I contend that government may legitimately calibrate the menu of rights to the menu of responsibilities to which partners agree.⁹⁹ My argument here, again, rests not on an indiscriminate embrace of diversity. Instead, I ask whether such relationships “have not only private significance (for their contribution to personal happiness and well-being), but also public significance, rooted in important social goods they realize and functions they serve (such as meeting dependencies, giving care, or fostering civic virtues).”¹⁰⁰ A genuine disagreement between my approach and that of critical familism is whether this sort of move “beyond marriage” would undermine marriage, weaken paternal investment, and be harmful to children’s well-being.¹⁰¹

A final form of inequality among families that is of concern to me as well as to Professor Browning is the fact that some men and women aspire to marry but do not because of economic factors. Like the marriage movement, I, too, am concerned that economic inequality is a barrier to marriage and that there may be a “marriage gap” between the affluent and the poor. A related problem is that economic disadvantage and other forms of inequality contribute to early

⁹⁷ MCCLAIN, *supra* note 1, at 153–54; see Don S. Browning, *What Kind of Love? The Equal-Regard Marriage and Children*, 4 AMER. EXPERIMENT QUART. 47 (2001).

⁹⁸ MCCLAIN, *supra* note 1, at 155–90.

⁹⁹ *Id.* at 209.

¹⁰⁰ *Id.* at 197.

¹⁰¹ For example, about forty percent of cohabiting households include children, and I argue that a registration option might help to contribute to the stability of the adult relationships, and thus, to such children’s well-being. *Id.* at 198, 207–08.

pregnancy and parenthood.¹⁰² But here I diverge from the marriage movement and from governmental efforts to promote “healthy marriage” in at least two respects. These bear on the issue of a “male problematic.” First, I argue that concerns not only about economics but also about relationship quality deter some low-income women from marrying. Research on low-income unmarried parents finds that a significant obstacle to stable family life is gender conflict or gender distrust. This distrust relates to quality issues like infidelity, violence, and whether marriage will be premised on an equal partnership rather than male dominance. This might be cast as a form of a “male problematic.” As some researchers concluded, if “healthy marriage” programs seek to encourage women’s positive attitudes toward marriage and reduce their distrust, this “may well require men to change the behavior that leads to distrust or negative attitudes.”¹⁰³ Relational conflict and violence are among the reasons for this distrust. Moreover, state-wide surveys conducted with welfare funds as part of marriage promotion initiatives find both that women more than men, and lower-income people more than the affluent, identify violence as a significant factor leading to divorce.¹⁰⁴

Browning comments that I miss the point that women in marriages are at lower risk for domestic violence than women in cohabiting or dating relationships.¹⁰⁵ But my point was not this comparative one. Rather, it was that, given that gender distrust is an obstacle to marriage and that violence within marriage is a significant factor leading to divorce, for women and for low-income partners, efforts to promote “healthy marriage” that focus primarily on improving unmarried men’s economic prospects to make them more “marriageable” do not go far enough. Concern for the *quality* of family life and of marital relationships—which relates in turn to equality within marriage—should be treated as equally important. Moreover, some researchers have proposed that a path to greater marriageability would be greater acceptance of nontraditional family roles for men, such as active nurturing, especially for men with lower earning capacity.¹⁰⁶

A second point of tension between my own approach and that of the marriage movement is whether marriage promotion should be the primary

¹⁰² *Id.* at 263–68.

¹⁰³ *Id.* at 332 n.93 (quoting Marcia Carlson, Sara McLanahan & Paula England, *Union Formation in Fragile Families*, 41 *DEMOGRAPHY* 237, 255–57 (2004)).

¹⁰⁴ *Id.* at 132–33 (citing state-wide surveys in Oklahoma and Utah).

¹⁰⁵ Browning, *supra* note 4, at 1399.

¹⁰⁶ MCCLAIN, *supra* note 1, at 140.

focus of helping low-income unmarried parents. For example, a serious question for welfare law and policy is whether efforts to promote responsible fatherhood should support only social services that emphasize marital fatherhood as the only form of responsible fatherhood. I support marriage education, but I also concur with those scholars who argue for seeking to strengthen families as they actually exist. Research on "fragile families," a term used to describe low-income, unmarried parents who have separated parenthood from marriage, finds that the gap between such couples' ideals about marriage and actual practices rests in part on a combination of economic and other obstacles to marriage.¹⁰⁷ However, most of these mothers and fathers—whether or not they have a current romantic involvement with each other—do value having the fathers' continuing involvement in the child's life.¹⁰⁸ Governmental efforts that go beyond marriage education to include a broader spectrum of supportive programs could help to encourage responsible fatherhood and cooperative parenting even if they are not anchored within marriage.

Would critical familism's "marriage plus" approach concur with approaches that help actual families as they presently exist, or would it worry that such an approach would weaken the institution of marriage? The marriage movement focuses on marriage as the crucial societal mechanism for securing paternal investment. Here, by contrast, the argument is made that encouraging active, nurturing fatherhood by young men—whether they are married or unmarried—may be an effective mechanism for improving adult-adult relationships. As one report commissioned by the federal government posed the question, "Can increasing men's commitment to active fathering be a mechanism for improving union quality and stability?"¹⁰⁹ Critical familism might well counter that society should aspire to link marriage and parenthood more tightly. But whatever the normative ideals that undergird family law, family law and welfare policy have to meet people in the actual circumstances in which they currently live. If marriage is not an appropriate goal for some men and women, programs seeking to improve parenting skills and the coparenting relationship could at least strengthen family life for families as

¹⁰⁷ See generally Center for Research on Child Wellbeing, <http://crcw.princeton.edu> (last visited Feb. 11, 2007).

¹⁰⁸ See RON MINCY ET AL., TEMP. ASSISTANCE TO NEEDY FAMILIES ("TANF"), FRAGILE FAMILIES IN FOCUS: A LOOK AT HOW NEVER-MARRIED, LOW-INCOME PARENTS PERCEIVE MARRIAGE AND RELATIONSHIPS (2004) (explaining a recent study commissioned by Louisiana's TANF).

¹⁰⁹ McCLAIN, *supra* note 1, at 140 (quoting DAVID J. FEIN, THE DETERMINANTS OF MARRIAGE AND COHABITATION AMONG DISADVANTAGED AMERICANS: RESEARCH FINDINGS AND NEEDS 37 (2003)).

they currently exist.¹¹⁰ A comprehensive approach to services could help those couples for whom “healthy marriage” is a desired outcome as well as couples who, although they would make poor marriage partners, could more easily move to a healthy coparenting relationship and thus more stable family life.¹¹¹

CONCLUSION

My project and critical familism share a common point of departure: concern over the contentious public debates in the United States over families. However, the aim of *The Place of Families*, by contrast to Professor Browning’s project, was not to synthesize and critically retrieve religious tradition, but rather it was to offer a framework, grounded in family law and political theory, for approaching contentious debates about the place of families in our political order and a number of issues of family law. In his review, Professor Browning gestures toward a larger question that he invites family law scholars—and legal scholars, as a more general matter—to take up: what is “the relation of religion to the law in a pluralistic and democratic society?”¹¹²

In an earlier exchange with me about critical familism, Professor Browning argued that “positions on family theory informed by explicitly religious sources have the right to enter into deliberations aimed to shape public policy,” provided that they “advance their arguments in publicly accessible ways.”¹¹³ As I observed in response, his premise that, out of engagement with and critical retrieval of classic texts about marriage in the Western tradition (and non-Western religious traditions), there “would emerge a public philosophy about marriage on which there would be widespread cultural agreement has some resemblance to political liberalism’s appeal to an overlapping consensus, where persons can draw upon their comprehensive moral views to find agreement about important political principles or public values.”¹¹⁴ *The Place of Families* draws on this dimension of political liberalism. However, Professor Browning seems to quest for a *comprehensive* public moral

¹¹⁰ *Id.* Given the high rates of unintended pregnancies experienced by unmarried, low-income couples, programs aimed at sex education, pregnancy prevention, and family planning would also be helpful. See MINCY ET AL., *supra* note 108, at 4–5.

¹¹¹ MINCY ET AL., *supra* note 108, at 17–18.

¹¹² Browning, *supra* note 4, at 1384.

¹¹³ Don Browning, *Critical Familism, Civil Society, and the Law*, 32 HOFSTRA L. REV. 313, 316 (2003).

¹¹⁴ Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379, 396 (2003).

philosophy about marriage, which takes its values and moral claims from religious texts, and seems to blur the distinctions between civil and religious marriage.

This fusion of the civil and religious is clear, for example, in the recent statement, *Marriage and the Public Good: Ten Principles*, to which Professor Browning was a signatory. *Marriage and the Public Good* expresses, as one principle, that “[c]ivil marriage’ and ‘religious marriage’ cannot be rigidly or completely divorced from one another”; it aims to “preserve some shared idea of what marriage is that transcends the differences between religious and secular marriages and between marriages within our nation’s many diverse religious traditions.”¹¹⁵ I contend that it is not an appropriate task for *the state* to pursue or seek to implement such a comprehensive philosophy, given the reasonable diversity of views among people about sexuality, family, and marriage, including diversity *within* specific religious traditions. Nor is it appropriate for legislatures and courts, when regulating and adjudicating marriage as a civil institution, to aim to advance a religious conception of marriage.

Undeniably, religious conceptions of marriage have shaped contemporary family law. Thus, a complicating factor in considering the place of religion in family law in a pluralistic constitutional democracy is that, although contemporary discourse about marriage emphasizes that *civil* marriage, as distinct from religious marriage, is, in a sense, a creature of state law and regulation,¹¹⁶ America’s history reveals the strong influence of Christian conceptions of marriage on the secular law.¹¹⁷ Indeed, in the informative volume coedited by Browning, *American Religions and the Family*, the late Lee Teitelbaum observed, “For a considerable part of American history, the posture of public authority was consistent with positions taken by the dominant religious culture For most of American history, . . . the law of marriage was consistent with and supported—if not created—by the views of dominant religious communities.”¹¹⁸ Yet Teitelbaum further observes the disestablishment of religious and civil family law. “[S]ince the 1950s this

¹¹⁵ THE WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 14 (2006), <http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf>.

¹¹⁶ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

¹¹⁷ A helpful source is JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997).

¹¹⁸ Lee E. Teitelbaum, *Religion and Modernity in American Family Law*, in *AMERICAN RELIGIONS AND THE FAMILY: HOW FAITH TRADITIONS COPE WITH MODERNIZATION AND DEMOCRACY* 227, 228–29 (Don S. Browning & David A. Clairmont eds., 2007).

close association of dominant religious views and marriage laws has weakened dramatically” (as the tension between the religious ideal of marital permanence and the advent of no-fault divorce illustrates).¹¹⁹

An intriguing question arising out of the consideration of this history of the intertwining and disentangling of family law and religion is what the conception of civil marriage is and whether various religious communities find this understanding of marriage compatible with or threatening to their own conception of marriage. As Mary Anne Case has observed, what “marriage licenses” today is quite different from what it licensed in an earlier era, when marriage entailed a hierarchical set of rights and duties of husband and wife (baron and feme) and the criminal law prohibited nonmarital, nonprocreative, and nonheterosexual sexual expression.¹²⁰ Today, by contrast, much of that criminal law has given way to understandings of a realm of constitutionally protected liberty and privacy. And, pursuant to the transformation of family law spurred by the Supreme Court’s series of equal protection rulings, although civil marriage does entail certain rights and obligations, they are stated in gender-neutral terms. Spouses are much freer to choose how to live their marital life, and the rules of exit are far less strict.

What civil marriage licenses, thus, is, no doubt, at considerable odds with at least *some* religious conceptions of marriage. In taking up Professor Browning’s question about the place of religion in shaping family law, we need to give attention to possible points of tension between these civil and religious conceptions. For example, I suspect that one point of tension will be the issue of gender roles in the family. Contemporary family law has rejected the common law’s model of husbandly rule and wifely obedience. In *The Place of Families*, I contend that sex equality is an important political value and constitutional principle as well as a commitment of family law. In Browning’s new anthology,¹²¹ a theme in nearly every chapter is that a traditional tenet in religious understandings of the home and family is that men are to exercise authority or leadership in the home (e.g., “headship”) and that women have special duties in the home, including (in some traditions) some form of submission to or respect for male authority. In coping with modernization, religious leaders and religious adherents face the challenge of how to reconcile traditional religious beliefs about male authority in the family

¹¹⁹ *Id.* at 230.

¹²⁰ Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005).

¹²¹ AMERICAN RELIGIONS AND THE FAMILY: HOW FAITH TRADITIONS COPE WITH MODERNIZATION AND DEMOCRACY, *supra* note 118.

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with contemporary American values about equality of the sexes and marriage as a partnership. To be sure, some religious traditions themselves have moved away from teachings about male dominance and female submission and fixed gender roles to more egalitarian visions of marriage and family. Critical familism, similarly, advocates an egalitarian vision. By contrast, some embrace traditional gender roles as part of an "oppositional" stance to American culture and the perceived weakening of family values.¹²²

The issue of diverse religious views about gender roles and the degree to which they support or oppose contemporary family law is but one of a number of issues raised by Professor Browning's quest to bring religion to bear on shaping family law and policy. I welcome critical familism's further engagement with the problems of family law.

¹²² See Margaret Bendroth, *Evangelicals, Family, and Modernity*, in AMERICAN RELIGIONS AND THE FAMILY: HOW FAITH TRADITIONS COPE WITH MODERNIZATION AND DEMOCRACY, *supra* note 118, at 56.

