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CRITICAL FAMILISM, CIVIL SOCIETY, AND THE LAW

Don Browning*

Critical familism is a concept that my colleagues and I developed to summarize our thinking during the first phase of the Religion, Culture, and Family Project—a research project located at the University of Chicago that deals with the possible relevance of the Western religious traditions to contemporary family issues. It is a summary of what we thought were the most abiding themes of that tradition—both Judaism and Christianity—as well as the best insights of contemporary human sciences such as sociology, psychology, and economics. It is a normative theory of family and marriage primarily intended to provide culture and civil society their ideals and practical strategies for family formation and marriage.

Critical familism only indirectly has implications for family law. On the other hand, family law should do nothing to undermine this normative model and, in fact, do some things to support it. Critical familism acknowledges the central importance of religiocultural aspirations and supports the equal-regard mother-father team with equal privileges and responsibilities in both the public worlds of politics and employment and the more private realms of home, child rearing, and intergenerational care.

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1. For more information about the Religion, Culture, and Family Project and about critical familism, see the Project’s webpage at http://divinity.uchicago.edu/family.
3. See id. at xv.
4. The basic source of critical familism is the summary book of the first phase of the Religion, Culture, and Family Project, FROM CULTURE WARS TO COMMON GROUND: RELIGION AND THE AMERICAN FAMILY DEBATE, supra note 2; see also DON S. BROWNING & GLORIA G. RODRIGUEZ, REWEAVING THE SOCIAL TAPESTRY: TOWARD A PUBLIC PHILOSOPHY AND POLICY FOR FAMILIES (2002) [hereinafter BROWNING, SOCIAL TAPESTRY]. Drafts of chapters from SOCIAL TAPESTRY served as background material for the American Assembly's consultation on families
Critical familism is “critical” in that it attempts to expose, critique, and reform distortions of social, economic, and political power that function to block or undermine the free formation and support of the equal-regard mother-father partnership.\(^5\) It holds that the principles supporting such critique can be found within both the Jewish and Christian traditions and gleaned as well from insights drawn from contemporary moral philosophy.\(^6\) Even though critical familism fully acknowledges that marriage is not always chosen by everyone for the purposes of procreation and child care, as an institution with certain cultural, social, and legal entitlements and responsibilities, marriage should be defined primarily with its child rearing tasks envisioned as central.

Critical familism has a variety of other names in the current literature. Sociologist Brad Wilcox in a recent review of the family strategies of the mainline churches refers to it as “progressive familism” in contrast to “traditional familism” of the 1950s or “expressive liberationist” approaches of some religious groups today.\(^7\) Sociologist William Doherty, partially influenced by critical familism, has developed a perspective on family issues that he calls a “critical promarriage” point of view with implications for cultural, social, and legal reform.\(^8\)

Critical familism is not primarily a legal theory, although it has implications for the law. It is basically a cultural strategy—indeed a religiocultural strategy—to be carried out principally by the institutions of civil society. It envisions the task of reconstructing family and marriage along its theoretical lines as a complex cultural work that


\(^{6}\) See BROWNING, CULTURE WARS, supra note 2, at 6.


requires a delicate set of collaborations between civil society, government, market, and the specialized field of family law.  

I. RELIGIOUS THINKING AND PUBLIC DISCOURSE

Critical familism holds that family theory informed by religious traditions has a right to contribute to public policy. It holds this because of the often overlooked symmetry of religious and so-called secular thought. Critical familism holds that all moral, political, and legal thinking—as expressions of practical wisdom (phronësis)—are complex interweavings of several dimensions of thought. These include deep metaphors conveying fundamental views of reality, general principles of moral obligation (e.g., utilitarian, ethical egoism, Kantian, the golden rule, neighbor love), assumed theories of premoral goods that satisfy central human needs, theories of natural and social-systemic patterns and constraints, and finally assumptions about preferred concrete practices, rules, and social roles. These five dimensions of practical wisdom can be uncovered through a process of empirical reconstruction of concrete instances of actual practical thinking in ways similar to how Jürgen Habermas uncovers his three validity claims. This is to say that a careful analysis of concrete instances of practical reason invariably demonstrates assumptions and judgments at these different levels.

Critical familism holds that the deep metaphors of all practical thinking have the status of faith-like assumptions. Deep metaphors may illuminate experience but are not subject to definitive proof short of metaphysical arguments that are themselves generally thought to be inconclusive. Since such metaphors (e.g., organic, mechanistic, monistic, harmonistic, dualistic, or theistic) can be uncovered in all instances of practical thinking, the distinction between explicitly religious practical thinking and so-called secular moral, political, or legal practical thought is not categorical. Both allegedly secular and religious forms of practical

9. For the idea of marriage reconstruction as a cultural work, see BROWNING, MARRIAGE AND MODERNIZATION, supra note 4, at 24-29.
10. See BROWNING, CULTURE WARS, supra note 2, at 1-3.
11. For an argument about the multidimensional nature of praxis and practical reason that includes reference to its surrounding narrative and metaphorical dimension, see generally Paul Ricoeur, The Teleological and Deontological Structures of Action: Aristotle and/or Kant?, in CONTEMPORARY FRENCH PHILOSOPHY 99 (A. Phillips Griffiths ed., 1987).
12. For a fuller discussion of the five dimensions of practical moral thinking, see DON S. BROWNING, A FUNDAMENTAL PRACTICAL THEOLOGY 105-09 (1991).
rationality float on a veritable ocean of assumed metaphors about the basic structures of life, their directions, and their trustworthiness or lack of it. This rough commensurability of so-called religious and secular forms of practical reason means that positions on family theory informed by explicitly religious sources have the right to enter into deliberations aimed to shape public policy. Of course, in contrast to confessional criteria that have their authority within their respective traditions, for explicitly religiously informed family theories to gain a hearing in policy debates, they must advance their arguments in publicly accessible ways.

This can happen when religiously informed perspectives present themselves as mixed discourses in which faith affirmations expressed in metaphor and narrative are interwoven with moral arguments about the right and the good that can be expressed in publicly recognizable forms of philosophy and social theory. Most axial religions contain clear examples of such articulate blends of religious narrative and metaphor with philosophically identifiable forms of argument about the nature of the moral and premoral goods relevant to public policy; for example, Roman Catholicism is informed by Aristotelianism and liberal Protestantism has been variously informed by Kantianism, American pragmatism, and existentialism. Furthermore, historical research reveals that the family theories of early Christianity contained insights from Aristotelian and Stoic philosophy. Mature forms of axial religions are almost always mixed discourses blending explicitly religious metaphors and narrative with moral-philosophical arguments that sometimes merge into political and economic judgments as well. The problem of linking the deep metaphors of practical thought to its more articulate moral and premoral judgments is a challenge not only for religious thinking; it is a challenge for so-called secular practical thought as well.


15. For example, Saint Thomas Aquinas drew and wrote extensively on Aristotelian thought. See generally, e.g., Saint Thomas Aquinas, Commentary on the Metaphysics of Aristotle (John P. Rowan trans., Chicago H. Regency 1961).


17. See, e.g., infra notes 29-30 and accompanying text.

18. For more on the influence of Stoicism on early Christian thought, see generally Marcia L. Colish, 2 The Stoic Tradition from Antiquity to the Early Middle Ages: Stoicism in Christian Latin Thought Through the Sixth Century (1985).

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Critical familism with its vision of the equal-regard mother-father partnership is grounded on a complex, mixed religio-philosophical discourse of this kind. At its most abstract formulation, the idea of equal-regard is what William Frankena called a “mixed-deontological” concept. It defines the marital contract as a complex social covenant. The covenant between husband and wife is to treat each other as ends and never as objects or means of satisfaction alone. Used as a mixed-deontological concept, it also contains a strong teleological subdimension that entails the obligation to actively work for the good of one’s marital partner in all spheres of life, both private and public. The equal-regard covenant or status is a theory of mutuality and is thoroughly reversible; it applies with equal force to both husband and wife. But because of the asymmetrical nature of male and female investments on certain matters such as procreation and child care, the equal-regard covenant does not necessary imply moment-by-moment identical treatment, although it does require equality over the marital life cycle.

The equal-regard covenant is primarily a religiocultural ideal to be promoted and implemented by the institutions of civil society. It would be a guide to socialization in family, schools, and religious institutions in their various forms of marriage education, preparation, and support. Government and market should do nothing to undermine the equal-regard covenant and do what they reasonably can to support it. Law in its various forms does not have the primary responsibility for promoting it but should be seen as a source of friendly assistance.

II. SOURCES OF CRITICAL FAMILISM AND THE EQUAL-REGARD COVENANT

Even though at its core, the equal-regard covenant is a mixed deontological concept, it also has many sources and several levels of additional meaning adhering to it.

It takes seriously what Hans-Georg Gadamer would call the written “classics” of Western religious and philosophical traditions on marriage

19. See supra note 6 and accompanying text.
21. See BROWNING, CULTURE WARS, supra note 2, at 275.
22. See id.
23. See id. at 154.
24. See Browning, Religious Institutions, supra note 5, at 103.
and family.\textsuperscript{25} For instance, it honors the Ur-myth of Genesis I that gives the dignity of the \textit{imago Dei} (Gen. 1:27) to both male and female and that also grants equal responsibility to both in procreation and “dominion” (generally interpreted as economic responsibility) (Gen. 1:28).\textsuperscript{26} In addition to the classic texts of Judaism, Christianity, and Islam, the equal-regard doctrine of critical familism takes seriously the Aristotelian theory of friendship between husband and wife as the sharing of utility, pleasure, and virtue\textsuperscript{27}—especially the Thomistic enrichment of these concepts with Aquinas’s attribution of the \textit{imago Dei} to the wife as well as the husband.\textsuperscript{28} This was a significant yet still incomplete step toward balancing Aristotle’s theory of proportional justice between husband and wife.\textsuperscript{29} Critical familism also values medieval canon law and Thomistic accomplishments that made uncoerced consent on the part of both husband and wife as central to the definition of marriage.\textsuperscript{30}

Thomas Aquinas provides critical familism with some additional insights. Aquinas could agree with those contemporary feminists who hold that the primordial family is the mother-infant dyad.\textsuperscript{31} The question for Aquinas, as it is for contemporary evolutionary psychologists, was this: \textit{what are the conditions which led to the momentously important cultural accomplishment of human males joining the mother-infant dyad}\textsuperscript{32}.

\begin{footnotesize}
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\item \textsuperscript{25} See Hans-Georg Gadamer, \textit{Truth and Method} 255 (Garrett Barden & John Cumming trans., 3d ed. 1982) (defining the classical as “the historical process of preservation that, through constantly proving itself, sets before us something that is true”).
\item \textsuperscript{26} See Browning, \textit{Culture Wars}, supra note 2, at 281-82; see also Phyllis Tribble, \textit{God and the Rhetoric of Sexuality} 19 (1978).
\item \textsuperscript{27} See Aristotle, \textit{Nicomachean Ethics}, \textit{in The Basic Works of Aristotle} Bk. VIII, ch. 3 (Richard McKeon ed., 1941).
\item \textsuperscript{28} See 3 Saint Thomas Aquinas, \textit{Summa Contra Gentiles} ch. 93, \textsection 6 (Vernon J. Bourke trans., Univ. Notre Dame 1975) [hereinafter Aquinas, \textit{Summa Contra Gentiles}] (discussing friendship between husband and wife); Saint Thomas Aquinas, I \textit{Summa Theologica} Q. 93, art. 4 (Fathers of the English Dominican Province trans., William Benton 1952) [hereinafter Aquinas, \textit{Summa Theologica}] (attributing \textit{imago Dei} to women).
\item \textsuperscript{29} See Aristotle, \textit{ supra note 27}, Bk. VIII, ch. 7.
\item \textsuperscript{30} See John Witte, Jr., \textit{From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition} 26, 32-33 (1997) (noting importance of consent in canon law); James A. Brundage, \textit{Law, Sex, and Christian Society in Medieval Europe} 361-64 (1987) (same); 3 Supp. Aquinas, \textit{Summa Theologica}, \textit{ supra note 28}, Q. 45, art. 1 (stating that the “joining together of marriage is effected” by consent).
\item \textsuperscript{31} See 3 Supp. Aquinas, \textit{Summa Theologica}, \textit{ supra note 28}, Q. 41, art. 1 (arguing that even though “at the beginning men were savages and then no man knew his own children,” marriage is natural) (internal quotation marks omitted) (citation omitted); Martha Albertson Fineman, \textit{The Neuterized Mother, the Sexual Family and Other Twentieth Century Tragedies} 5 (1995) (hereinafter Fineman, \textit{The Neuterized Mother}) (defining the “core, primal [family] unit as mother and child”).
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\end{footnotesize}
and contributing to the provision and care for their offspring and consorts? His answer (also parallel to that given by contemporary evolutionary psychology, but of course without its theory of evolution) contained several elements. The long period of human infant dependency, the father’s recognition and certainty that the child was his (what evolutionary theorists call “paternal recognition” and “paternal certainty”), sexual exchange, and mutual assistance between father and mother gradually brought the human male to assist the mother-infant dyad. These are the naturalistic foundations of matrimony, which religion and culture sanction and stabilize but do not directly create.

Both Aquinas and much of contemporary evolutionary psychology assume that this was an enormous social and cultural achievement that distinguishes humans from almost all other creatures at the mammalian level. My research suggests that other medieval scholars from different faith traditions such as the Jewish Nachmanides and the Islamic Al-Ghazālī also recognized something like this naturalistic archeology of the marital institution. Marriage as sacrament for Aquinas and marriage as a one-flesh covenant for Nachmanides and Al-Ghazālī gave this male connection with the mother-infant dyad the additional stability and reinforcement of sacredness. The sacred character of sacrament and covenant convert the logic of mutual advantage (the logic of costs and benefits) to the logic of mutual obligation and respect; costs and

32. See infra note 35 and accompanying text.

33. For references to these various moves by Aquinas, see the following texts: 3 Supp. AQUINAS, SUMMA THEOLOGICA, supra note 28, Q. 41, art. 1 (period of dependency, mutual assistance); 3 AQUINAS, SUMMA CONTRA GENTILES, supra note 28, ch. 122, ¶6 (mutual assistance); id. ch. 122, ¶8 (period of dependency); id. ch. 123, ¶5 (paternal recognition); id. ch. 126 (sexual exchange). For analogous points made in evolutionary psychology, see DONALD SYMONS, THE EVOLUTION OF HUMAN SEXUALITY 131-32 (1979) (discussing the roles of sexual exchange and mutual assistance in the early evolution of marriage); ROBERT TRIVERS, SOCIAL EVOLUTION 203-38 (1985); PIERRE L. VAN DEN BERGHE, HUMAN FAMILY SYSTEMS: AN EVOLUTIONARY VIEW 20-21 (1979) (discussing parental investment); see generally FATHER-CHILD RELATIONS (Barry S. Hewlett ed., 1992). For a more detailed summary of this comparison between the naturalism of Aquinas and evolutionary psychology, see BROWNING, MARRIAGE AND MODERNIZATION, supra note 4, at 117-25.

34. See 3 Supp. AQUINAS, SUMMA THEOLOGICA, supra note 28, Q. 41, art. 1; VAN DEN BERGHE, supra note 33, at 82 (“Human culture is a species-specific idiom for expressing mating and reproduction.”).

35. See NACHMANIDES, COMMENTARY ON THE TORAH: GENESIS 308 (Rabbi Dr. Charles B. Chavel trans., 1971); Abū Hamid Al-Ghazālī, Book on the Etiquette of Marriage, in MADELAINE FARAH, MARRIAGE AND SEXUALITY IN ISLAM 43, 45 (Madelain Farah trans., 1984). For extensive commentary on these texts, see BROWNING, MARRIAGE AND MODERNIZATION, supra note 4, at 117-25.

36. See 3 Supp. AQUINAS, SUMMA THEOLOGICA, supra note 28, Q. 42, art. 1; Al-Ghazālī, supra note 35, at 54; NACHMANIDES, supra note 35, at 80; see also FARAH, supra note 35, at 11.
benefits are not ignored but they now become secondary.\textsuperscript{37} Marriage law since the Protestant Reformation, in most Western societies, has in some way recognized for most of this period the priority of the logic of sacred obligation in the marital contract and covenant.\textsuperscript{38}

Sacred concepts endow with intrinsic value the human arrangements that they bless. These arrangements are seen to have such intrinsic value that they are regarded as protected and sanctioned as termini for entire ranges of important but less valuable instrumental goods. Until recent decades, Western thought has developed certain legal and philosophical concepts that honor understandings of marriage as sacrament (Catholicism, Hinduism),\textsuperscript{39} covenant (Judaism, Islam, Protestantism),\textsuperscript{40} or “one flesh” union (Judaism, Catholicism, Hinduism, and Protestantism),\textsuperscript{41} without sanctioning any one model of the sacred. The concepts of “status” and more secularized versions of “covenant” are designed to serve this legal and cultural function of supporting and stabilizing this human accomplishment of joining the father to the mother-infant dyad.

There are additional sources for the ideal of the equal-regard mother-father marital covenant. Of course, Kant and his followers, such as John Rawls and Susan Okin, are sources of this concept.\textsuperscript{42} But critical familism adds additional twists to the Kantian formulation. First, it holds

\textsuperscript{37} See 3 AQUINAS, SUMMA CONTRA GENTILES, supra note 28, ch. 123; see also Al-Ghazālī, supra note 35, at 47-77 (discussing the advantages and disadvantages of marriage); cf. id. at 93-126 (discussing the obligations of marriage).

\textsuperscript{38} For more about the effects the reformation had on marriage law, see generally John Witte, Jr., The Transformation of Marriage Law in the Lutheran Reformation, in THE WEIGHTIER MATTERS OF THE LAW 57 (John Witte, Jr. & Frank S. Alexander eds., 1988) [hereinafter Witte, Transformation of Marriage Law].

\textsuperscript{39} See, e.g., 3 Supp. AQUINAS, SUMMA THEOLOGICA, supra note 28, Q. 42, art. 1 (discussing Catholic marriage as sacrament); Lecture VII, in TAGORE LAW LECTURES–1870 156, 162-69 (Thacker, Spink and Co. 1870) (discussing Hindu marriage as sacrament and how this affected the civil status of husband and wife in British India). But see MONMAYEE BASU, HINDU WOMAN AND MARRIAGE LAW: FROM SACRAMENT TO CONTRACT 21-38 (2001) (discussing how the concept of Hindu marriage has changed from one of sacrament to contract over the last century).

\textsuperscript{40} See, e.g., Witte, Transformation of Marriage Law, supra note 38, at 68-72 (noting the protestant reformers’ rejection of marriage as sacrament, acceptance that “[t]he duty of marriage stems from God’s command that man and woman unite,” and establishment of civil marriage laws based on these beliefs).

\textsuperscript{41} See, e.g., NACHMANIDES, supra note 35, at 80.

\textsuperscript{42} See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 47 (Lewis White Beck trans., Bobbs-Merrill Co. 1959) (1785) (“Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 109 (1989) (arguing that Rawls’ theories provide a basis for “think[ing] about how to achieve justice between the sexes . . . within the family”); JOHN RAWLS, A THEORY OF JUSTICE 112 (1971) (“We are not to gain from the cooperative labors of others without doing our fair share.”).
that it is precisely the task of both husband and wife in the equal-regard covenant to promise publicly before the state, friends, extended family, and, if religious, before relevant communities of faith that they will treat one another as ends and never only as means. Hence, the equal-regard marital covenant is also a covenant with other spheres of society beyond the husband-wife dyad. This makes the equal-regard covenant simultaneously both thoroughly private and thoroughly public. It is public in that its promises start with the conjugal couple but also include a variety of spheres beyond it. It is thoroughly private in that neither state nor market should interfere except in emergencies and to support; both state and market must avoid disrupting or replacing the tasks of the conjugal couple as parents and lovers.

Second, in contrast to Kant, the mixed deontological logic of the equal-regard covenant implies that this public pledge also entails equally strong efforts to actualize the welfare of the other (the good of the other) as well as any offspring of their union. But, as Kant himself recognized, his categorical imperative had its predecessors in the golden rule, the Jewish and Christian principle of neighbor love, and their various analogues in other religions.

Finally, it should be emphasized that the equal-regard marital covenant is about the conjugal couple and not necessarily the neo-local nuclear family isolated from the rest of society. The equal-regard covenant and critical familism are ecological concepts designed to define families as democracies of work and affection interacting with, contributing to, and supported by wider social and natural networks.

III. CRITICAL FAMILISM AS ANTIDOTE TO MODERNIZATION

The ideal of the equal-regard covenant also is informed by various historical and sociological trends. The development of democratic
politics and modernization in Western societies gradually has been interpreted to require something like the equal-regard covenant. The processes of early modernization drew men in the nineteenth century into the wage economy and out of dependence on farm and craft-based economies centered in the extended family. In the twentieth century, modernization and industrialization drew women into the wage economy and away from exclusive economic dependence on husbands. These social processes decreased forced economic dependencies and have had a democratizing influence on marriage and family.

It should be noted, however, that the concept of the equal-regard marital covenant is both compatible with modernization and an antidote to its excesses. Both husband and wife have access to the fruits of the modernizing process. But Habermas argues that the blind processes of modernization also tend to “colonize” the life world of face-to-face social interactions (neighborhoods, families, and marriage) and reduce them to the cost-benefit logics and functional universalism of efficient market productivity. The equal-regard marital covenant places strong limitations on these disruptive excesses of market forms of modernization. Although critical familism supports appropriate welfare measures, it also places strong limitations on bureaucratic forms of modernization that attempt to remedy the disruptions of families with dependency-inducing forms of assistance that actually encourage further family fragmentation. Critical familism follows the thinking of Roman Catholic subsidiarity teaching; neither government nor market should interfere with or attempt to replace the investments of kin altruism located in the mother-father team. Both spheres of society—but especially government—should be willing to assist families (and indeed all families with children, be they intact yet poor, single-parent families,

48. For detailed figures on the mid-twentieth century assimilation of women into the wage economy, see GARY S. BECKER, A TREATISE ON THE FAMILY 248-56 (1981).
50. See Browning, Religious Institutions, supra note 5, at 103.
or same-sex families) when the need is clear and beyond remedy by other means.

IV. PRACTICAL STRATEGIES

Since critical familism is primarily a theory and strategy for the culture-building and socializing tasks of the institutions of civil society, recommendations for concrete strategies should begin there. The first task is to both recover and reconstruct our inherited marriage and family traditions. Neither the general public nor the specialized professions of law, medicine, education, or therapy understand these traditions. Most people do not comprehend the complex interweaving of Jewish and Christian teachings, Greek philosophy, Roman and German law, and Enlightenment philosophy that have gone into the formation of Western marriage and family traditions. But the retrieval and reconstruction of these traditions also will require a nuanced dialogue between them and more newly visible traditions in Western societies such as Islam, Hinduism, Buddhism, and Confucianism. Critical familism holds that neither our family culture nor our public policies should be developed in such a way as to marginalize either the classics of the Western religions that have shaped our culture or the traditions once thought to be exotic but that now are part of our daily lives and may have insights to contribute.\footnote{See BROWNING, CULTURE WARS, supra note 2, at 310-11 ("[P]ublic institutions [should not] become isolated from the energies and positive cultures of specific religiocultural traditions.").}

The task of the future is to both retrieve and reconstruct all these traditions and find fruitful analogies (not necessarily identities) between them for the purposes of rough cultural consensus.\footnote{For a discussion of the distinctions between analogy, identities, and non-identities in correlational thinking, see generally DAVID TRACY, BLESSED RAGE FOR ORDER (1975) and DAVID TRACY, THE ANALOGICAL IMAGINATION (1981).} Research and scholarship by both the Emory Center for the Interdisciplinary Study of Religion\footnote{For more information about the Emory Center for the Interdisciplinary Study of Religion, see their webpage at http://www.law.emory.edu/cisr.} and the Religious Consultation on Population, Reproductive Health, and Ethics\footnote{For more information about the Religious Consultation on Population, Reproductive Health, and Ethics, see their webpage at http://www.religiousconsultation.org.} suggest that all these classic religions have significant strands that are roughly analogous to the central ideas of critical familism.\footnote{Supporting publications of the Religious Consultation on Population, Reproductive Ethics, and Health include DANIEL C. MAGUIRE, SACRED CHOICES: THE RIGHT TO CONTRACEPTION AND ABORTION IN TEN WORLD RELIGIONS (2001) (discussing how various major world religions—}
reconstruction should not be to dictate either public policy or the details of family law. The purpose instead should be to help develop a loose cultural consensus to which public policy and law would be both sensitive and, indeed, respectful.

Critical familism holds that our society should retain the accomplishment of the Protestant Reformation that made marriage a public institution but also an institution that could be blessed by religious traditions. This achievement should be preserved now, however, with broad sensitivity to the variety of religious traditions that make up the American social reality.

The development of a powerful culture of critical familism requires more than historical retrieval and reconstruction. It also necessitates effective systems of socialization. Marriage is a complex intersubjective communicative process that needs advanced levels of communicative competence. Furthermore, there are analogies between the skills, privileges, and responsibilities of driving an automobile and the skills, privileges, and responsibilities of marriage and child rearing. To take the comparison further, there are similar material and economic costs and benefits to health, safety, pleasure, and utility in both marriage and driving a car. Hence, just as we train people to drive well and safely, society through its various educational and religious institutions should teach people to handle the communicative, cultural, and bio-economic realities of marriage. This is primarily a task for the institutions of civil society rather than law or government, although both can, in limited ways, support this cultural task.

The market is not the primary locus for promoting critical familism. But it can make essential contributions. In addition to a broad array of family-friendly provisions, business and industry should take rapid steps toward implementing what critical familism has called the sixty-hour workweek option for married couples with children, to be divided

including Hinduism, Judaism, Islam, Catholicism, Protestantism, and others—have strands supporting some right to family planning), and WHAT MEN OWE TO WOMEN (John C. Raines & Daniel C. Maguire eds., 2001) (discussing how all the same major world religions have strands supporting equality between husband and wife within marriage). For a publication associated with the Emory Center for the Interdisciplinary Study of Religion that reviews and expands upon the Religious Consultation’s work, see BROWNING, MARRIAGE AND MODERNIZATION, supra note 4, at 223-44.

57. See Witte, Transformation of Marriage Law, supra note 38, at 68-72.

58. Although Habermas develops the idea of communicative competence in relation to his discourse ethics and its implications for political procedures, in an era when economic dependence no longer unifies marriage, communicative competence and discourse ethics are relevant to family dialogue as well. See HABERMAS, supra note 13, at 120, 209.
between husband and wife thirty-thirty or forty-twenty. It follows that single-parents should be offered thirty-hour workweek options and that work requirements for single parents on welfare should not exceed thirty hours per week. These options should be offered with health benefits, and in the case of welfare, single parents also should receive child care, medical insurance, and transportation supports. Through the instrument of the sixty-hour workweek option, critical familism simultaneously supports the modernizing process but also limits its mindless spread into family life.

This proposal reveals the radical edge to critical familism. Limiting the time and energy that parents dedicate to the wage economy is essential for shaping a society in which the privileges and responsibilities of the public and private spheres of life are equally available to all parents. This recommendation makes critical familism truly progressive in contrast to other contemporary options. The conservative political and religious right wants to contain the spread of the market into private life by retaining the nineteenth century solution of the divided spheres that placed men in the public realm and women in the domestic realm. Critical familism differs from liberal feminism that would give women full access to the market but has few proposals to radically contain it other than government and business support for child care. Critical familism differs from gynocentric legal feminists who emphasize the elevated status of mothering before law and government but have few proposals to limit the demands of market rationality.

59. See Browning, Culture Wars, supra note 2, at 316-18, 327-28. For further discussions of the sixty-hour workweek for couples with children and the thirty-hour workweek for single parents, see Browning, Social Tapestry, supra note 4, at 128-30, and the final consensus statement of the Ninety-Seventh American Assembly, reprinted in Browning, Social Tapestry, supra note 4, at 190.

60. See Don Browning, Practical Theology and the American Family Debate: An Overview, 1 Int'l J. Prac. Theology 136 n.10 and accompanying text, available at http://divinity.uchicago.edu/family/browning_article.html (citing Karl Barth, Emil Brunner, and Abraham Kuyper as modern conservative scholars holding such views).

61. See Martha Albertson Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 22-24 (1991) (discussing how the traditional feminist focus on market participation is inadequate to produce equality).

62. See generally Fineman, The Neutered Mother, supra note 31 (making motherhood central to the author's vision of a reformed family law, but not addressing work marketplace demands placed upon women that impose excessive pressures upon family life).
Finally, critical familism has proposals relevant to the law even though law and government are not its primary points of leverage for marriage and family reform.

Critical familism is fully aware that the modernizing process has done much to break down old cultural pressures and economic dependencies that functioned to support stable marriage formation. As a consequence, there has been more divorce, nonmarital births, and alternative family patterns in modernizing societies. Abundant social-science research accumulated since the early 1990s demonstrates that these marriage and family disruptions have not been good for the health and well-being of either children or adults. These negative trends are now showing signs of slowing in the U.S., although not in other parts of the world where they seem to be gaining momentum.

Whether coming or going, these trends are serious enough to require government policies and family law to develop fair and equitable ways for handling family disruption and the strains of divorce, custody, single parenthood, and out-of-wedlock births. But in addressing these issues, law and public policy should not attempt to develop alternative family and marriage cultures that would require heroic redefinitions of inherited cultural patterns. Efforts to delegalize the marital relation and grant legal status only to parenthood, or perhaps mainly to mothers, would be ineffective and culturally destructive from the perspective of

63. See Katherine Trent & Scott J. South, Structural Determinants of the Divorce Rate: A Cross-societal Analysis, 51 J. MARRIAGE & FAM. 391, 396 (1989) (finding a statistically significant positive correlation between increasing modernization and divorce rates).

64. See id. (divorce); Samuel H. Preston, The Decline of Fertility in Non-European Industrialized Countries, 12 POPULATION & DEV. REV. 26, 36 tbl.5 (1986 Supp.) (showing approximately two hundred percent to four hundred percent increases in out of wedlock births in Australia, Canada, New Zealand, and the United States between 1949 and 1982); Andrew Cherlin, Changing Family and Households: Contemporary Lessons from Historical Research, 9 ANN. REV. SOC. 51, 52-54 (1983) (detailing the effects of modernization on family structure). But see Preston, supra, at 36 tbl.5 (showing a seventy percent decrease in out of wedlock births in Japan from 1949 to 1980).


critical familism. They also would arrogate far too much cultural and social power over family matters to law and public policy.

There are, however, steps that law and policy should take to both encourage and support the equal-regard marriage and family and, at the same time, provide a range of universal supports and remedies for all families with children. Policies that would remove the marriage penalty can be recommended. The increase of child tax exemptions and child credits for all families regardless of their form is also clearly in order. Advances in marriage education have been made that are sufficiently researched to justify making it widely available to teens and young people throughout society. Government support of experiments in marriage education, generally offered by various agencies of civil society, is consistent with centuries-old state interests in marriage as a civil institution. From the perspective of critical familism, state-mandated marriage education at the level of secondary schools, as now exists in Florida, is an acceptable idea, just as are experiments in covenant marriage now being conducted in Louisiana, Arizona, and Arkansas. State encouragement of intersector cooperation on marriage education between religion, medicine, welfare agencies, and schools, as

67. See BROWNING, SOCIAL TAPESTRY, supra note 4, at 55-58 (discussing critical familism’s reasons for rejecting such measures). For an emphasis on parenthood as the center of family law, see PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 1.1.1.d (2002) (establishing de facto parenthood as the primary focus of the principles), and JUNE CARBONE, FROM PARTNERS TO PARENTS xiii (2000) (“[T]he code of family responsibility is being rewritten in terms of . . . [ties] to children.”). For an emphasis on motherhood as the center of family law, see FINEMAN, supra note 61, at 179-81 (1991) (stating that “the family home should follow custody” and that custody decisions in divorce should be based on the “primary caretaker” rule because “mothers’ sacrifices in providing daily care to children yield no collateral advantages [and] custody . . . can be viewed as a reward for past caretaking”), and FINEMAN, THE NEUTERED MOTHER, supra note 31, at 4-5, 228-33 (arguing that there should be no legal recognition of marriage and that the “mother/child dyad” should be the focus of family law).

68. See JOHN MORDECHAI GOTTMAN, WHAT PREDICTS DIVORCE 430-42 (1994) (offering, after an extensive statistical analysis of the factors making for stable marriages, suggestions for improvements in marital therapy); HOWARD MARKMAN ET AL., FIGHTING FOR YOUR MARRIAGE (1994).

69. See FLA. STAT. ANN. § 1003.43(l)(i) (West 2003) (making “[o]ne-half credit in life management skills to include . . . marriage and relationship skill-based education” a requirement for high school graduation).


is being pursued in Oklahoma, is also worth studying.73 “Children first” legislation that would require the filing of long-term financial plans for children at the time of divorce as proposed by Mary Ann Glendon, Katherine Spaht, and William Galston has considerable merit as well.74

Finally, government should pass legislation that encourages business and industry to provide more twenty and thirty-hour workweeks with benefits to make more widely attainable the sixty-hour workweek for couples with children and the thirty-hour week for single parents. Government should take the radical step of curtailing the spread of market demands into the intimate rhythms of families and child care.

As indicated above, the equal-regard covenant recognizes the existence of male-female asymmetries in their respective investments in procreation and child care.75 In fact, an ethic of equal-regard demands additional protections for vulnerable mothers during childbirth and the early years of child care. Similarly, critical familism recognizes the need for additional cultural and social inducements for fathers and husbands to commit to child and spousal support.76 Because of these asymmetries, it is reasonable for culture and law to give preferential rights and support to mothers in custody matters. But this should not be done at the expense of exempting fathers from their legal responsibilities to assist in guiding and financially supporting their offspring except in clear instances of incapacity or unfitness. Of course, in some instances, these features of incapacity and unfitness may equally apply to the mother, thereby overriding legal and cultural presumptions in her favor.

73. The Oklahoma Marriage Initiative (“OMI”) is the primary example of such intersector cooperation. The OMI provides marriage workshops, sponsors studies on the state of marriage in Oklahoma, see, e.g., CHRISTINE A. JOHNSON ET AL., MARRIAGE IN OKLAHOMA: 2001 BASELINE STATEWIDE SURVEY ON MARRIAGE AND DIVORCE (2002), available at http://www.okmarriage.org/pdf/survey_report.pdf, and is otherwise actively engaged in matters of marriage policy. For more information about the OMI, visit http://www.okmarriage.org.

74. See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 93-95 (1987) (proposing a “children first” approach in divorces involving minor children, in which all distribution of property and income in a divorce would be according to the best interests of the child); ELAINE CIULLA KAMARCK & WILLIAM A. GALSTON, PUTTING CHILDREN FIRST 27-31 (1990) (suggesting the federalization of child support and citing with approval a British Law Commission report recommending that the “first obligation [of divorcing parents should] be to decide the future of their children before settling questions of property and maintenance”); Katherine Shaw Spaht, The Family as Community: Implementing the “Children-First” Principle, in MARRIAGE IN AMERICA: A COMMUNITARIAN PERSPECTIVE, supra note 5, at 235-56 (proposing a “Family as Community Act,” which, among other things, would give children a property interest in marital property and “requir[e] that parental obligations to children be fulfilled first” in the event of a divorce).

75. See supra note 23 and accompanying text.

76. See BROWNING, CULTURE WARS, supra note 2, at 330.
But it is best for those of us who do not specialize in the law not to become buried in the legal details. It is safer for me to stay at the level of general frameworks, reasserting my belief that marriage and family matters are primarily works of culture to be addressed in civil society and only secondarily matters that can be promoted or remedied by government policy, the market, or the details of family law.