Love and Obligation: Family Law and the Romance of Economics

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INTRODUCTION

The coupling of economic theory and family law seems, at first glance, to be an odd one. Many traditions within both law and economics have operated for generations to keep the family in a class apart from the marketplace, sheltered from its principles and values. But in recent years, the match is increasingly common, and, for many in the academy, the pairing has proved to be quite fruitful. The final legitimation of the union came in 1992, when Professor Gary S. Becker of the University of Chicago was awarded the Nobel Prize for his work applying microeconomic theory to social problems, including various aspects of family life.

Scholars like Becker have complicated and extended the way economists think about the family. By conceiving of households

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as economically productive, their work opens the way to filling the conceptual gaps that have existed not only in economics but also in law. Already, the cross-fertilization of family law and economics has produced some vigorous hybrids.

This Article is an exploration of the intersection of economics and the law of the family from the viewpoint of legal theory and practice, rather than economics. Part I reviews the traditional legal and economic understanding of the family and introduces several important contributions of the new family economics. These contributions include the analysis of specialization of labor in households, household production theory, and theories of human capital investment. Part I also considers the paradigms of exchange and altruism that have been a foundation for family economics. It concludes that economic analysis is an inadequate basis for theorizing about family life and discusses the reasons for this inadequacy.

Part II considers the application of economic theories in four specific areas of the law: tort claims for injury or death of a homemaker, contract and restitution claims between members of shared households, property division in divorce, and child support. The Article demonstrates that the insights drawn from economic theory are useful in each of these areas, but that there are additional important legal and moral questions for which economic theory has not provided useful answers. First, economic models offer reasons why household services should be valued based on the opportunity costs of a homemaker's work, but the models do not address the underlying question of how entitlements in tort should be defined. Second, although the economists' approach suggests that contract and restitution principles deserve application in family as well as commercial settings, the exchange norms economists apply do not address the channeling policies reflected in the more traditional rules. Third, economic theory provides a strong basis for the argument that human capital assets should be valued and divided in divorce, but these arguments do not address the concern with commodification of intelligence and love that appears regularly in the case law or the practical problems that would result if this approach were enacted into law. Finally, where child rearing is concerned, economic analysis explains the need for sub-
stantial private investment in the human capital of children, but it does not address the dilemmas created when self-interest overtakes the commitments of love and obligation.

I. LAW AND ECONOMICS AND FAMILY LIFE

In order to understand why the new family economics has had such powerful appeal, it is useful to consider the traditional views of the family reflected in economics and law. Both economics and law traditionally have represented the household or the family as a fundamentally different sphere of human behavior than the marketplace. Economics and law have each constructed different norms to explain and govern behavior in each sphere. In law, the boundary between the family and the marketplace sometimes is described as a distinction between status and contract. In economics, the distinction is understood in terms of the difference between altruistic and self-interested motivations for behavior. Contemporary legal and economic doctrines construct different understandings of these boundaries and a new set of theories to define family life.

A. Traditional Approaches to the Family

The intellectual dichotomy between family and market has encouraged an assumption that family issues are not relevant to economic and legal analysis. Economists and lawyers have not treated work in the family as comparable to work in the marketplace. Families or households are not seen as economically productive. Families do appear in the analysis of consumer behavior, but even in that analysis, economists and lawyers typically assume that the family behaves as if it were a single individual. In both disciplines, the participants in market transactions

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4. This description is attributed to Sir Henry Sumner Maine, ANCIENT LAW 165 (10th ed. 1884) ("The movement of the progressive societies has hitherto been a movement from Status to Contract.").
5. See BECKER, supra note 2, at 277-78 (citing Adam Smith).
6. See infra notes 9-24 and accompanying text.
7. See infra notes 25-39 and accompanying text.
are conceived as individuals without family attachments.8

1. Work in the Household

Statistical measures of economic production, such as Gross National Product (GNP), reflect a narrow, neoclassical vision. These indicators measure only market activities.9 The work of maintaining a family—bearing and caring for children, housework, home maintenance, meal preparation, subsistence agriculture, and so on—is excluded unless performed for payment.10 Public policies reflect this confusion of market activity with economic production. Income tax laws treat only remunerated work as sufficiently productive to be taxed.11 Social insurance schemes, including social security payments and a whole range of unemployment, disability, and workers compensation benefits, cover only workers in the wage labor economy and their dependents.12 Social insurance defined to meet the particular needs

8. See infra notes 25, 34-35 and accompanying text.
10. In the words of political theorist Susan Moller Okin:
At the public policy level, the lack of recognition of the economic value of housewives' work is indicated by the fact that housework is included in the GNP only if it is paid work done by a housekeeper. . . . [I]t has been estimated that, if it were included, unpaid housework done in the industrialized countries would constitute between 25 and 40 percent of the GNP.
OKIN, supra note 9, at 204 n.48 (citing DEBBIE TAYLOR, ET AL., WOMEN: A WORLD REPORT (1985)); see WARING, supra note 1, at 276-87 (discussing the problem of imputing value to women's home production); see also JOHN K. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 33 (1973) (characterizing women as a "crypto-servant class"); Richard A. Posner, Conservative Feminism, 1989 U. CHI. LEGAL F. 191, 192 n.4 (citing other authorities on imputing value to home production).
11. The effect is to subsidize families with higher levels of household production, principally those with traditional gender-based divisions of household labor. See Edward J. McCaffery, Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. REV. 983, 1001-05 (1993); Posner, supra note 10, at 192-95.
of household producers without breadwinner partners—particularly the Aid to Families with Dependent Children (AFDC) \(^\text{13}\) program—pays much lower benefits than those available under the payroll programs.\(^\text{14}\)

Some economists argue that the exclusion of nonmarket work from public policy and planning creates a substantial distortion. Policy decisions based on incomplete statistics may omit important values and areas of production from the planning process.\(^\text{15}\) As economist Marilyn Waring has noted, the distinction between market and nonmarket production is a heavily gendered one; work done predominantly by women remains invisible to economic policy makers.\(^\text{16}\) Both the statistical indicators and the policies based upon these indicators privilege market production and the types of economic activity most characteristic of modern, industrialized societies over household production and more traditional economies.\(^\text{17}\) Reformatting the treat-

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\(^\text{15}\) E.g., Waring, supra note 1, at 1-4, 17-20.

\(^\text{16}\) Waring argues that economists use terms such as "labor" and "production" to refer only to activities that produce profit in the market place. So, for example, the labor of childbirth may be work for a paid surrogate mother or for the paid midwife, nurse, doctor, and anaesthetist. Despite the Oxford English Dictionary's description of labor as "the pains and effort of childbirth: travail," the woman in labor—the reproducer, sustainer, and nurturer of human life—does not "produce" anything. Similarly, all the other reproductive work that women do is widely viewed as unproductive. Growing and processing food, nurturing, educating, and running a household—all part of the complex process of reproduction—are unacknowledged as part of the production system. A woman who supplies such labor is not seen by economists as performing work of value. Id. at 27-28; see also id. at 189-93 (describing the economics of surrogacy); id. at 206-10 (describing the economics of breast feeding). Waring's criticisms also apply to Marxist economists. Id. at 29.

\(^\text{17}\) Characterizing market production as more significant than household or subsistence production is an evolutionary perspective that follows the conventional sociological wisdom that where families once served important economic purposes, their functions in the modern world have diminished to those of nurturance of adults and socialization of children. See, e.g., Talcott Parsons, The American Family: Its Relations to Personality and to the Social Structure, in FAMILY, SOCIALIZATION AND INTERACTION PROCESS 3 (Talcott Parsons & Robert F. Bales eds., 1955). Gary Becker's
ment of household production has gained currency, in part because increasing portions of women's traditionally unpaid labor in the home has been shifting to the market. Without better information on household production, evaluating these types of changes is difficult.

Of course, it is easier to collect information on market transactions than to estimate the productive value of work in the home. Economists, however, routinely adjust their figures to include other types of nonmarket activity, such as the rental value of private home ownership. 18

The idea that "services" in the household are not equivalent to "work" also appears in the common law tradition. Restitution principles permit compensation only for services provided without a gratuitous intention, a rule that excludes most interactions between family members. Moreover, the law has presumed that work within a household is gratuitous. 19 Efforts to use law to define and enforce contractual relationships between household members also have been constrained. 20 In more recent analyses, both economic and legal theorists have come to recognize

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analysis shares this general perspective. See BECKER, supra note 2, at 342-58. The dispute over the productive value of housework has deep roots. See Nancy Folbre, The Unproductive Housewife: Her Evolution in Nineteenth Century Economic Thought, 16 SIGNS 463 (1991); Reva Siegel, Home as Work: The First Women's Rights Claims Concerning Household Labor, 1850-1880, 103 YALE L.J. 1073 (1994); see also Diana Strassman, Not a Free Market: The Rhetoric of Disciplinary Authority in Economics, in BEYOND ECONOMIC MAN, supra note 1, at 59-60 (describing "the story of the woman of leisure" in economic thought).

18. PETERSON, supra note 9, at 74-75; see also WARING, supra note 1, at 152-54 (discussing economic treatment of hidden or illegal economic activity). The distinction is zealously guarded; efforts to reform the statistical measures maintained in the United States have been strongly opposed in some circles. The Unremunerated Work Act, sponsored by Rep. Barbara-Rose Collins (D-Mich.), would have required that GNP be computed to include the monetary value of unremunerated work performed in the United States "including household work, work related to child care and other care services, agricultural work, work related to food production, work related to family businesses, and volunteer work." H.R. 966, 103d Cong., 1st Sess. § 3(a) (1993); H.R. 2790, 103d Cong., 1st Sess. § 803(a) (1993); see Constance Sommer, Congress Again Asked To Put Price on Cooking, Diapering, L.A. TIMES, Mar. 25, 1993, at A5. For an example of opposition to the measure, see Daniel Seligman, Mad About Housework, FORTUNE, June 1, 1992, at 163.

19. See infra notes 229-32 and accompanying text.

20. See infra notes 225-28 and accompanying text.
that the activities of a household are economically productive. Economic theorists began to describe the productive role of families in the 1960s. In tort law, household services are acknowledged to have "pecuniary" value, although this value remains difficult to quantify. In divorce law, rules for property division now require consideration of all contributions made by husband and wife, including "the contribution of a spouse as homemaker."

2. Families or Individuals?

In neoclassical economics, the individual is the unit of analysis. Individuals sell their labor, receive paychecks, and purchase goods and services. Sometimes the prototypical rational economic man appears in the analysis abstracted and alone; sometimes he is understood to represent a family or a household as the breadwinner and "head" of a conventional nuclear family. "The family" exists only parenthetically, as an appendage to the individual economic actor. Many aspects of public policy reflect

21. See infra notes 50-72 and accompanying text.
22. Judge Richard A. Posner summarizes the new "household production theory" in this way:

The food, clothing, furniture, medicines, and other market commodities that the household purchases are inputs into the production of nourishment, warmth, affection, children, and the other tangible and intangible goods that constitute the output of the household. A critical input into this productive process is not a market commodity at all; it is the time of the household members, in particular—in the traditional family—of the wife.

The challenge of applying economic principles to family life has been welcomed by law and economics theorists. As Judge Posner poses the question: "The persistence of the family as a social institution suggests to an economist that the institution must have important economizing properties. What might these be?" POSNER, supra note 1, at 139. His musings extend to two possibilities: economies of scale derived from shared households and the potential for gains from a specialization of labor.

23. See infra notes 155-90 and accompanying text.
24. UNIF. MARRIAGE AND DIVORCE ACT (UMDA) § 307(A), 9A U.L.A. 239 (1987). In practice, this consideration often reduces to a conclusion that both parties' contributions were equal. See infra notes 265-78 and accompanying text.
25. Becker comments that "economists hardly noticed the family prior to the
the assumption that families are attached to individual, usually male, workers.26

Families began to appear in the economic analysis of consumer demand in the mid-1950s. Paul Samuelson is credited with providing and justifying an economic model of family behavior that treats the family as a unit with a single, unified "utility function."27 This model, and the absence of empirical knowledge about distributions within the family, have led economists—and government policymakers—generally to assume that a family's resources are equally distributed among its members.28 Al-


26. For example, the social security system presumes family dependence on a single primary wage earner. See supra note 12 and accompanying text.

John Kenneth Galbraith is sharply critical of the definition of the conventional family as a mechanism for an "efficiently necessary division of labor." Galbraith, supra note 10, at 234-35. Galbraith argues that the family is a "facilitating instrument for increased consumption." Id. at 235. He further observes that, although the neoclassical system treats consumption as trouble-free and as something to be maximized, significant burdens accompany the possession and consumption of goods, particularly as more elaborate housing, dress, vehicles, and so on become available. Id. at 29. He argues that housewives became necessary to manage the household consumption—replacing the servants required in an earlier era for maximal consumption. Id. at 29-30. As he notes, in some social classes, a suitable wife came to be an important and expensive consumer good. Id. at 31-32. The concept of wife as status symbol is not a relic of an earlier age, although what type of wife confers the greatest status has shifted over the decades. Compare id. at 32 with Julie Connelly, The CEO's Second Wife, Fortune, Aug. 28, 1989, at 52.

27. See Blaug, supra note 1, at 220 ("Traditional theory views the family as a one-person household, maximizing a utility function that is defined on goods and services bought in the market place."). See generally Shelly Lundberg & Robert A. Pollak, Separate Spheres Bargaining and the Marriage Market, 101 J. Pol. Econ. 988, 991 (1993) (citing Paul A. Samuelson, Social Indifference Curves, 70 Q.J. Econ. 1-22 (1956)) (discussing the fact that economic models traditionally ignored distribution within the family).

28. See Edward P. Lazear & Robert T. Michael, Allocation of Income Within the Household (1988). Lazear and Michael describe this assumption as analytically convenient but probably not correct. They emphasize that various models of "decision rules" for allocation of goods within the family "are mute on the issues of how, in fact, conflict is resolved and resources allocated after marriage," id. at 23, and that the decision rules studies "do not investigate directly the nature of the distribution of resources within the family," id. at 24.

Becker's theory is based on a slightly different assumption—that the wage earner acts altruistically toward other members of his family, allocating his money income to serve optimally all of the utility functions within the household. Becker,
though this approach has been characterized as analytically convenient, it has also been criticized for ignoring the significance of what occurs within the family.29

Similarly, in the branches of economics concerned with the distribution of income and wealth, the household is the basic unit of analysis.30 As a result, the internal character of families or households is again largely ignored, and comparisons of the living standards of different households are distorted significantly.31 The problems this distortion poses are compounded by the tendency of statistical measures and public policies to ignore household production.32 As Edward Lazear and Robert Michael

supra note 2, at 296-97; see infra notes 109-13 and accompanying text.

29. As described by Lazear and Michael:

There is an honored tradition in economics of ignoring the distribution of income within the household. Attention is typically focused on the distribution of resources among families, households, earners, or consumer units. . . . The individualistic ethic that underlies the assumptions of modern economics implies an interest in the person, not simply in the family or household unit. Yet, in a number of matters of social policy, economists and others have acted as if the family unit, not the individual, is at the heart of an issue, thereby conveniently skirting the problem of what happens within the family.

LAZEAR & MICHAEL, supra note 28, at 12; see also GALBRAITH, supra note 10, at 35 (explaining that income distribution within the household “requires extensive subordination of preference by one member or another”).

30. E.g., POSNER, supra note 1, at 455-56 (beginning a discussion about “measuring of inequality” with the phrase, “[i]f income were distributed evenly among all the household units in the country . . . .”)

31. Posner explains the point in this way:

[B]eing limited to pecuniary income, the statistics on the distribution of incomes ignore many factors that are highly important to economic welfare—even quite narrowly defined—but difficult to quantify. Compare two households: In one both husband and wife work and each earns $20,000 per year; in the other only the husband works, and he earns $40,000. The pecuniary income of the households is the same, but the real income of the second household is greater. The wife stays home because her services in the home are worth more to the household than the income she would obtain from an outside job.

POSNER, supra note 1, at 456:

Posner argues elsewhere that the fact that a housewife’s productivity is not taxed (as imputed income) while the earnings of wives employed in the market are fully taxable, creates distortions between households. Posner, supra note 10, at 192-93.

32. Lazear and Michael note that

[m]ost studies of income distribution focus on money income, although a
have argued, these issues pose a particular problem in analysis of family policy, especially in the context of divorce.  

The law reflects a similar preoccupation with individuals. With slight differences between traditional "community property" and "title" states, the individual wage earner, not the family, has the legal right to own and control the household's money income and to determine how that income will be spent. Courts will not second-guess a wage earner's decisions regarding the allocation of income within the family. In fact, the law traditionally gave a husband and father control over the money income of his wife and children in addition to his own.

few attempt to measure one or another of the broader concepts of income. . . . [N]onpecuniary resources or externalities . . . are uniquely associated with knowing the utility function or preferences of the household members. . . . [W]ithout knowing about these preferences one cannot speak to these externalities, and hence one cannot speak to the distribution of well-being or welfare.

LAZEAR & MICHAEL, supra note 28, at 22.

33. Id. at 13. These writers also devote a chapter to "Guidelines for Alimony and Child Support," id. at 150, that examines the implications of several criteria typically used to determine these awards. See infra notes 338-47 and accompanying text.

34. Legal rules regulating management of marital or community property during marriage are a current subject of debate. See, e.g., UNIF. MARITAL PROPERTY ACT, 9A U.L.A. 97 (1987); Symposium, The Continuing Evolution of American Community Property Law, 1990 Wis. L. REV. 583; see also GALBRAITH, supra note 10, at 34-35 (noting that the party who receives income gets basic authority over its use).

35. See generally PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 139 (1983) (arguing that the shift in control of income changes family dynamics as well). In addition to the wife's control of an income, "the simple fact that she has a job . . . gives a wife clout." Id. Other writers have recommended that legal remedies be available to allow nonwage-earning spouses to reach a share of a partner's paycheck during an intact marriage. E.g., Joan M. Krauskopf & Rhonda C. Thomas, Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support, 35 OHIO ST. L.J. 558, 586 (1974).


37. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 299-303 (2d ed. 1988) (married women's contracts and earnings); id. at 314 (child's work and earnings). In the law, a wage earner is understood to be financially responsible for his household, at least where the claims of creditors are at stake. See generally id. at 265 (discussing the doctrine of "family necessaries"). Several recent cases have struggled to apply the rule in a gender-neutral fashion. See, e.g., Jersey Shore Medical Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003 (N.J. 1980); North Carolina Baptist Hosp., Inc. v. Harris, 354 S.E.2d 471 (N.C. 1987);
By ignoring work in the household and treating families as unitary and undifferentiated, traditional economic and legal analysis is ill-equipped to respond to contemporary policy problems. In effect, by ignoring the internal characteristics of families, economics and law define all families as the same, and many household types disappear into this theoretical void. Divorced families, single-parent families, and extended-kin families all vary significantly from the implicit legal and economic norm. Many of the intractable policy problems in property division and child support relate directly to the problem of how resources are allocated among different households in the same “family.” Controversies concerning public benefits law, and the discrepancy between narrowly drawn economic policies and the wide variety of family arrangements in society, repeatedly have reached the United States Supreme Court.

B. New Family Economic Theory

The new theory of family economics reconceptualizes family life as a process of exchange between individual family members. Marriage, divorce, and decisions concerning the household all are analyzed in terms of bargaining and rational choice. Economists recognize that exchange behavior in the family is different from exchanges in the market, and they explain the difference in terms of altruism, which serves to bond individual family members’ interests.

With this theory, economists have developed a much richer understanding of the productive aspects of family life. This theory offers vocabulary and a range of models to describe interactions within families and interactions between the market and family spheres. Acknowledging these economic relationships is

Landmark Medical Ctr. v. Gauthier, 635 A.2d 1145 (R.I. 1994); Sharpe Furniture, Inc. v. Buckstaff, 299 N.W.2d 219 (Wis. 1980).

38. See infra notes 341-53 and accompanying text.


40. See infra notes 50-98, 102 and accompanying text.

41. See infra notes 102-18 and accompanying text.
an important step toward correcting the oversights of traditional economic theory, and it offers important lessons for the law. The theory originated, however, when economists began to explore issues of market behavior that could not be fully explained without consideration of family behavior.\textsuperscript{42} For the most part, this investigation has operated within the same conceptual frameworks used to understand market production.\textsuperscript{43}

For these scholars, “economic analysis” means viewing family issues in terms of rational choices made by autonomous agents seeking to maximize their individual welfare or profit.\textsuperscript{44} Professor Becker articulates his goal as the use of “a choice-theoretic framework for analyzing many aspects of family life,” based on the assumptions “that individuals maximize their utility from basic preferences that do not change rapidly over time, and that the behavior of different individuals is coordinated by explicit and implicit markets.”\textsuperscript{45} As Becker writes, “an analysis based on rational behavior provides a powerful framework for gaining insights into family organization and structure under different laws, circumstances, and cultures.”\textsuperscript{46} Over time, this framework has led economists to consider a widening set of family issues, and some now see their analysis as an alternative to other theories of family behavior.\textsuperscript{47}

\textsuperscript{42} The movement toward application of microeconomic theory to the family, referred to as the “new home economics,” began in the mid-1960s with economists, concerned with labor supply questions, who began to understand that the family was deeply significant to such issues as “investment in human capital (education), labor force participation (labor-leisure choice), birth rates, morbidity, and mortality.” Neil K. Komesar, Toward a General Theory of Personal Injury Loss, 3 J. LEGAL STUD. 457 (1974); see also Willis, supra note 1, at 78 (stating that there has been “a rich cross fertilization between family economics and other branches of economics that has already borne fruit many times”).

\textsuperscript{43} Komesar, supra note 42, at 461-62.

\textsuperscript{44} Julie A. Nelson, The Study of Choice or the Study of Provisioning? Gender and the Definition of Economics, in BEYOND ECONOMIC MAN, supra note 1, at 23, 25 (criticizing this view as a narrow and masculinist definition of economics and suggesting replacement of the exclusive focus on choice a broader concern with provisioning).

\textsuperscript{45} BECKER, supra note 2, at ix.

\textsuperscript{46} Id. at 17.

\textsuperscript{47} See BLAUG, supra note 1, at 226-27. This school uses microeconomic theory to analyze fertility patterns, marriage and divorce, and divisions of labor within the home on the basis that because time and human resources are scarce, they are
This Part will sketch the framework of the new theory and note where its concepts interact with legal and policy questions. Four aspects are particularly important. First, these theorists explain the social institutions of marriage in positive economic terms as a device to facilitate specialization and division of labor. In effect, this explanation is a defense of "traditional," gender-role divided marriage. Second, the theory investigates the economic effects of this traditional type of marriage for husband and wife and develops models for valuing the nonmarket work of a homemaker in market terms. This work has potential significance for a wide range of family-related legal problems from contract and tort to the financial regulation of divorce. A third issue, which has been less neatly resolved in the theory, is the economic role of children in family life. The fourth area of concern is a pair of assumptions about family life that have been the foundation for the larger theoretical framework. One is the use of exchange as a model for family relationships, and the other is the concept of altruism as a motivation for individual choices of family members.

1. Household Production

Household production theory treats the time and other resources of household members as inputs into the production of various goods, ranging from food and shelter to children, leisure, and love. This process occurs within a set of constraints established by the larger economic system that defines market values for the time of household members and prices the commodities that family members purchase. The theory assumes that resources available to the family are allocated efficiently in order to maximize the total satisfaction or utility of household members. Although household members realize much of this satisfaction in the form of nonmarket goods, for purposes of the theory...
ry, this satisfaction is treated as if it could be monetarized.\footnote{51}

Economists explain the institution of marriage by the efficiencies that result from a specialization of labor. As Judge Posner notes:

\begin{quote}
[T]he family facilitates the division of labor, yielding gains from specialization. In the traditional family the husband specializes in some market employment (for example, engineering) that yields income that can be used to purchase the market commodities needed as inputs into the final production of the household, while the wife devotes her time to processing market commodities (for example, groceries) into household output (for example, dinner).\footnote{52}
\end{quote}

Because husband and wife specialize in complementary activities, both are able to maximize the value of their time to produce a greater total output for the household.\footnote{53}

In his book, \textit{A Treatise on the Family}, Professor Becker demonstrates that a division of labor within the household would be efficient even without the overlay of a traditional marriage relationship, or, as he puts it, between an “intrinsically identical” husband and wife.\footnote{54} Next, he notes that women have a “comparative advantage” when it comes to the work of bearing and rearing children\footnote{55} and observes that even very small differences in biological advantage (or small differences caused by other

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\begin{footnotes}
\item[51.] See William J. Goode, \textit{Comment: The Economics of Nonmonetary Variables}, in \textit{ECONOMICS OF THE FAMILY}, \textit{supra} note 50, at 345.
\item[52.] \textit{POSNER}, \textit{supra} note 1, at 140; \textit{see supra} note 22 (quoting Posner).
\item[53.] \textit{POSNER}, \textit{supra} note 1, at 140.
\item[54.] See \textit{BECKER}, \textit{supra} note 2, at 30-37.
\item[55.] Becker views the primary purpose of marriage and the family as “the production and rearing of own children.” \textit{Id.} at 135; \textit{see also} \textit{POSNER}, \textit{supra} note 1, at 140; discussion accompanying \textit{infra} notes 61-63.
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factors, such as market discrimination against women) can generate much greater differences in the activities of husband and wife.\(^{56}\) This relationship suggests an explanation for highly distinct gender roles—the greater the differences in the economic attributes of men and women, the greater the benefits from marriage.\(^{57}\)

In economic theory, the benefits of specialization explain marriage, divorce, and fertility behavior. Thus, Becker views the choice of a particular marriage partner as a highly significant economic event because the potential for gains from specialization is different with different potential mates.\(^{58}\) His model depicts marriage decisions as occurring in a type of market which operates to sort potential husbands and wives.\(^{59}\) Moreover, he also describes divorce as an illustration of a type of market; the decision to seek a divorce occurs when an individual compares his or her current marital satisfaction with what he or she anticipates would be available in the remarriage market or in

\(^{56}\) BECKER, supra note 2, at 4.

\(^{57}\) Traditional gender roles facilitate the division of labor by increasing the distinction between male and female skills and interests and rooting those differences in early experience. Id. at 37-39. On the other hand, the recent move toward greater participation by women in the labor force decreases the difference between women and men and decreases the economic advantage of marriage. See infra note 87 and accompanying text.

Becker is careful to note that his argument does not preclude or deny the likelihood that women also have been exploited by the system. BECKER, supra note 2, at 4, 62. Although identifying the division of labor as a source of efficiency, Becker's analysis does not suggest how the economic surplus should be allocated. Presumably, however, the surplus is allocated among the household members by the breadwinner, the presumptively altruistic head of the household. See infra notes 109-13.

\(^{58}\) Becker's work discusses the economics of positive " assortative mating," which he suggests can explain social customs such as the tendency of relatively more attractive partners to marry each other. Id. at 112-18. Blaug refers to this as "the use of a sledgehammer to crack a nut." BLAUG, supra note 1, at 224. Becker's analysis draws on sociobiology as well, asserting that men search for wives to bear and raise children and women search for husbands who will provide material support for them and their children. He argues that, for these reasons, it is economically efficient for high-income-producing men to marry lower-earning women, describing this as "negative associative mating." See BECKER, supra note 2, at 118-19. But see BLAUG, supra note 1, at 225.

\(^{59}\) To an extent, the "market" in marriage partners is competitive, and, in theory, an individual's decision to marry is based on the utility-maximizing conclusion that the benefits from marriage will be greater than either continuing to search or remaining single. BECKER, supra note 2, at 83-84, 326-27.
single life.⁶⁰

Raising children is central to the economists’ view of marriage. Judge Posner writes that specialization of labor principles do not alone explain marriage; in fact, he states that the efficient, role-divided marriage elaborated in economic theory could be replaced by a “business partnership” if it were not for the production of children. He concludes: “The key to the puzzle lies in the nature of the major ‘commodity’ that marriage produces: children. . . . [I]t is hard to believe that marriage would be a common institution if most people didn’t want children.”⁶¹ Professor Becker’s conclusion is similar; he argues that the “main purpose of marriage and families is the production and rearing of own children.”⁶² Posner describes rearing children as a process that demands substantial investments of the parents’ resources, primarily “an enormous amount of parental (traditionally maternal) time.”⁶³ Traditional family structures and gender roles facilitate these investments.

The understanding of marriage as a device for efficient household production is central to the economic approach to family policy. The models define efficiency, in the sense of resource allocations that generate the maximum total level of satisfaction, as the measure of marital success. They view the economic advantages of marriage as similar to the advantages of other “organizations”; these advantages include a better flow of information between group members and various internal rewards for working for the benefit of the group.⁶⁴

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⁶⁰ Becker argues that early divorces are a result of the imperfect information available to potential mates prior to marriage, and later divorces are “a response to a demand for variety in mates or to life-cycle changes in traits.” Id. at 327; see also Lloyd Cohen, Marriage, Divorce, and Quasi Rents; or, “I Gave Him the Best Years of My Life,” 16 J. LEGAL STUD. 267 (1987) (“Over time, the utility functions, information, and opportunities of both marriage partners change.”).

⁶¹ POSNER, supra note 1, at 140.

⁶² BECKER, supra note 2, at 135; see also id. at 44-48, 112, 140-41 (discussing the production and rearing of children).

⁶³ POSNER, supra note 1, at 140.

A number of law and economics writers draw explicit analogies between marriage and various commercial relationships. From this viewpoint, marriage, a relationship "dominated by long-term repeated transactions that tie people together personally," is similar to the relationship of a landlord and tenant with a long-term lease, a parts supplier with one major client, or a car owner and his regular auto mechanic. This analysis builds on a body of economic writing developing the concept of the "firm" and legal writing discussing long-term, "relational" contracts. Likewise, the risks of marriage correlate with those of other long-term economic relationships, including the danger that one party may take advantage of the others by cheating, shirking, or other dishonest behavior. For these commentators, divorce is a problem because it may reflect "opportunism" or exploitation of the economic effects of the joint enterprise.

66. Cornell, supra note 64, at 112.
68. Ellman, supra note 65, at 41.
69. Cornell, supra note 64, at 109, 112.
70. Cohen, supra note 60, at 269-70; Cornell, supra note 64, at 107-20. According to Mark Blaug: "The new economics of the family . . . view the family as a multiperson production unit, maximizing a production function whose inputs are market goods and the time, skills, and knowledge of different members of the family." BLAUG, supra note 1, at 220.
71. Cornell, supra note 64, at 107-08, 112, 119. In theory, the economic benefits of forming such groups include "internal controls" on self-interested behavior.
72. The paradigm case is the divorce that occurs shortly after one partner has completed a degree or received a professional license, an event that corresponds with another central aspect of the new family economics—the study of "human capital" formation. See infra notes 279-306 and accompanying text; Cohen, supra note 60, at 287-88; Cornell, supra note 64, at 120-21; see also Ellman, supra note 65, at 40-53 (describing alimony as a device for encouraging marital investment). Professor Ellman, however, speaks of risks and burdens and the reallocation of financial consequences rather than the problems of opportunistic behavior. Some of these commentators appear to be suggesting a restitutionary remedy for opportunistic behavior. See, e.g., Cornell, supra note 64, at 106. "Public remedies should readjust the gains and losses that exist at the point of breakdown." Id. at 123. Ellman, however, rejects the use of unjust enrichment principles, Ellman, supra note 65, at 24-28, as well as the relational contract model. Id. at 28-32. He argues that both approaches require reference to established understandings of the terms governing parties' rela-
2. Human Capital

In contemporary settings, many long-term benefits and risks of marriage for individuals correlate with its effects on human capital. Economic theories hold that along with the specialization of labor in households goes a differentiation, increasing over time, in the "human capital" accumulations of household members. Human capital refers to a variety of factors that increase or decrease the labor power of individuals. It may be augmented by education, training, experience, and medical care, or it can deteriorate from such causes as lack of current work experience or an addiction to heavy drinking. Empirical data suggest that human capital investments have a substantial impact on earnings. In economic theory, work in the household as well as the market can become more productive through increases in skills, experience, and good work habits.

Human capital theory has led to new methods for valuing household production. Starting from the premise that work in the home is productive, and that it involves training, experience, and a choice not to pursue work in the market, these methods focus on the opportunity cost of the homemaker's time (the price the wage labor market would pay for the time devoted to household services) as an indirect measure of the value of those services and that such shared understandings no longer exist with respect to family. Id. at 24-32.


74. Becker, supra note 73, at 392.

75. See id. at 393-94 (discussing JACOB MINCER, SCHOOLING, EXPERIENCE, AND EARNINGS (1974) and other studies.)

76. Becker distinguishes "household" from "market" capital. He assumes that there are increasing returns to scale from investments in either market or household capital and argues that this creates additional economic incentives for a division of labor in households. BECKER, supra note 2, at 33-37. Traditionally, of course, this meant that husbands specialized in market capital and wives did not. However, the economic significance of household and market capital are quite different because one variety is of value beyond the confines of a particular household. In the event of family breakdown, this difference may leave husband and wife in very different economic positions. See infra notes 269-76 and accompanying text. Some writers question the assumption that there are in fact increasing returns to scale. See infra note 130.
vices. Using this approach, economists have tied the value of time spent on household tasks to many different variables, including (1) the composition of the household, (2) the age, education, and wage rates of husband and wife, (3) the number and ages of children, and even (4) the number of rooms in the house. As the model becomes more sophisticated, some writ-

77. Some argue that even an opportunity cost method may seriously underestimate the actual value to the family of a homemaker's services. See, e.g., POSNER, supra note 1, at 192-93. Work in the home may be considered less valuable than work in most occupations in the marketplace, if the assumption is made that a homemaker would be able to command only minimum wages. Thomas R. Ireland, Valuing Homemaker Production by Implied Opportunity Cost: Using a Family Human Capital Methodology, J. LEGAL ECON., July 1991, at 1, 4. Although this assumption is not always correct, it is true that accumulations of household capital are rarely valued highly in the workplace. As many writers have pointed out, however, the homemaker's next best alternative in the paid-labor market suggests only the minimum value of family care. In economic terms, the homemaker's time usually generates greater returns in the household than it could in the marketplace. See Komesar, supra note 42, at 481-82. This concept is known as "economic rents." Id. at 482. The rational-choice model implies that, if this time were not more valuable to the family, the family would choose instead to consume the homemaker's income. But see Reuben Gronau, The Intrafamily Allocation of Time: The Value of the Housewives' Time, 63 AM. ECON. REV. 634, 635 (1973). Reuben observes that labor force statistics lend themselves to two differing interpretations: if those wives who work outside the home are the least productive in the home sector, then the mean price of housewives' time is greater than the average wage rate of working women, but if those who work are those "most fit for market work, i.e. those who have received the highest wage offers," then the mean price of household time is less than the average wage rate of working women. Id.; cf infra notes 158-71 and accompanying text (discussing "replacement cost" measures of value applied in tort litigation).

78. See Reuben Gronau, Home Production—A Forgotten Industry, 62 REV. ECON. & STAT. 408 (1980); see also Charles C. Fisher, Measuring Household Production: Methodological Considerations and Current Practice, J. LEGAL ECON., Mar. 1993, at 15, 20-21 (discussing method as "Family Profile Methodology"). The analysis suggests that the value of a housewife's time increases not only with her potential wage rate, but also with the size of the household and total family income. As the husband's wage rate increases, family income increases, and there is an accompanying "increase in the demand for both wife's leisure and home goods." Gronau, supra note 77, at 639-40. Gronau writes: "[W]hile the value of time of working women equals their wage rate, the value placed on the time of housewives exceeds their potential wage rate and increases with family income." Id. at 642; see also BARBARA R. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 30 (1986) ("In households where the husband . . . has an income that is considerably above average, a high proportion of the wives are still at home. The benefit of additional dollars to such a family is relatively low. . . . Such families constitute the last bastion of the full-time housewife.").
ers have added human capital considerations into the measure-
ment of opportunity costs.

Because a homemaker’s wage opportunities are limited by the
fact that she has specialized in domestic rather than market
labor, the opportunity costs of homemaking may be defined to
“include[] not only current foregone earnings but also loss of [the
homemaker's] market earning power, through depreciation of
market skills previously acquired, and foregone opportunities to
invest in market skills.”79 As Posner describes the issue, an ac-
curate measurement of these costs requires “estimating what
her probable market earnings would have been had she entered
the market at the time when instead she became a house-
wife.”80

Household production and human capital theories have be-
come important to the analysis of damages awards in tort when
a homemaker is killed or injured81 and to financial remedies
between the parties to a divorce.82 The theories also help to ex-
plain the demographic changes in family life over the last half-
century. Economists postulate that the dramatic changes in
women’s labor force participation, and the accompanying trend
toward greater investments by women in their own market-ori-
ented human capital, have had significant effects on family be-

citing Jacob Mincer & Soloman Polachek, Family Investments in Human Capital:
Earnings of Women, in ECONOMICS OF THE FAMILY, supra note 50, at 297). Although
research is sketchy, it shows that the potential for long term career depreciation
(and its costs) when a caregiver leaves the labor force can be substantial. An early
estimate of human capital depreciation for mothers who left the work force to care
for children, using 1967 data, suggested that earnings declined by an average of
1.5% per year of absence from the labor force. The depreciation rates were higher
for those with greater stores of market capital, increasing to 2.3% per year for wom-
en with 16 or more years of education. Mincer & Polachek, supra at 397, 415. These
writers attribute at least half of the wage gap between men and women to sex dif-
fences in length and continuity of their work histories.

80. POSNER, supra note 1, at 193; see also Fisher, supra note 78, at 19-20 (review-
ing alternative methodology developed by Thomas R. Ireland).

81. See infra notes 146-209 and accompanying text.

82. See infra notes 265-330 and accompanying text.

83. BECKER, supra note 2, at 350-56. There remain, of course, large differences
between the earnings of women and men. Economists explain these differences as
the effect of discrimination against women in the marketplace and the higher level
home has increased as women's real wages and labor market opportunities have increased. 84 In economic theory, increases in the "cost" of household labor translate into an increase in the labor's value or utility to a family. 85 One result is a shift in some aspects of housework into the market sector. 86 Economists of family responsibilities women continue to bear in the household. Id. at 64. As Becker writes:
The earnings of women are adversely affected by household responsibilities even when they want to participate in the labor force as many hours as men, because they become tired, must stay home to tend sick children or other emergencies, and are less able to work odd hours or take jobs requiring much travel.

Id. Victor Fuchs traces much of women's economic inequality to their actual or anticipated family obligations. See VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY (1988).

84. See BERGMANN, supra note 78, at 17-61; FUCHS, supra note 83, at 23-24. There is a considerable debate in the literature concerning the causes and relationships of women's increased labor force participation, lower fertility rates, and higher divorce rates. See, e.g., ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 44-65 (1981).

85. The conclusion that caregiving work is more valuable today seems counterintuitive from the perspective of family law, in which older housewives receive far greater economic recognition for their services than younger caregivers. See Ann L. Estin, Maintenance, Alimony and the Rehabilitation of Family Care, 71 N.C. L. REV. 721, 769-74 (1993).

Some economists argue that household labor has in fact become more productive as the household has become industrialized: many tasks that once were contracted out have become the responsibility of the housewife. RUTH S. COWAN, MORE WORK FOR MOTHER: THE IRONIES OF HOUSEHOLD TECHNOLOGY (1983).

The rising opportunity cost of caregiving is also a problem because it means that fewer families choose (or are able) to "purchase" the full time family care afforded by marriages of an earlier era. See infra notes 96-98 and accompanying text (regarding the rising cost of parenthood).

86. In families without a full-time homemaker, increasing portions of household work are routinely contracted out. See BERGMANN, supra note 78, at 282 (discussing modest-sized growth of small, local business firms that offer housecleaning services); GALBRAITH, supra note 10, at 58-59, 236 (regarding the transfer of household services to small firms and entrepreneurs).

Although the "expansion" of the service economy appears to be an increase in economic activity, it may reflect a shift of some activities from the home into the market. Child care for pay in a day-care center contributes to GNP, whereas the same hours of child care by a housewife do not. See WARING, supra note 1, at 30-31 ("Cooking, according to economists, is 'active labor' when cooked food is sold and 'economically inactive labor' when it is not. Housework is 'productive' when performed by a paid domestic servant and 'nonproductive' when no payment is involved.").

A number of economists have noted the increasing substitution of market goods
argue that these changes also reduce the gains from gender-role-divided marriage relationships (which may contribute to lower rates of marriage, increased rates of divorce, and significant declines in fertility rates). 87

Household members may devote significant resources of time, effort, and money to particular human capital investments. Several patterns of family investment in adult human capital are well recognized, including the "two person career" 88 and the

and services for parental time. E.g., Sawhill, supra note 1, at 118 (listing records, books, television, and daycare as examples); see also BERGMANN, supra note 78, at 283-295 (discussing the movement toward use of out-of-home child care.) Isabel Sawhill has suggested that this "dehumanization" of family life simply reflects the economics of time. Sawhill, supra note 1, at 118. Gary Becker also argues along these lines that, "[m]any deplore individualism and lament the passing of the traditional family, but my analysis implies that individualism replaced familialism because many family functions in traditional societies are more effectively handled by markets and other organizations of modern societies." BECKER, supra note 2, at 349. "Families are much less closely-knit . . . primarily because market and government mechanisms have evolved to train and educate young people, and to protect against the hazards of old age, illness, premature death, prolonged unemployment, and other economic disasters." Id. at 15.

The substitution of wage income and paid household services for a more traditional homemaker is complex. As Victor Fuchs writes, "no one should imagine that when a man or woman substitutes a paid job for housework and childcare that the household's economic well-being increases by the full value of the money income." FUCHS, supra note 83, at 77. Most women and men who are employed also work in the home. For many, the resulting "double burden" of responsibility carries a significant cost in terms of leisure. ARLEH HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 3-4 (1989); see FUCHS, supra note 83, at 73-74 (comparing quantity of services of wives who work outside the home with those who do not). The double burden may not be an economically efficient resolution of this problem. Becker notes that human capacities are limited not only by time but by the amount of effort an individual can muster. BECKER, supra note 2, at 64-79; see also Hadfield, supra note 64, at 97-98.

87. BECKER, supra note 2, at 140. Analysis of fertility rates was one of the primary concerns of the "new home economics" at its inception. See generally ECONOMICS OF THE FAMILY, supra note 50. Becker describes broad demographic trends toward lower fertility and offers economic explanations for these changes, pointing out that "[t]he relative cost of children is significantly affected by changes in the value of the time of married women." BECKER, supra note 2, at 140. He argues that the increase in women's earning power over the last century is a major cause of the drop in fertility in developed countries over the same time period. Id. at 140, 352. Becker further argues that the effective price of children rises with household income. Id. at 144-54; see also FUCHS, supra note 83, at 24; Willis, supra note 1, at 74.

graduate school "PhT" marriage.\textsuperscript{89} In economic theory, many of the problems of divorce stem from the fact that a housewife's human capital is rarely valued outside a particular family. Conversely, market types of human capital improve an individual's earning potential regardless of whether a marriage continues.\textsuperscript{90}

Virtually all of the activities and expenses of child rearing represent investments in children's stock of capital;\textsuperscript{91} these parental investments are central to children's future income and satisfaction as adults.\textsuperscript{92} Although economic analysis views raising children as the reason for marriage and family,\textsuperscript{93} it is no longer so clear that parents consider the costs of raising children as an economic investment. Posner notes that although children once constituted an "income producing" investment for families, the desire to have children is now more plausibly explained by the pleasure adults receive from their children.\textsuperscript{94} Posner also cites an "instinct or desire to preserve the species" or to perpetuate the parents' own characteristics, name, or memory.\textsuperscript{95}

\footnotesize
\begin{itemize}
  \item \textsuperscript{89} See Estin, supra note 85, at 757. "PhT" is used to describe "putting hubby through" school. Id. at 757 n.135. In divorce cases, the "diploma dilemma" involves one spouse putting the other through school, only to see the marriage end when the diploma or professional license is achieved. See generally id. at 757-67. The divorce aspects of human capital issues are discussed infra notes 265-330 and accompanying text.
  \item \textsuperscript{90} See infra notes 279-85 and accompanying text.
  \item \textsuperscript{91} Becker describes the investment in children's human capital as an investment in their quality. BECKER, supra note 2, at 151-53. He analyzes the demand for children at some length, taking the view that, in wealthier families, investment in greater quality substitutes for investment in a greater quantity of children. Id. Blaug points out that this conclusion derives from Becker's assumption that "the income elasticity of demand for the quality of children is substantially larger than that for the quantity of children." BLAUG, supra note 1, at 222. Though plausible, Blaug argues that this assumption is an example of a methodological problem that Becker himself refers to elsewhere as "ad hocery." Id. at 23.
  \item \textsuperscript{92} The quality of children's early family life has been associated with significant effects on economically vital attributes. See, e.g., Arleen Leibowitz, \textit{Home Investments in Children}, in \textit{ECONOMICS OF THE FAMILY}, supra note 50, at 432. For the problems of underinvestment in children's human capital, see Lynn A. Stout, \textit{Some Thoughts on Poverty and Failure in the Market for Children's Human Capital}, 81 GEO. L.J. 1945 (1993).
  \item \textsuperscript{93} See supra notes 61-63 and accompanying text.
  \item \textsuperscript{94} POSNER, supra note 1, at 141-42.
  \item \textsuperscript{95} Id. at 141. Economists describe children either as "producer durables"—a source of a stream of future income for their parents—or as "consumer durables"—a source of a stream of future satisfactions for their parents. Sawhill, supra note 1, at
The decision to have children has become a question of consumer choice, a question of personal taste. Raising children is very expensive,\(^9\) and, in our economic system, children have no productive role. For women in particular, parenthood presents a variety of personal and financial risks that are increasingly severe.\(^9\) Acting rationally, a couple will choose to have children only if they perceive parenthood as more enjoyable than the other pleasures their time and money can buy.\(^9\)

Children also greatly complicate the economic analysis of divorce.\(^9\) In a family with young children, divorce dissolves the organization that was specialized to provide for their care and replaces it with a much less efficient system. Divorce significant-

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117. See generally Theodore W. Schultz, Fertility and Economic Values, in ECONOMICS OF THE FAMILY, supra note 50, at 3 (arguing that the cost of having children increases as human time becomes more valuable).

96. See infra notes 338-40 and accompanying text.

97. As women's wages have increased, the time they devote to rearing children comes at a greater personal cost, both in terms of participation in the labor force and other uses of time, including leisure. See generally supra notes 84-87 and accompanying text. Victor Fuchs' work and that of other theorists demonstrate that women increasingly are choosing not to invest in children. FUCHS, supra note 83, at 96-104; CHERLIN, supra note 84, at 19-21; see also KATHLEEN GERSON, HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER AND MOTHERHOOD 138-57 (1985).

For women who do bear children, the economically prudent course is to avoid dependence and maintain connections to the workplace by strategies such as limiting their family size, spending only short periods at home with children, or continuing to work part-time or on a "mommy track." See Estin, supra note 85, at 785-91.

98. Becker argues that parents determine how many children to bear, and how much of their time and other resources to invest in their children, and that these decisions are related. His treatise includes a significant discussion of the demand for children and the interaction between quantity and quality of children in a family. BECKER, supra note 2, at 135-54. His theory suggests that as families have fewer children, however, they invest more in them. Id. at 135-54, 155-78.

Isabel Sawhill makes this point in the context of baking bread rather than buying it. Sawhill, supra note 1, at 117. Victor Fuchs observes the growing attraction of pets as a cheaper and less demanding substitute for children. He notes that as birth rates have declined, the rate of pet ownership has increased. FUCHS, supra note 83, at 101-02.

Of course, in the case of poor families, the investment in children is much more difficult to make. Economists have also debated the effects on fertility rates of lack of opportunity and programs such as AFDC. See BECKER, supra note 2, at 139, 152, 356-57.

99. See infra notes 341-72 and accompanying text. In turn, economic analysis suggests that increased rates of divorce influence significantly the decision to have children. See BECKER, supra note 2, at 355.
ly reduces the resources of time and money available for children.\textsuperscript{100} Although economic theory has been applied to issues of child support and custody after divorce,\textsuperscript{101} what is most revealing about the economic approach is what it suggests about a transformation of attitudes toward parenthood. Particularly in the setting of divorce, these attitudes are rooted increasingly in parental self-interest and separated from more traditional conceptions of love and obligation.

3. \textit{Exchange and Altruism}

Economic analysis of family behavior redefines family life as a process of exchange.\textsuperscript{102} The theory is built with models in which members of a household interact in the ways that strangers do in the marketplace: contracting around allocations of resources, using stores of wealth and power to make deals to increase each player's utility or personal happiness. In this work, however, economists have begun to investigate the role of altruism, which is described as a distinctive characteristic of family economic behavior.\textsuperscript{103} Altruism complicates the models of exchange within the family, but it does not displace the understanding of behavior as ultimately rational and self-interested.

According to Judge Posner, "[t]here is a substitute in marriage

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\item \textsuperscript{100} See Yoram Weiss & Robert J. Willis, \textit{Children as Collective Goods and Divorce Settlements}, 3 J. LABOR ECON. 268, 269 (1985).
\item \textsuperscript{101} See infra notes 331-410 and accompanying text.
\item \textsuperscript{102} As James Boyd White has pointed out, economic analysis is based on exchange, and, where no actual exchange takes place, the analysis is based on "an imagined exchange, the one the actor has foregone." James B. White, \textit{Economics and Law: Two Cultures in Tension}, 54 TENN. L. REV. 161, 167 (1986).
\item Milton Regan describes the growing use of "market discourse" about family relationships and identifies ways this discourse has shaped our thinking in family law. Among the examples he cites are the economic partnership view of marriage and the view of children as a commodity "produced" by marriage. Milton C. Regan, Jr., \textit{Market Discourse and Market Neutrality in Divorce Law}, 1994 UTAH L. REV. 605, 629. Regan elaborates the reasons why we should be wary of adopting market language "as our official account of family life." \textit{Id.} at 668-84.
\item \textsuperscript{103} Becker traces the distinction between selfishness and altruism to Adam Smith. See Becker, \textit{supra} note 2, at 277-78. In his more recent work, Becker has gone even further, arguing that economists should look into the role of many other factors, including such motivations for behavior as loyalty, spite, and duty. See Becker, \textit{supra} note 73, at 386, 398-400.
\end{itemize}
for the control mechanisms within a business firm. Economists naturally do not call this factor 'love,' but describe it as a form of altruism." Posner defines altruism as "the condition in which the welfare of one person is a positive function of the welfare of another."

The paradigms of exchange and altruism are especially important to questions of how resources are allocated within the family. This literature, which began with Paul Samuelson's "consensus" model, has seen the appearance of two newer models. One is based on the premise of an altruistic head of the household with power to make transfers within the family in order to achieve optimal allocations of various goods. The other model envisions explicit or implicit bargaining among family members over these questions.

Professor Becker defines an altruistic person as one whose utility function depends positively on the well-being of another. He demonstrates that in families with an altruistic head, the preferences of different family members will be maximized. In an altruistically controlled organization, each person's "happiness or utility or welfare" will be experienced by all members of the organization. As Judge Posner argues, it is a "cheap and efficacious substitute for (formal) contracting."

Other economists are critical, however, of the uses to

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104. POSNER, supra note 1, at 141.
105. Id.
106. See supra note 27 and accompanying text.
107. Lundberg & Pollak, supra note 27, at 991.
108. Id. at 992. In the bargaining model, the family becomes a firm, a device for organizing and coordinating the production of individual family members. Economic literature on the "firm" is influential here. See supra note 70 and accompanying text.
109. BECKER, supra note 2, at 278. Becker also notes that "since an altruist maximizes his own utility (subject to family income constraint), he might be called selfish, not altruistic, in terms of his utility. Perhaps—but note that h also raises w's utility through his transfers to w." Id. at 279.
110. Id. at 277-306. For criticism of this general approach, see, for example, Paula England, The Separative Self: Androcentric Bias in Neoclassical Assumptions, in BEYOND ECONOMIC MAN, supra note 1, at 37, 47-48; Ferber & Nelson, supra note 1, at 5; Hadfield, supra note 64, at 97; Strassman, supra note 17, in BEYOND ECONOMIC MAN, supra note 1, at 54, 58 (describing and criticizing the "Story of the Benevolent Patriarch").
111. POSNER, supra note 1, at 141.
112. Id.
which altruism is put in this analysis. They argue that family members' interests are often in conflict and present the altruism hypothesis as a more sophisticated version of the old consensus model.113

Economic models of family behavior have become part of the legal framework for understanding marriage and divorce.114 Increasingly, the paradigms of exchange and altruism have begun to define parenthood as well. Becker and other economists assume that parents act altruistically with respect to children.115 "The utility of parents depends not only on their own consumption, but also on the utility of each child and the number of children."116 Therefore, parents invest in the human capital of their children by spending money, time, and effort on child care, education, health care, gifts, and bequests.117 At the same time, economists note that expenditures on children also reduce the consumption opportunities of parents, and families (and family members) vary widely in the degree of altruism they demonstrate.118 Increasingly, bargaining models appear in the analysis of parent-child relationships, with children viewed either as objects of parental bargaining119 or participants in a

113. See Lundberg & Pollak, supra note 27, at 992. Becker sees his model as a significant improvement over Samuelson's formulation of family utility functions. Becker, supra note 2, at 296-99.

114. See generally Regan, supra note 102, at 629-59.

115. E.g., Becker, supra note 2, at 8-9, 156, 277-306, 364. It is assumed that at least one parent can be counted on to act altruistically. See, e.g., Posner, supra note 1, at 143-44; Landes, supra note 79, at 36 n.3.


117. Id. at 163, 364-65. Becker devotes considerable attention to an economic theory of bequests in family life. See id. at 366-69. On the investment in children's human capital, see Stout, supra note 92; Willis, supra note 1, at 74-76.

118. See, e.g., Becker, supra note 2, at 8-9, 277-306 (discussing the "Rotten Kid Theorem"), 364-66; Posner, supra note 1, at 149.

119. E.g., Weiss & Willis, supra note 100. Weiss and Willis characterize children as a "couple-specific public or collective good." Id. at 270; see also Martin Zelder, Ineffi-
process of exchanges with their parents.\textsuperscript{120}

C. Limits of Economic Analysis

The new economic theories of family life present a useful remedy for many of the conceptual ills of older law and economic analysis. New theories are especially significant in their recognition of the importance of the work that occurs in households. However, constructing a legal theory of marriage and divorce on purely economic foundations would be enormously problematic. Many criticisms of law and economics appear in the literature,\textsuperscript{121} but these issues take on special significance in the setting of family law problems.

One issue is the very neutrality attempted by economic theorists. As James Boyd White argues, the translation of human activity into economic terms erases important values and distinctions, such as the difference between selfishness and generosity or the personal characteristics of individuals.\textsuperscript{122} To econo-

\textit{cient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce, 22 J. LEGAL STUD. 503 (1993).}

For an early discussion of the conceptual problem children pose to the new home economics, see Marc Nerlove, \textit{Toward a New Theory of Population and Economic Growth}, in \textit{ECONOMICS OF THE FAMILY, supra note 50, at 527, 531-33. "When, for example, are children members of the family, and thus codeterminers of the utility function, and when are they just arguments in the utility function determined for the family not including them?" Id. at 531; see also infra notes 376-81 and accompanying text.}

\textsuperscript{120.} E.g., Gary S. Becker & Kevin M. Murphy, \textit{The Family and the State}, 31 J.L. \\& ECON. 1, 1 (1988) ("[A surprising number of state interventions [in families] mimic the agreements that would occur if children were capable of arranging for their care.").

Becker and others suggest that parents may "underinvest" in their children's education and care in order to save resources for their own support in old age. They argue that children and parents would both be better off if they could make binding agreements exchanging investment in children for old age support. Becker, \textit{supra} note 73, at 399; Becker & Murphy, \textit{supra} at 8-12. Since such contracts are not feasible, some of the same efficiencies are achieved by different means such as laws requiring certain levels of parental support for children. \textit{Id.} at 1-3.


\textsuperscript{122.} White, \textit{supra} note 102, at 174.
mists, even those interested in family life, these matters lie entirely outside their analysis, which is not concerned with the various "tastes" or "preferences" of individual economic actors. The new home economics follows this tradition, examining only certain economic implications of the choice of whether to work in the home or the market, to raise children or pets, or the preferences for either fidelity or variety in sexual partners. Although these "preferences" may be exogenous in economic theory, they remain very significant in the social and legal regulation of families. A legal theory that ignored these questions would be seriously deficient. 123

The problems that this limitation creates are most dramatic when it comes to parent-child relationships. Despite the fact that these analysts describe child rearing as the purpose of marriage, economic theories of the family cannot—and do not try to—explain why some couples choose to have children and some do not. 124 Some economists have made this criticism. Zvi Griliches observes that the economic analysis of fertility begins with three premises: "[C]hildren are goods, that all goods are subject to two constraints—time and money—and that children are relatively time-intensive goods." 125 Griliches points out that this analysis does not distinguish children from hi-fi sets, and he goes on to argue that:

[I]f we want to study the demand for children, we have to put more content into the theory and start asking why do people want to have children; what are the returns and not just the costs of this activity? . . . If we are studying the demand for children rather than for hi-fi sets, we have to ask ourselves

123. To an extent, ignoring the effect of these preferences is what the no-fault reforms are believed to have attempted, and this aspect remains somewhat controversial, even among the economically inclined. See, e.g., Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 MICH. L. REV. 1803 (1985); Elizabeth S. Scott, Rational Decision Making About Marriage and Divorce, 76 VA. L. REV. 9, 91 (1990); Judith T. Younger, Light Thoughts and Night Thoughts on the American Family, 76 MINN. L. REV. 891, 900-11 (1992).

124. E.g., BECKER, supra note 2, at 8 ("Economists almost never discuss why consumers like bananas or other goods, but it is not hard to understand why parents are altruistic toward children.").

what it is about children that distinguishes them from other
time-intensive durable goods.\textsuperscript{126}

For family law, it is essential to be able to distinguish children
from stereo equipment.

A second problem concerns the particulars of the economic
models being offered. Legal theorists need to question both the
positive and normative aspects of these models.\textsuperscript{127} Are effici-
cy principles a useful normative base for family regulation?\textsuperscript{128}
Are exchange norms adequate to represent the full range of
values at stake? Can these models be extended to nonmonetary
goals of families? How broadly can we assume that people live in
the family types which these models describe?

Theories premised on unelaborated assumptions about family
composition, opportunities, and values may be seriously deficient
when applied to different types of families. Economic theory has
been preoccupied with a single type of household, marked by a
traditional, gender-based division of roles.\textsuperscript{129} We can question

\begin{flushleft}
126. Id.
127. Many economists have also begun debating these points. See, e.g., Nelson, su-
pra note 44, at 23. See generally BEYOND ECONOMIC MAN, supra note 1 (discussing
the failure of historical economic theories to consider feminist perspectives).
128. E.g., Margaret F. Brinig, Comment on Jana Singer's Alimony and Efficiency,
82 GEO. L.J. 2461 (1994); Hadfield, supra note 64; Carl E. Schneider, Rethinking
Jana Singer, Alimony and Efficiency: The Gendered Costs and Benefits of the Eco-
129. There is substantial irony in the fact that the economic analysis of the family
tends to assume a "traditional" nuclear family. New home economics has developed
during the same period that has seen the traditional family largely consigned to the
dustbin of history. Deep tension and concern surround these developments. This con-
cern is apparent in the popular debate over whether "the family" is disappearing
and the recent academic interest in diverse family forms. This interest has influ-
cenced the legal literature, in which the problems involved in defining what "the
family" is, have gained new attention. See Martha Minow, Redefining Families:
a Family Resemblance: The Limits of the Functional Approach to the Legal Definition
HERE TO STAY (1976) (arguing that although the traditional family structure has
undergone change, the American family remains strong and a vital part of society)
withCHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED
(1977) (writing that the status and significance of the family has been in demise
since the late 19th century).

Because the theory assumes a particular model of family life, it may be more
how accurately this model describes the reality of family circumstances. Moreover, while it may work well in theory, this model may not work as well for devising a generalized system of legal rules.

One illustration of this narrow vision is the choice of research problems. The new family economics has paid serious attention to the problems of divorce in a certain type of household, while ignoring a wide range of economic issues of desperate importance for many other types of families. For example, one of the premises of the analysis of specialization and division of labor is that the parties in fact have opportunities for paid work. In view of the extremely limited employment opportunity for men in some sectors of our society, this suggests an issue of enormous importance to poor and minority families. It has been, however, all but invisible in the economic theory of family life.

Another limitation of economic theory as a model for law results from its emphasis on individual behavior and rational choice. Rational choice theory largely ignores the social construction of "the family" and of individual choices. The analysis does not address issues of gender and issues of power. Family law doctrines have often served protective functions for women readily applicable in particular divorce or tort actions and broadly applicable to rules for tax, social security, family leave, adoption, or divorce.

130. For example, Margaret Brinig points out that the household production model assumes unrealistically that there are increasing returns to scale from both market and home production. Margaret F. Brinig, The Law and Economics of No-Fault Divorce, 26 Fam. L.Q. 453, 456-57 (1993) (reviewing ALLEN M. PARKMAN, NO-FAULT DIVORCE (1992)). Gillian Hadfield notes empirical evidence that women continue to be responsible for household work even when their market income exceeds that of men and argues that this suggests a problem of inefficiency within households. Hadfield, supra note 64, at 97-98.

131. See, e.g., RUTH SIDEL, WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA 106-14 (1992) (discussing correlation between lack of economic opportunities for men and lack of male commitment to and steady participation in family life); see Helen E. Longino, Economics for Whom?, in BEYOND ECONOMIC MAN, supra note 1, at 162 ("One might ask, for example, how the new home economics would treat the economic behavior of women and men who, like members of many inner-city African-American families, confront situations in which the usual gender asymmetry of job opportunities is reversed.").

132. But see Becker, supra note 73, at 399 (describing new work which "carries the economic approach to the family onto unchartered ground related to the rational formulation of preferences within families").
and children, both within and outside of marriage,\textsuperscript{133} in large part because men have tended to have more choices and greater allocations of power and resources than their female partners.\textsuperscript{134} Economic theories of the household have not yet incorporated these concerns.\textsuperscript{135}

Legal theorists must recognize that the divide between family and market still runs deep. The new household economics has had limited effect, even in those areas of family policy and law that raise the most directly economic issues. There has been no move toward broad reforms of tax and social insurance laws to recognize the value of household labor. Opportunity cost measures of the value of household services are controversial, as are rules that would treat earnings during marriage as shared resources, or human capital changes as compensable at divorce. Even when homemaking and child-rearing work are transferred to paid domestic employees, popular opinion and practice keeps this work outside the mainstream of economic life.\textsuperscript{136}

\textsuperscript{133} The rules surrounding common law marriage and the “putative spouse” traditionally have been available to protect women who rely on quasimari- tal relationships. In some cases, whether or not these doctrines are made available, the gendered nature of the power differential in the household is apparent. See, e.g., Hewitt v. Hewitt, 394 N.E.2d 1204, 1207-08 (Ill. 1979); see infra note 236.

\textsuperscript{134} See generally Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1596-1605 (1991) (concluding that society forces mothers to be selfless while permitting others to have self-interest).

\textsuperscript{135} Cf. Lundberg & Pollak, supra note 27 (investigating marital bargaining and issues of intrafamily distribution). See generally Rebecca M. Blank, What Should Mainstream Economics Learn from Feminist Theory?, in BEYOND ECONOMIC MAN, supra note 1, at 133-43 (discussing the incorporation of feminist theory into modern examinations of economic behavior). Issues of gender are so pervasive in the social, economic and legal organization of family life that any theory that ignores such questions is probably fatally incomplete. For a number of points at which these issues raise serious problems for economic analysis, see supra notes 16, 17, 37, 54-57, 127-31 and infra notes 182, 213-14, 234, 257-59, 345 and accompanying text.

\textsuperscript{136} Many home employers routinely ignore the commands of immigration, tax, and other laws that regulate other types of labor markets. One common explanation is that compliance would increase the cost of such services beyond what families can afford to pay, clearly reflecting a view that work in the home is simply worth less than the minimum prices paid for other kinds of work. These issues drew sudden and enormous public attention in the wake of President Clinton’s nomination of Zoe Baird to be Attorney General. See, e.g., David Johnston, Clinton’s Choice for Justice Dept. Hired Illegal Aliens for Household, N.Y. TIMES, Jan. 14, 1993, at A1. For an example of the treatment of these issues before the Baird flap, see Lucinda Harper, The Yuppie Secret: Many Flout the Law on Reporting Taxes for Domestic Help, WALL
the controversy surrounding the inclusion of household production in the nation's GNP suggests that many dissenters continue to challenge the view that household work is economically significant.\textsuperscript{137}

In a previous article, I argued that maintenance law reflects a struggle to understand marriage in both economic and moral terms.\textsuperscript{138} I suggested that the difficulty was greatest "in those areas of family life defined by tangles of love and obligation: raising children, preparing family meals, working to be a 'good provider'—keeping groceries on the table and a roof overhead."\textsuperscript{139} These difficulties are expressed in the hesitation of some courts to allow compensation for one spouse's disproportionate contributions to a marriage.\textsuperscript{140} In law and economics, there is an opposite tendency to conceive relationships in solely economic terms and ignore the dangers of subjecting all aspects of family life to market discourse.\textsuperscript{141}

A vision based on exchange and altruism is not sufficient to discern the full spectrum of behavior within families. Altruism, defined as the interdependence of utility functions, is actually a type of self-interest.\textsuperscript{142} Economic theory fails to recognize both love, which does not assume self-interest, and obligation, which exists despite self-interest.\textsuperscript{143} It also ignores the wide range of

\textsuperscript{137} See supra notes 15-18 and accompanying text.
\textsuperscript{138} Estin, supra note 85, at 721.
\textsuperscript{139} Id. at 766.
\textsuperscript{140} Id. at 764-67.
\textsuperscript{141} See CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Margaret J. Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1851 (1987); Regan, supra note 102.
\textsuperscript{142} See supra note 109 and accompanying text.
\textsuperscript{143} There is a growing body of literature in political theory exploring self-interest and altruism and the tensions that connect them. See generally Jon Elster, Selfishness and Altruism, in BEYOND SELF-INTEREST 44 (Jane J. Mansbridge, ed. 1990); Christopher Jencks, Varieties of Altruism, in BEYOND SELF-INTEREST, supra at 53; Jane J. Mansbridge, The Rise and Fall of Self-Interest in the Explanation of Political Life, in BEYOND SELF-INTEREST, supra, at 3.

These writers distinguish between love and obligation as two distinct forms of
less admirable motivations in family behavior such as spite, rage, and guilt.\textsuperscript{144}

The most difficult family law problems prove that altruism is undependable and that self-interest does not always further family and social needs. Custody disputes, marital violence, child support payments, and divorce reflect failures of altruism. The concept of altruism as defined by economic theory has not been useful in understanding these failures. Rather, it serves as a rationalization for the older economic notions that viewed the family uncritically as a single unit.\textsuperscript{145} Perhaps more than anything, what legal theory requires is a set of principles to employ when the power of self-interest overtakes the commitments of family life.

II. ECONOMICS IN THE LAW OF FAMILY LIFE

In order to illustrate both the potential and the limitations of economic theory for the law, this Part of the Article examines four substantive areas in which legal theory and practice overlap with concerns of the new family economics. These areas include several old problems in applying tort and contract law to fami-
lies, as well as more recent questions concerning property division and child support in divorce that have generated enormous policy debate in family law. In each of the four areas discussed below, the insights and methodologies developed in economics offer substantial benefits for legal analysis. In each area, however, there are also important aspects of these problems that economics does not reach. In general, household production and human capital theories can be usefully employed against the tradition which denies the productive value of work in the home. Economic theory is much less helpful in addressing the set of problems that arise from ongoing redefinitions of marriage and family life.

A. Tort Claims

Tort law offers opportunities for direct legal application of household production and human capital theories. In cases involving the injury or death of a full- or part-time homemaker, the conventional techniques for computing damages based on lost earnings are not useful. Although liability may be clear, and despite the fact that the victim's role as wife and mother is venerated in the case law, a homemaker's life is routinely valued at a much lower figure than that of a comparable person working for wages instead of within the family.

Empirical data and anecdotal evidence suggest that jury awards for wrongful death of a homemaker are considerably lower than awards for wage earners. One recent report, describing results in Southern California, noted that settlements and verdicts in housewife cases tend to reach a ceiling at around $450,000, whereas awards more typically ran in the millions of dollars for those with regular outside earnings. The case law reflects a similar pattern, and nationwide samples of jury

146. See infra notes 208-09 and accompanying text.
147. Gail D. Cox, Juries Place Less Value on Homemakers, NAT'L L.J., Sept. 14, 1992, at 1, 38. But see High Settlement for Housewife, CHI. DAILY L. BULL., May 4, 1992, at 14 (reporting $5 million settlement in suit over wrongful death of unemployed 44-year-old housewife and noting that, in Cook County, "verdicts and settlements for women employed in the home took a substantial jump a few years ago, but have leveled off in recent years").
148. Even jury verdicts that appear to have valued the homemaking and wage-
verdicts also suggest that wrongful death awards generally are lower for women than for men of comparable age and family status.\footnote{149} In effect, these awards represent a judgment that women are worth less than men because women's work in the home does not carry the same financial rewards as work in the marketplace. There are two significant components of this judgment: the legal framework for tort recoveries and the valuation practices used by experts testifying in the courtroom. New economic theories suggest different methods for valuation of household services with the potential to increase recoveries in these cases.

earning functions comparably result in higher figures for wage earners. See Schmitt v. Jenkins Truck Line, Inc., 170 N.W.2d 632, 639, 663-64 (Iowa 1969). In Schmitt, the deceased's estate sought damages on behalf of six children for the wrongful death of their mother and father. \textit{Id.} at 639. Damages for the father's death, based on lost earnings, were set at $302,577.94. \textit{Id.} Damages for the mother's death, based on lost future earning capacity and value of services lost by children, were set at $264,162.74. \textit{Id.}

\footnote{149} A handbook prepared by Jury Verdict Research, Inc., (JVR) based upon actual verdicts, states “base values” for wrongful death actions and a formula for “economic adjustment” to reflect a decedent's annual income at the time of death, with separate figures given for men and women. 4 JVR, PERSONAL INJURY VALUATION HANDBOOKS § 4.10.0, at 3 (1993) (men); \textit{id.} § 4.20.0, at 3 (women). Awards for women are very strongly influenced by age. \textit{Id.} Awards for men are very strongly influenced by both age and earning level. \textit{Id.} The verdicts reported had higher midpoints for men than for women in every age category. \textit{Id.} at 8-9 (men); \textit{id.} at 7-8 (women). In lower age groups, single women, and married women with children, start at significantly higher “base values.” \textit{Id.} at 1. When the required adjustment for earnings is made, the male values increase by as much as 111\% for those with high earnings and decrease by as much as 72\% for those with relatively lower earnings. \textit{Id.} Accordingly, a young man earning $42,000 per year would likely be valued by a jury at twice the base amount, and a young man earning minimum wage would likely be valued at half the base amount. The adjustment for earnings for women is only positive, but it increases base awards only by up to 76\%. \textit{Id.} These figures suggest that in lower-income families, women have greater value to a jury than do men.

Using the formulas, if a single man and single woman, without children and age 28, each earned $10,000 a year, the man's life would be valued at $175,200 and the woman's at $676,910. \textit{Id.} at 1-3. If married, the same individuals would be valued at $365,000 and $825,500, respectively. \textit{Id.}

With higher earnings, however, the husband's relative value increases. If each earned $30,000, the husband's value would increase to $735,000 and the wife's to $1,144,000. If the husband earned $60,000 and the wife earned nothing, the figures become $1,055,000 for him and $650,000 for her. \textit{Id.}

With children added to the equation, the patterns remain the same, although the base figures increase for men and for women. \textit{See id.}
Economic theories are less useful, however, to the larger questions posed by the set of legal entitlements that define and limit rights of recovery.

The different forms that entitlements might take are illustrated by the two distinct types of tort actions that require valuation of a homemaker. One is a spouse’s claim for loss of consortium, and the other is the claim for “pecuniary damages” in a homemaker death case. At common law, a husband’s claim for loss of consortium included recovery for the loss of his wife’s services, as well as her society, companionship, and affection. In the context of wrongful death actions, however, state statutes provide a narrower basis for recovery. These statutes typically

150. See CLARK, supra note 37, at 382 (discussing fact that the husband’s common law recovery for his wife’s injuries parallels the master’s recovery for loss of his servant’s services); see also Evans Holbrook, The Change in the Meaning of Consortium, 22 Mich. L. Rev. 1 (1923) (noting that under common law, the husband has an interest in the wife’s custody, affection, and services); Jacob Lippman, The Breakdown of Consortium, 30 Colum. L. Rev. 651 (1930) (writing that the common law considered women to be “servants” to their husbands, thus entitling the husband to recover for loss of her services in addition to loss of consortium); Susan G. Ridgeway, Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres, 50 Mont. L. Rev. 349 (1989) (writing that, historically, loss of consortium was available only to the husband).

The loss of a wife’s household services is sometimes characterized as a “material” or “tangible” loss. Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950). The other aspects of consortium, such as love, affection, and sexual relations were distinguished as “sentimental” or “intangible.” Id.; see Ridgeway, supra at 350, 359-60 (discussing Hitaffer). As described by Homer H. Clark, Jr., the action for loss of consortium “included but was by no means limited to the value of the wife’s services.” CLARK, supra note 37, at 390; see also Lippman, supra, at 667 (writing that the wife’s services go beyond material services and labor to include the companionship of domestic life). By contrast, under the common law a wife had no claim for either aspect of consortium in the wake of an injury negligently inflicted upon her husband. Ridgeway, supra at 356-57. Her only protectible interest was conceptualized narrowly, based on the right to her husband’s financial support, and this interest was part of his direct claim for lost earnings. CLARK, supra note 37, at 391; Ridgeway, supra at 356-59.

Since the Hitaffer holding in 1950, the law has moved toward recognition of a wife’s right of action for loss of consortium, but the cases demonstrate some judicial difficulty reconceptualizing consortium in a gender-neutral manner. See generally CLARK, supra note 37, at 391-92; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 895 (4th ed. 1971); Ridgeway, supra at 359-60.

151. For a survey of wrongful death statutes, see DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 552-56 (1973). See also RESTATEMENT (SECOND) OF TORTS § 925 (1979) (noting that most state statutes measure damages by determining the
limit the damages to "pecuniary losses," generally measured by
the decedent's lost earnings over her life expectancy, and exclude recovery for any of the relational interests that may be compensated in a consortium action. The data for economic loss computations offered at trial typically are obtained from the actual work history of the injured party or from statistical evidence of wages in general. For a worker who has not received salary or wages, the process is much more complex.

1. Valuation

Because a housewife's contribution to the household was not a monetary one, wrongful death cases involving wives and mothers historically have posed a conceptual difficulty. Over time, courts began to define the loss of unremunerated household services as a "pecuniary" loss if those services, "when obtained by others, must be for financial compensation." This approach created a distinction between a housewife's "services" and other aspects of the marital relationship such as society and affection. Along with this distinction came a shift toward use

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of evidence intended to establish the pecuniary value of household services.\textsuperscript{157}

In early cases, the value of a caregiver was determined by the cost of hiring one or more workers to replace the housewife: a governess, a cook, a housekeeper.\textsuperscript{158} The plaintiff's testimony would include a description of the quantity of housecleaning, child care, meal preparation, and so on required to replace the caregiver.\textsuperscript{159} In addition, the evidence might include testimony from employment agency personnel or home economists as to the market cost of such services, or evidence of the actual expenditures the family made for a replacement.\textsuperscript{160}
A variation of this replacement cost measure involved breaking down the housewife's job description into a variety of categories and determining the number of hours she spent on each type of work. After determining these figures, labor market data supplied wage rates applicable to each service, a cost was computed for each function, and the various figures were totalled to reach a composite value. Typically, plaintiff's counsel offered testimony by an expert forensic economist on this point.161

In these cases, experts often attempted to individualize the computation with respect to the structure of a particular household or the services of the particular housewife. Thus, the opinions are replete with references to whether the family usually hired babysitters or brought their children along to social functions and whether the wife sewed clothing for family members and canned produce from her garden.162 The methods described in the current literature are often far less individualized, based on statistics concerning the average value of services contributed to a household by husbands and wives.163

215 N.W. at 84-85. Other labels for this are "equivalent homemaker methodology" and "general replacement cost." Fisher, supra note 78, at 17; see also Janet Yale, The Valuation of Household Services in Wrongful Death Actions, 34 U. TORONTO L.J. 283, 297-300 (1984) (applying the "substitute parent" method to measure the replacement cost of a deceased parent). This method requires a consideration not only of salary, but fringe benefits, including workers' compensation and unemployment insurance that would not be provided for a housewife. Id.

161. E.g., Har-Pen Truck Lines, Inc., 378 F.2d at 710-12; Merrill v. United Air Lines, 177 F. Supp. 704, 705 (S.D.N.Y. 1959). Other names for this method are the "sum-of-the-services" methodology and "specific services replacement cost." Fisher, supra note 78, at 17; see also Yale, supra note 160, at 293 ("itemized services" method). Courts have permitted a variety of types of experts to testify. See generally Patricia J. Lamkin, Annotation, Admissibility and Sufficiency of Proof of Value of Housewife's Services in Wrongful Death Action, 77 A.L.R.3d 1175 (1977) (writing that, although some have argued that experts interfere with the fact finder's role in a personal injury case, testimony from economic and other experts is generally found to be admissible).

162. E.g., Legare, 195 F. Supp. at 560; Lithgow, 69 So. 2d at 778-79; Spangler, 153 A.2d at 491-92.

163. BAKER & SECK, supra note 154, at 191-208. The data these writers rely on come from two sources. The first, described as the "Sylvia Porter Study," estimates that a housewife spends 99.6 hours per week in domestic work and attributes to those hours an annual value of $18,862.48 (in 1979 dollars). Id. at 191-92. The other, called the "Gauger-Walker Study," computes the dollar value of household work in families of different compositions, based on the time actually spent on household
Replacement cost measures raise characteristic problems, however. The social context of family and market render comparisons of work inside the home with outside work difficult. Work in the home is structured and understood differently: hiring an employee who will perform the services of a housewife and mother under the same working conditions generally is impossible.\textsuperscript{164} Comparisons to different categories of market occupations are also difficult. Are a parent’s hours spent in preparing family meals equal in value to the time of a head chef or more comparable to a minimum wage prep assistant? Moreover, how should the computation evaluate different tasks performed simultaneously, such as watching children and weeding the garden or preparing a meal and starting loads of laundry?\textsuperscript{165} What about the “job” of coordinating the many different tasks

work by 1378 families surveyed in 1967-68. \textit{Id.} at 192-94. According to this study, the annual value of household services provided by unemployed wives ranged from $7000 to $15,200 (in 1979 dollars). \textit{Id.} at 193.

Computations using these aggregate statistical data are not very persuasive. A single average figure for the work hours of all housewives in the nation and the value of that work will almost always be wide of the mark in any individual case. Even those statistics that recognize different household types are too broad to be meaningful. For example, one approach defines a single category of “employed wife” households, in which the “employed wife” may be anything from a part-time sales clerk to a professional working 60-hour weeks. In addition, the use of data 25 years out-of-date to establish the numbers of hours husbands and wives devote to household tasks suggests a substantial issue that is apparently not addressed. In their handbook, Baker and Seck indicate a methodology for adjusting the dollar values of these services to reflect inflation, but retain time use data based on 1968 research. \textit{Id.} at 199.

Some of these data attempt to identify statistically similar families, based on variables such as the number of children, the age of the youngest child, and whether the wife is employed. \textit{See id.} at 192-94. In general, more and younger children increase the value of a wife’s household services, and employment outside the home decreases it somewhat. \textit{Id.}

164. The “substitute mother” will need to be paid fringe benefits, including vacation and sick leave, and will generate additional costs for social security, workers’ compensation, and unemployment insurance. She may not be able or willing to perform several functions simultaneously, such as housecleaning and child care. Moreover, as many old cases have noted, the services will not be performed with the “tender solicitude” that ideally characterizes family relationships. \textit{See} Ireland, \textit{supra} note 77, at 304. \textit{See generally} Fisher, \textit{supra} note 78, at 23-25 (discussing literature concerning problems with replacement cost).

165. Identifying the time spent on individual tasks is complicated due to “joint production of various household services.” Yale, \textit{supra} note 160, at 294; \textit{see id.} at 298-99.
and functions of the household? 166

Evidence of the actual practices of forensic economists confirms that their practice, even when testifying on behalf of plaintiffs, is to estimate the value of household services conservatively. 167 In applying these methods, experts tend toward comparisons that constitute the work of a "housewife" as a job category at the low end of the occupational scale. 168 The result of these methodological judgments is to keep expert valuations of housewives relatively low. As Neil Komesar has argued, although replacement cost measures could in theory provide an accurate measure of these losses, 169 "in practice, the valuation is limited to a few basic domestic services that have easily identifiable market substitutes." 170 Komesar concludes that "while such a system is superior to no evaluation, it is likely to underestimate seriously many losses." 171

New family economic theories suggest an alternative method, in which a homemaker's work is valued based on the opportunity cost of her time. 172 At a more theoretical level, economists

166. See Fisher, supra note 78, at 23-25; Ireland, supra note 77, at 4.
167. Fisher, supra note 78, at 25-28. The economists also indicated that they utilize very simple valuation techniques in order to be cost-effective and more readily understood by a jury.
168. Typically, experts utilize minimum-wage pay rates, on the theory that job categories in the low range of skill and pay best reflect the value of household work. E.g., Wolf, supra note 158, at 82. "Overestimation can be minimized if competitive job categories in the low range of skill and pay—e.g. kitchen helper and laundry worker—are used." Id. Some experts view it as impossible to perform two occupations at the same time, pronouncing that an analysis that gives credit for tasks performed simultaneously is a source of error. See Fisher, supra note 78, at 23-24. But see WARING, supra note 1, at 281-82 (discussing problems in the use of this replacement measure, including the choice of categories of workers with wages among the lowest of all those in the market, and the fact that many household tasks are done simultaneously).
169. The measure would be accurate "to the extent that (1) all services were enumerated, (2) each was adjusted for the quality of performance, and (3) a substitute market service could be identified." Komesar, supra note 42, at 480. Professor Komesar continues: "In fact, each of these conditions for accuracy presents substantial problems, especially the last two." Id.
170. Id.
171. Id.
172. See supra notes 77-80 and accompanying text. Opportunity costs are discussed in Reuben Gronau, The Effect of Children on the Housewife's Value of Time, in ECONOMICS OF THE FAMILY, supra note 50, at 457 (discussing the shadow price of time
view this method as obviously correct, but forensic economic literature disputes the methodology, and it apparently is not used widely in the courtroom.

The reasons that experts do not use opportunity cost analysis more widely are both methodological and strategic. Depending on the wage figures used, such methods may produce a lower value for the housewife's time than the replacement measures. Unless recent employment history is available, the determination of earnings a homemaker could have received in

and methods for estimation of its price); see Posner, supra note 1, at 6.

173. For example, Judge Posner argues that replacement measures of damages in cases involving disabled housewives are incorrect because "the minimum value of a housewife's services, and hence the cost to the family if those services are eliminated, is the price that her time would have commanded in its next best use." Posner, supra note 1, at 177-78. But see Waring, supra note 1, at 280-81 (describing problems in use of the opportunity cost approach to tort recoveries).

174. As Fisher puts the issue, "in addition to the inherent difficulties encountered in quantifying the value of household production, the profession itself cannot agree on a proper methodological approach. Furthermore, for any given methodology, there is much disagreement over how to execute it." Fisher, supra note 78, at 16; see also Ireland, supra note 77, at 1 (outlining the manner in which the value of a homemaker's utility can be estimated and measured). Properly applied, the opportunity cost methods are more complex than the computations involved in calculating a replacement cost. Among other issues, computations should reflect the economic effects of incentives for work in the home created by federal tax and benefit laws. See supra notes 11-14 and accompanying text.

175. Fisher, supra note 78, at 22. Fisher points out that defendants rarely offer expert testimony on this point as it has the effect of appearing to concede liability or putting a "floor" on the damages award. Id. Reports of actual verdicts based on opportunity cost methods are conspicuously absent from the case law. Opportunity cost concepts, however, have generated more interest in the context of divorce litigation. See Posner, supra note 1, at 177-78, 194-95; Ellman, supra note 65, at 53-55; Landes, supra note 79, at 49-50.

176. In the forensic literature, opportunity cost is sometimes described as yielding a "lower-bound" value for lost household production resulting in its higher popularity among defense attorneys. See Fisher, supra note 78, at 19.

In a world in which women have few job opportunities, it may turn out that the substitute mother will cost more than the housewife could have earned by working for a wage. In this situation, opportunity cost theories may be used to argue that replacement cost measures of value are too high. Of course, when women have greater job opportunities, the opportunity cost measure will be challenged as too high, on the theory that homemaking is not as productive as the work available in the paid labor force. One writer argues for a "no-nonsense approach" in which household services are valued based on whichever measure generates the lower result. L. Keith Larimore, Evaluating Household Services and Other Nonmarket Production, J. Legal Econ., Mar. 1991, at 63, 63-65.
the wage labor market involves a significant level of speculation. Some commentators have argued that a correct determination of opportunity costs requires "returning to the decision point at which a homemaker began investing in household human capital rather than fully pursuing a labor market career." However, as the analysis becomes more sophisticated, it also becomes more speculative and raises the potential for serious problems of evidence and persuasion. Given the perceived difficulty of using sophisticated economic theory in the courtroom, professional norms counsel against more complicated methods, even though they may be more theoretically accurate. Ultimately, both replacement and opportunity cost approaches require controversial judgments about the correlation between work in the household and work in the market. These choices are value judgments in every sense. Use of labor markets as a reference point permits a plaintiff's lawyer to argue that a homemaker has "pecuniary" value, but it also incorporates into the valuation process the economic effects of discrimination in the workplace against women and women's work roles.

Because damages for economic loss in injury and death cases

177. Treating housework as unskilled labor ignores the homemaker's accumulation of household oriented human capital and other factors that increase the productivity and value of the time devoted to household work. Ireland, supra note 77, at 4. Approached in this manner, the method "implicitly treats the occupation of homemaker as if it involves only unskilled labor with no educational requirements of significant skill development." Id.

178. Ireland, supra note 77, at 6; see supra notes 79-80 and accompanying text.

179. The Restatement rule is that a plaintiff seeking compensatory damages must prove "the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit." RESTATEMENT (SECOND) OF TORTS § 912 (1979); see also id. § 924(b), cmt. c (noting that an injured person can receive damages for lost earnings despite not working at the time of the accident). Measurement of damages in child death cases poses similar problems. See VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 138-68 (1985).

180. See Fisher, supra note 78, at 27.

Woven throughout . . . is a commitment to keeping the valuation process as simple as is reasonably possible. Forensic economists must be good pragmatists, both in terms of what is cost-effective and what is credible to a lay jury. Sophisticated, complex measurement methodologies found in some of the literature . . . are not likely to have strong appeal among those who must convince the lay public of the validity of their work.

Id.
are premised on lost earnings, the low market values accorded to the types of work done by homemakers, and to women as workers, result in lower verdicts when a homemaker is killed or injured. The salient economic feature of household work is that it exists outside the market. Employing the market as the determinant of the value of household production assumes that market commodities can be compared meaningfully to those produced in the family.

Replacement cost measures define "housewife" as a job classification, a category comprised of fungible workers with a fixed market value. Such categorization compensates the family’s losses in terms of unmade beds, babysitters, and home-cooked meals. The difference between the value of services performed by a family member rather than by a collection of part-time, minimum-wage servants and contractors is not considered. However, if the value of household work is based on the housewife’s other employment opportunities, then the household chores performed by a teacher-mother are worth more than those of a factory worker mother. Although there are economic arguments to suggest that a caregiver with more education contributes more to the human capital accumulations of her husband and children, it is difficult to imagine that this effect is well measured by the wage differential between a doctor and a nurse or a lawyer and a secretary. It is even more difficult to accept that this analysis could extend across the spectrum of homemaking activities. Does clean laundry have different values depending on the education of the laundress or the wealth of her partner?

181. See supra notes 146-49 and accompanying text.
182. Other value judgments are hidden in these methods as well. Waring, supra note 1, at 21-25. This phenomenon is all the more troubling given that the usual approach to the household in both economics and law is itself substantially responsible for creating the “gender gap” in the market’s treatment of women workers. See Hadfield, supra note 94.
183. This objection is discussed in Comment, supra note 158, at 71; see also Wolf, supra note 158, at 82-83 (recommending that the value of the housewife equals the cost of acquiring various individuals from the market to perform her services).
184. Lee Benham, Benefits of Women’s Education Within Marriage, in Economics of the Family, supra note 50, at 375; Leibowitz, supra note 92, at 432.
185. See supra note 78 and accompanying text.
With a broad approach to either opportunity cost or replacement cost measures, tort damages shift toward recoveries for the more intangible aspects of household services. This shift moves the law well beyond the limits of most wrongful death statutes, which limit recoveries to “pecuniary” losses.\footnote{We might understand such a rule as preventing a windfall to defendants who injure or kill less accomplished (or less talented, ambitious, or privileged) persons. Conversely, we might view it as either an appropriate subsidy for housewives that is intended to encourage socially important behavior or a disincentive for potential tortfeasors that is intended to achieve full insurance for the personal and social costs of accidents. This problem is not unique to household services. Komesar argues that the present wrongful death statutes generally undercompensate the losses of families because of the rules limiting recoveries to lost earnings. Komesar, supra note 42, at 457-59. In effect law only recognizes the loss of 40 hours per week. \textit{Id.} at 466; \textit{cf.} \textit{id.} at 457 (noting the “strong policy grounds” for setting tort damages below actual losses).} Is it appropriate to require a tortfeasor to pay compensation based on what might have been, on the value of a career or education that was, in fact, rejected?\footnote{Dobbs's treatise cites a tort case in which the court approved a recovery based on lost earning capacity for an injured priest who had taken a vow of poverty. \textit{DOBBS, supra} note 151, at 541 (discussing McLaughlin v. Chicago M., St., P. \& Pac. R.R. Co., 143 N.W.2d 32 (Wis. 1966)). The issue framed in the text is not a question of measuring the housewife's earning capacity, which is clearly recoverable in a tort action. \textit{See supra} notes 155-57 and accompanying text. Rather, the question is whether for a priest or a housewife, the rules of recovery in tort should permit recoveries that ignore life choices that may have reduced a person's earning potential.} Human capital and household production theories suggest that it is appropriate. Because the decision to specialize in household work is rational, that work must be at least equivalent in value to alternative career paths.

One commentator's defense of the opportunity cost measure is based on distributive justice norms: similarly situated claimants should be treated alike.\footnote{See Yale, supra note 160, at 304-06.} She argues that opportunity cost measures would “achieve consistency with the treatment of the loss to a family occasioned by the death of an income-earning spouse and/or parent.”\footnote{\textit{Id.} at 289.} Of course, the judgment as to which claimants should be treated comparably could be made differently. If the principle is that those who perform similar work should be treated similarly, then the replacement cost measure
would be more just.\textsuperscript{190}

These questions are not questions of economic methods. Although the choice of methodology has clear policy implications, the policy questions are not themselves answerable from the domain of economic theory. These problems are legal and moral, and they concern the individual and family interests that society will recognize and how those entitlements, once recognized, should be protected.

2. Entitlements

The question of how entitlements should be defined and protected is a recurring theme in tort law and is not easily answered. More generally, the question is whether tort recoveries should be available only for injuries to tangible interests—damages that can be readily quantified.\textsuperscript{191} Wrongful death statutes supply one set of answers to this question, but tort law reflects wide diversity on this point.\textsuperscript{192}

Law and economics scholarship outside the “new family economics” has often been concerned with issues of tort liability. In particular, the literature reflects substantial debate and many proposals intended to define liability rules to promote socially efficient levels of risk-taking.\textsuperscript{193} Although these arguments have been less concerned with the specifics of damages rules, it is important to the larger project that damages should accurately measure the harms caused.\textsuperscript{194} The literature reflects concern that over- and under-compensation defeat the normative goal of encouraging efficient levels of risk and care.\textsuperscript{195} In addition, al-
though Judge Posner and others treat items such as pain and suffering and grief as real costs, they recognize the problem that monetizing these costs creates.196 Recently, proposals for new methods of quantification for ever-wider ranges of nonpecuniary losses have appeared,197 as have arguments questioning financial awards for nonmonetary losses.198

At its frontiers, this economic analysis bears out the objections of theorists, including Richard Abel and Margaret Radin, who argue that tort recoveries defined in this way foster the commodification of important aspects of human life.199 In Radin’s usage, the term commodity describes “something that is thought appropriate to buy and sell through a market,”200 and “commodification” refers to “market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions.”201 Radin characterizes the debate over whether to quantify and compensate injuries for loss of consortium as a debate over the commodification of love.202

cussing the meaning of personal injury losses).

196. See CALABRESI, supra note 193, at 215-25; Posner, supra note 193, at 46-48. Calabresi writes that “ex hypothesis such items are only very inaccurately converted into money terms,” and this uncertainty adds expense to the process of compensation. CALABRESI, supra note 193, at 215-16. He concludes that “to the extent that some such costs are relatively nonindividual, i.e. shared by most potential victims, collective valuations are feasible.” Id. at 222. However, “[s]uch valuations will always be expensive and may not be worthwhile because the tertiary costs may be greater than the expected general deterrence benefits.” Id. This conclusion suggests an economic argument against the use of extensive expert testimony.


199. Richard L. Abel, A Critique of Torts, 37 UCLA L. REV. 785 (1990); Margaret J. Radin, Compensation and Commensurability, 43 DUKE L.J. 56 (1993); see also Radin, supra note 141, at 1876-77 (discussing Abel’s arguments); Schwartz, supra note 198, at 411 n.116 (same).


201. Id. at 1859.

202. Id. at 1876-77. Radin, also discusses Richard Abel’s arguments that portray the tort recovery system as fostering the universal commodification of human life.
As Professor Radin's insight suggests, the equation of what a wife and mother does for her family with services sold in the market is not only difficult on a quantitative level; it is also an extremely complex moral and emotional problem. Attempting this valuation is all the more troublesome when the process takes place after her death or serious injury—an entirely involuntary "exchange" of caregiving for the possibility of financial damages.

The solution is not to abandon the goal of setting tort recoveries. As Radin points out, it is not necessary to understand compensation for injuries as a process of equating harms with dollar values.\textsuperscript{203} Damages can be viewed as a form of redress that affirms the existence of a right and recognizes the fault with regard to disrespecting that right rather than as a quid pro quo awarded in exchange for the right.\textsuperscript{204} Compensation becomes a question of corrective justice intended to restore a moral balance between the parties.\textsuperscript{205} Radin's arguments suggest that when a deeply personal quality or relationship is to be compensated, the process must be very carefully circumscribed to prevent equating the harms suffered with the money used for compensation.\textsuperscript{206}

To fail to carefully balance these factors risks further harm to important aspects of personhood and family life.\textsuperscript{207}

To deny substantial financial recoveries to families who have

\textit{Id.} at 1876-77.

\textsuperscript{203} Radin, \textit{supra} note 199, at 56.

\textsuperscript{204} \textit{Id.} at 57.

\textsuperscript{205} \textit{Id.} at 60.

\textsuperscript{206} \textit{See Radin, supra} note 141, at 1877-86.

\textsuperscript{207} \textit{See id.} Michael Trebilcock recognizes the force of Radin's argument, although he responds that it offers little help in defining when legal constraints on commodification are appropriate. \textit{MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT} 29-47 (1993). Trebilcock has a very sophisticated and subtle analysis of the exchange aspects of family relationships. He argues that commodification problems arise in areas of market failure and that an adequate framework of background legal entitlements can serve to limit these risks. \textit{Id.} Trebilcock acknowledges that economics conventionally takes these entitlements as givens and therefore offers little direct input on the issue of how entitlements should be defined. \textit{Id.} at 44. Trebilcock also asserts that feminist theorists are inconsistent on this point: In the context of divorce entitlements, feminists see recognition and remuneration for household production as essential to women's equality and dignity, while in the context of surrogacy arrangements, feminists oppose compensation on commodification grounds. \textit{Id.} at 48.
lost a caregiver seems to deny the redress of a deep moral injury. The feeling that such redress is important is attested to in the language of older judicial opinions which enshrine a wife and mother as something of immeasurable value. As one court asks: "Who can value the love and companionship, the strength and solace in times of sorrow, the joyous partnership in times of happiness, of a steadfast and devoted wife?"\textsuperscript{208} Or, in the words of another: "The loss of a wife's services are imponderables which, indeed, command almost inestimable values."\textsuperscript{209}

The new family economics is important because it affirms these truths, lending new words and techniques to older forms of knowledge. Paradoxically, although this theory has the potential to bring law toward a fuller understanding of family productivity, it also risks pulling our practice in the wrong direction. The challenge for law is to determine whether a system that does not attempt to quantify the value of lost love and nurture is ultimately preferable to one that measures these values in explicitly monetary terms.

\textbf{B. Contract and Restitution}

Contract and restitution law present another arena for the application of the new family economics. One argument, made regularly in law reviews, is that enforcement of agreements between family members can serve the same social functions that contract has filled in the commercial world: encouraging and protecting reliance and promoting efficient exchanges and allocations of resources.\textsuperscript{210} In addition, commentators argue that con-

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\textsuperscript{208} Legare v. United States, 195 F. Supp. 557, 561 (S.D. Fla. 1961). The court went on, quoting Proverbs: "Her price is 'far above rubies,' and no figure in dollars can be set down as adequate compensation." Id. Nonetheless, the court sustained an admittedly "arbitrary" award of $25,000 for a husband's lost consortium. Id.


\textsuperscript{210} E.g., Brinig & Crafton, supra note 65; Cohen, supra note 60; Marjorie M. Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 CAL. L. REV. 204 (1982); Michael J. Trebilcock & Rosemin Keshvani, The Role of Private Ordering in Family Law: A Law and Economics Perspective, 41 U. TORONTO L.J.
\end{flushleft}
tractual approaches to marriage and family life offer individuals the potential for greater autonomy and freedom in designing the terms of their private life.\(^\text{211}\)

Despite common talk of the "marriage contract," family and contract law doctrines historically have served primarily to prevent the use of contract rules and exchange norms in the family.\(^\text{212}\) The common law viewed husband and wife as one person upon their marriage,\(^\text{213}\) lacking the legal and economic individuality required for market transactions or relationships with each other.\(^\text{214}\) Although the spousal unity doctrine has waned, divorce courts continue to treat legal arguments asking a court to look at the real exchanges and contributions within a particular marriage with ambivalence or even hostility.\(^\text{215}\)

\(^{211}\) See, e.g., LENORE J. WEITZMAN, THE MARRIAGE CONTRACT (1981); Shultz, supra note 210.
\(^{212}\) See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 189-91 (1981) (mandating that promises in restraint of marriage, changing the essential nature of the marital relationship, or affecting the right to custody of a minor are unenforceable on grounds of public policy); RESTATEMENT OF CONTRACTS § 581-87 (1932) (establishing the illegality of certain bargains concerning domestic relations); E. ALLAN FARNSWORTH, CONTRACTS §§ 3.7, 5.4 (2d ed. 1990) (discussing policies against enforcement of family or social promises or agreements that might impair family relations).
\(^{213}\) See generally CLARK, supra note 37, at 286-88 (discussing the common law position of married women). As restated by Justice Hugo Black, "though the husband and wife are one, the one is the husband." United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).
\(^{214}\) Of course, their positions were not symmetric: married women had no independent legal existence in the common law. See CLARK, supra note 37, at 289-90, 293-305 (discussing married women's property acts). Yet even after the passage of statutes in the mid-19th century granting married women civil personhood, a variety of legal principles continued to restrict the ability of husband and wife to contract with each other, especially where the core aspects of their relationship were concerned. Id. at 301-03; see, e.g., Graham v. Graham, 33 F. Supp. 936 (E.D. Mich. 1940). Significantly, despite the claims of early feminists that women also should be deemed to own the fruits of their labors in the home, these statutes preserved the tradition that made a husband the owner of his wife's household services. See Siegel, supra note 17.
\(^{215}\) See infra note 219 and accompanying text. In a number of cases, courts have even refused to recognize contracts between husbands and wives outside the home, for example, where one spouse employs the other in a business. CLARK, supra note 37, at 302-03. But see Romeo v. Romeo, 418 A.2d 258 (N.J. 1980) (rejecting common law rule against enforcement of interspousal contracts in context of workers' compen-
Historically, family relationships also have generated analytic tensions in other areas of private law. Among the most difficult problems have been those that arise in the context of informal families: unmarried couples, extended families, parents, and stepchildren. If these relationships were recognized by law, the disputes would be regulated by family property rules. Instead, they reach the courts as claims based in contract, restitution, or estoppel—sometimes with an overlay of fraud, duress, and undue influence. The judicial reaction to these claims also has been mixed. Some courts recognized contract and restitution claims, while others denied relief, often based significantly on the fact that the relationship fell outside the traditional boundaries of “the family.”

Although the market paradigm has had significant influence on family law, the tensions between contract principles and family policies have not abated. The scope of contracting permitted within the family has increased significantly in the past two decades, yet contractual modifications of most family obligations are still prohibited, and courts routinely decline to

216. See infra notes 237-38 and accompanying text.
217. See generally Olsen, supra note 3; Regan, supra note 102.
219. See generally CLARK, supra note 37, at 14-15 nn.88-94. “Notwithstanding the existence of a general power of husband and wife to contract with each other, at least some courts seem still to be unwilling to recognize their contracts when they relate to what are regarded as essential aspects of the marital relationship.” Id. at 302; see also Younger, supra note 218, at 1071-73 (“[S]uch agreements have been thought to be unenforceable because they run afoul of the well-established rule that it is improper for courts to intervene in the married couple’s daily domestic af-
intervene in the financial disputes of both married and unmarried couples. There is also resistance to contractual models in settings where family law principles have not historically been available to regulate family-type relations. Individuals in these settings often turn to exchange norms to structure their relationships, but exchange-based rules continue to be defined in a manner that precludes legal protection. In effect, these relationships are deemed too contractual to be tolerated within the framework of family law and too much like the family to be subsumed into rules of contract and restitution. These problems demonstrate that it is not a simple matter to substitute contract and market principles into the framework of family policy. Many of the difficulties courts encounter in applying contract and restitution doctrines to family disputes trace to the vastly different structures that constitute family and exchange relationships.\footnote{220}{This difference and the problems it causes are reflected in the language of courts struggling to create new equitable remedies in the domestic relations context. See \textit{Estin, supra} note 85, at 773-76.}

fairs.". For example, in Mathiasen v. Mathiasen, 219 Cal. App. 3d 1428 (Ct. App. 1990), the California Court of Appeals denied enforcement of a prenuptial agreement providing that the parties would contribute equally to their shared support and requiring that, if one party had made excess contributions, these would be reimbursed in the event of divorce. \textit{See also} Kuder v. Schroeder, 430 S.E.2d 271 (N.C. Ct. App. 1993) (discussing contract and unjust enrichment claims in case where husband breached promise to support family after completing undergraduate and law degrees). Where children are concerned, the barriers to contract are even more strenuously maintained. \textit{See generally Younger, supra} note 218, at 1072-73 (discussing close scrutiny of antenuptial provisions providing for custody of children).

The problem has two dimensions. First, contract rules developed in commercial settings are difficult to apply to household relations. Second, to the extent contract law rules have been applied in this setting, they serve the larger purpose of directing individual behavior into the channels of established social institutions. At the very least, the commercial nature and effect of contract law suggests the need for a set of special contract and exchange norms consistent with the purposes and experience of family life. For an excellent discussion of these problems in the context of bargaining over the terms of separation agreements, see Sally B. Sharp, \textit{Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom}, 132 U. PA. L. REV. 1399 (1984).

Even in the setting of the market, contract and restitution principles are not purely devoted to fostering autonomy and choice, but extend as well to the creation and enforcement of commercial norms. \textit{See Shultz, supra} note 210, at 213-16; \textit{see also} Marsha Garrison, \textit{Marriage: The Status of Contract}, 131 U. PA. L. REV. 1039 (1983) (reviewing \textit{Weitzman, supra}, note 211). In commerce and in the family, these background entitlements are an important precondition to private ordering.
There is a tendency to ignore this problem in positive economic analysis, which treats both spheres as characterized by utility maximizing, "efficient" behavior.\textsuperscript{221} However, the fact that society views the market and the family as occupying separate spheres, each based on entirely different normative premises and employing different institutional frameworks, dramatically alters the project of applying contractual norms in household settings.

1. Exchange Relationships

An exchange or market system necessarily operates within an institutional framework. The framework includes a large set of ground rules and entitlements established by the law of property and contract. Law defines (1) who is capable of entering into agreements, (2) when an agreement is formed and enforceable, (3) what limits might be placed around bargaining behavior and results, (4) what terms to supply when parties fail to negotiate fully, and (5) what social means will be made available for contract enforcement. Without this framework, we are at a loss to determine when an agreement has formed or what terms

\begin{itemize}
\item Trebilcock & Keshvani, \textit{supra} note 210, at 551.
\item See \textit{supra} notes 44-46. Positive economic analysis describes family law principles as operating as if directed by an underlying economic logic to foster the maximum potential gain from the exchanges of family life. Traditional gender roles increase the gain from specialization, rules governing divorce provide protections against termination, and protections for children prevent externalization of costs of divorce. See \textit{Posner}, \textit{supra} note 1, at 143-46. This commentary does not suggest that family law rules be replaced by more general exchange norms. Instead, it understands family law principles as specially adapted to the types of behavior involved.
\item Other writers suggest that family law rules frustrate relationships that norms of contract would permit. This leads to the argument that the standard terms the law dictates are too restrictive, preventing other arrangements that individuals might prefer. See \textit{supra} notes 210-11 and accompanying text. This literature suggests an evolutionary approach, conjured by ubiquitous quotations of Henry Sumner Maine's famous "status to contract" maxim. See \textit{supra} note 4.
\item Recognizing that the law imposes a fairly uniform, standardized marriage contract, Douglas Allen argues that this standardization can be seen as economically useful. The standard-form marriage contract eliminates the large transaction costs that would be necessary if every couple negotiated from scratch. Douglas W. Allen, \textit{An Inquiry into the State's Role in Marriage}, 13 \textit{J. Econ. Behav. & Organ.} 171, 177-79 (1990).
\end{itemize}
it includes.

The new economic theory depicts the family in terms of economic goals: efficient production of goods and services covering a spectrum from meals, clean laundry, and transportation to love, sex, and children. Each member of a household has different skills and resources to offer this project, and over time it will be rational for household members to specialize in different aspects of household production. The more distinct family members are or become, the more they have to gain and lose from their relationship. In order to protect themselves and their enterprise, they will negotiate terms to govern the dissolution of their enterprise and terms for allocations of household production among the membership.

In the law, however, exchange rules rarely are broad enough to embrace family behaviors. Contract norms in family law apply only to those situations in which family members come closest to imitating arm's-length, commercial relationships. Thus, where members of marital and nonmarital households reach explicit written agreements, their contracts are typically enforced. Conversely, where terms for their exchange have not been formalized, contract claims are far less readily accepted. Courts are quite clear about their inability to extrapolate contractual intent from everyday family behavior. Because such

222. See supra notes 50-72 and accompanying text.
223. See supra notes 54-57 and accompanying text.
224. See supra notes 66-72 and accompanying text.
225. See, e.g., Cook v. Cook, 691 P.2d 664 (Ariz. 1984); see also supra note 218 (regarding enforcement of prenuptial agreements). Courts may reject even express contract claims on policy grounds, most notably by finding that some portion of the consideration is meretricious. See, e.g., Jones v. Daly, 176 Cal. Rptr. 130 (Ct. App. 1981); Timmons v. Timmons, 222 S.W.2d 339, 341 (Tex. Civ. App. 1949). In Illinois, the state policy against recognition of common-law marriage is the basis for refusing to consider contract claims arising from a long marriage-like relationship. See Hewitt v. Hewitt, 394 N.E.2d 1204, 1207-09 (Ill. 1979); see also infra notes 237-38 and accompanying text (discussing greater judicial protection for traditional families than for nontraditional families).
226. Compare Morone v. Morone, 413 N.E.2d 1154, 1158 (N.Y. 1980) ("declining to recognize an action based upon an implied contract for personal services between unmarried persons living together") with Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (recognizing an implied contract claim between unmarried cohabitants); see also Carroll v. Lee, 712 P.2d 923 (Ariz. 1986) (holding that homemaking services were consideration in exchange for agreement to acquire and jointly own property); Boland
behavior falls outside the social, economic, and legal framework of exchange, there are no reference points or rules to delineate enforceable agreements. As a result, the only successful implied-contract claims are those in which household behavior mimics commercial exchange relationships. Recovery is often available based on evidence that one household member made direct financial contributions to another member's individual property interests. Proof that the household member contributed services or materials also may establish a claim.\textsuperscript{227} Recovery is much less likely where there is proof of household or "personal" services because the norms of sharing and altruism, treated as paramount in the household, serve to defeat the inference that the parties intended to be legally bound.\textsuperscript{228}

Restitution claims are even more difficult to bring. Here, courts must determine whether particular exchanges within a household were unjust, using a standard that is explicitly rooted

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\textsuperscript{227} When a specific asset is involved, a claimant may seek imposition of a constructive trust. See, e.g., Mike McCurley, \textit{Same Sex Cohabitation Agreements, in PRE-MARITAL AND MARITAL CONTRACTS} 195, 201-02 (Edward L. Winer & Lewis Becker eds., 1993) (citing cases).

\textsuperscript{228} See Carol S. Bruch, \textit{Property Rights of DeFacto Spouses Including Thoughts on the Value of Homemakers' Services}, 10 FAM. L.Q. 101, 105 n.17 (1976); Havighurst, supra note 218.

According to the Restatement of the Law of Restitution, it is unjust for a party to go without compensation where he has conferred a benefit in order to protect the life, health, or property of another. \textit{RESTATEMENT OF RESTITUTION} §§ 112-17 (1937).
\end{quote}
in commercial norms. The heart of an unjust enrichment claim is the fact that one party has received something of value without payment or reciprocation. The issue of whether household services have monetary value is settled quickly under the new economic theory. The steady evolution of tort law has led to the same conclusion. In the setting of family life, however, norms of reciprocation are different, based on deeply held conceptions of what family relationships demand. Acts seen as rooted in love or obligation need not be reciprocated because by definition they have already been compensated by the relation-

229. Traditionally, the law of restitution drew content for the term “unjust” from tort and contract norms that exclude the family. Although the law deems it “unjust” for one party to retain without payment a benefit conferred by another in reliance on an agreement where the agreement later proves unenforceable as a contract, Restatement of Restitution §§ 107-11 (1937), restitution for failed family agreements is restricted by the rules prohibiting family members from contracting around support or the provision of services, see supra note 219, as well as the presumption that household services are rendered gratuitously. Restitution on theories of fraud, duress, and mistake is similarly limited in scope. It is understood to be unjust to allow someone to retain a benefit received from another as a result of fraud, mistake, duress, or undue influence. Restatement of Restitution §§ 15, 55, 70. But only some types of mistakes or pressures count. When services are performed because of a mistaken or coerced understanding that the services in time will be reciprocated or that the relationship is one that will continue, there is no recognized claim in restitution. Id. §§ 57-58; see, e.g., Kuder v. Schroeder, 430 S.E.2d 271 (N.C. Ct. App. 1993). However, mistake or fraud pertaining to the validity of a marriage may be the basis for restitutionary remedies in addition to other protections for a “putative spouse.” E.g., Santos v. Santos, 89 P.2d 164 (Cal. Ct. App. 1939); Roberts v. Roberts, 196 P.2d 361 (Wy. 1948).

230. Restitution for personal services and support traditionally has been denied where services are rendered either gratuitously, without any expectation of compensation, or as a matter of legal obligation. Even outside the household, locating the requisite commercial intent poses difficulties. In the rescue and salvage cases, familiar from first-year law school courses, restitution is available only to a party who can assert that he intended to charge for his services. E.g., Glenn v. Savage, 13 P. 442, 448 (Or. 1887); see also Restatement of Restitution §§ 116, 117 (1937) (concerning restitution for supplying services to another or protecting another’s property without that person’s knowledge or consent); cf. Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907) (physician entitled to recover for emergency medical services); Chase v. Corcoran, 106 Mass. 266 (1871) (plaintiff entitled to recover his expenses for saving and repairing lost boat).

231. See supra notes 155-57 and accompanying text. In more recent family contract and restitution cases, household services are more generally understood to have value measured with reference to economic or market value. See Bruch, supra note 228, at 110-14; Robert C. Casad, Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?, 77 Mich. L. Rev. 47, 52-53 (1978).
ship itself. Therefore, they fall outside the realm of restitution. The closer the family or household relationship between the parties, the more likely any services will be seen as gratuitously provided.

The distinction in law between services for which compensation is generally expected and those seen as rooted in love or obligation is closely connected to the distinction in economics between altruistic and selfish behavior. There seems to be no inquiry in either law or economics as to whether exchanges based on love and obligation could be enforced or compensated on the same terms as those that are selfishly induced. Rather, the legal, economic, and social approach to altruistic behavior constructs it entirely outside the domain of exchange.

The traditional means of protecting behavior motivated by love and obligation is to differentiate a separate sphere of family life and to define particular rights and duties that accompany family roles. In effect, law and economics address the problems

232. See In re Estate of Beecham, 361 N.W.2d 86 (Minn. Ct. App. 1985). In Beecham, a 60-year-old woman married a 70-year-old man and spent more than six years caring for his aged mother. She sought recovery for her services, including "preparing her meals, doing her laundry and ironing, cleaning her room, doing her hair, taking her on errands, cleaning up after her due to her incontinent situation, and being with her 24 hours a day." Id. at 87. Despite precedent allowing recovery for nursing care provided to a family member, the daughter-in-law's claim was denied. Id. at 89-90. Noting that she had "welcomed the in-laws into her home and cared for them as a natural and family-type thing to do," id. at 88, the court found reciprocity in their relationship based upon the older woman's "companionship, affection and respect" for her daughter-in-law. Id. at 89.

233. See supra notes 103-13 and accompanying text.

234. This approach to altruism seems closely related to the conception of families in both law and economics that views the (male) household head as a benevolent individual with power to allocate the family resources among family members. These allocations cost him nothing—by definition, being altruistic, his own utility is increased when he allocates some portion of family resources to the wants or satisfaction of other family members. See supra notes 109-10 and accompanying text. Because the law expects altruism, it refuses to recognize commercial motives in these circumstances. At the same time, the law is only rarely available to correct failures of altruism within the family.

The problem of uncompensated household services usually reflects "altruism" of a different sort. Our norms of family life demand that family members without power over household resources behave in a selfless manner, often by providing uncompensated labor for various family purposes. These services also fall outside the framework of exchange.
of altruism by separating family and market, private and public. An example of the effort to define and maintain the boundaries of the family sphere is the restrictive approach to contract and restitution in family settings. Another example is the broad range of doctrines that extend the protections of family status in particularly compelling cases. These rules reflect the importance of sustaining certain normative boundaries even as courts create exceptions to the rules. Thus, those who believe themselves to be married receive greater judicial and legislative solicitude than those who know that their family arrangements fall outside the approved forms. The same goal is clear in the language that judges employ, particularly the concern that permitting proof of "commercial intent" would demean the relationship within which the services were provided.

235. Carl E. Schneider, The Channelling Function in Family Law, 20 HOFSTRA L. REV. 495, 503 (1992) ("Sometimes competing institutions are merely disadvantaged. For instance, the rule making contracts for meretricious consideration unenforceable traditionally denied unmarried couples the law's help in resolving some disputes.").

236. Examples of such compelling cases include the rules governing common-law and putative marriage and equitable adoption. See also Alvin E. Evans, Property Interests Arising from Quasi-Marital Relationships, 9 CORNELL L.Q. 246, 262 (1924) (contrasting putative marriage and "concubinage"). See generally CLARK, supra note 37, at 45-62, 625-27 (discussing common-law, putative marriage, and equitable adoption).

In a few recent cases, courts have held that the statutes governing divorce may be used as a basis for financial remedies granted to unmarried cohabitants. See, e.g., Connell v. Francisco, 872 P.2d 1150 (Wash. Ct. App. 1994).

237. The struggle to allow compensation while retaining these norms has meant that the same services may be valued and compensated in one context but not in another. Compare Stejeskal v. Darrow, 215 N.W. 83 (N.D. 1927) (father compensated in tort for loss of adult daughter's housekeeping services, which he stated had a value of $40 per month beyond the room and board she received from him) with Harrison v. Harrison, 75 So. 2d 620 (Ala. 1954) (daughter-in-law denied restitution from mother-in-law's estate for housekeeping services on the basis of presumption that her services had been rendered gratuitously).

238. E.g., Wright v. Wright, 289 S.E.2d 347 (N.C. 1982) (husband's extensive improvements to wife's separate real estate presumed to be gratuitous); Dade v. Anderson, 439 S.E.2d 353, 356 (Va. 1994) (wife denied recovery from husband's estate for health care services with value of $69,480). See generally Havighurst, supra note 218, at 390; Jane M. Draper, Annotation, Establishment of "Family" Relationship to Raise Presumption That Services Were Rendered Gratuitously, As Between Persons Living in Same Household but not Related by Blood or Affinity, 92 A.L.R.3d 726 (1979). The element of gratuity may be presumed even between those who do not share a household. See, e.g., Glenn v. Savage, 13 P. 442, 448 (Or. 1887). Ironically, although contract and restitution remedies traditionally have been unavailable to en-
These examples illustrate the channelling function of family law, which Carl Schneider describes as "the law's work in building and sustaining social institutions." He points out that, over time, the law has constructed and reflected the normative characteristics that define "marriage" and "parenthood," deploying a variety of incentives and sanctions to move people into the established patterns of marriage and parenthood. Professor Schneider points out that this function is not unique to family law; in the commercial setting as well, law provides channels that facilitate the process of exchange.

Milton Regan describes the traditional definitions of family law force the agreements of spouses because of a reluctance to demean the marriage relationship, they also have been unavailable to enforce agreements between unmarried cohabitants because of the taint of their "meretricious" sexual relationship. See supra note 225 and accompanying text; see, e.g., Hewitt v. Hewitt, 394 N.E.2d 1204, 1207-09 (Ill. 1979). But see Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Kozlowski v. Kozlowski, 403 A.2d 902 (N.J. 1979); Rolle v. Rolle, 530 A.2d 947 (N.J. Super. 1987); Watts v. Watts, 405 N.W.2d 303, 311-13 (Wis. 1987). See generally Casad, supra note 231; Jane M. Draper, Annotation, Recovery for Services Rendered by Persons Living in Apparent Relation of Husband and Wife Without Express Agreement for Compensation, 94 A.L.R.3d 552, 559-67 (1979).

239. Carl E. Schneider, State-Interest Analysis and the Channelling Function in Family Law, 55 ALB. L. REV. 669 (1992); see also Schneider, supra note 235. Schneider's channelling idea is distinct from the concept as developed in Lon Fuller, Consideration and Form, 41 COLUM. L. REV. 799 (1941), which is discussed in Schneider, supra note 235, at 496 n.2. Both uses reflect a concern with the law's role in facilitating human relationships. Compare Schneider, supra note 235, at 507 with Fuller, supra, at 801-03. In Schneider's usage, "social institutions" are predefined patterns of conduct for types of actors, enforced by social sanctions. Schneider, supra note 235, at 498.

240. Schneider, supra note 239, at 671. Schneider describes the normative mode of marriage as "monogamous, heterosexual, and permanent. It rests on love. Husbands and wives are expected to treat each other affectionately, considerately, and fairly. They are to be animated by mutual concern and willing to sacrifice for each other." Id. Parenthood has these key normative characteristics:

Parents should be married to each other. They are preferably the biological father and mother of the child. They have authority over their children and can make decisions for them. Like spouses, parents are expected to love their children and to be affectionate, considerate and fair. They must support their children during their minority. They should try to assure them a stable home. In particular, they should stay married to each other, so that the child lives with both parents.

Id.; see also Schneider, supra note 235, at 500-01.

241. Schneider, supra note 235, at 505-06 (arguing that the corporation also serves as a channelling institution).
roles as a reflection of status principles. The notion of family relations as based on status rather than contract is in part a reflection of the power of the rules that define the legal channels of family life. Professor Regan proposes a balance between contract and status principles as a means to foster norms of responsibility and relationship that can allow richer emotional and family life. Regan argues for a "new model of status" that can "attend to the desire for greater equality and the fact of more diversity in family life," and he makes specific and persuasive suggestions as to how his model might play out in a number of family law settings, including the regulation of unmarried cohabitation.

What both Professors Schneider and Regan demonstrate is that an expanded role for contract and individual autonomy in family life must be balanced against the wide variety of functions served by family law and by the family as a social institution. While enormous debate surrounds the specifics of these rules, there seems to be a broad consensus on the need to preserve and protect the social institutions of family life in some form.

2. Institutions

The functions of channelling rules are readily described in economic terms. One purpose is protective, which an economist might describe in terms of preventing market and contracting failures. Another purpose is facilitative, which an

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243. Id.
244. Id. at 3.
245. Id. at 3-4.
246. Id. at 122-28.
247. One of Schneider's central points is that law's role in sustaining institutions should be understood as part of the state interests at stake when family legislation is subjected to constitutional challenge. Schneider, supra note 235, at 524-29 (discussing Michael H. v. Gerald D., 491 U.S. 110 (1989)).
249. Channelling rules serve an important protective function. Schneider, supra note 239, at 674; Schneider, supra note 235, at 506-07.
250. E.g., TREBILCOCK, supra note 207.
251. Schneider, supra note 235, at 505-08 (referring to the facilitative role as an
An economist could view as a means of reducing transaction costs. Even if these rules can be said to serve economic purposes, economic theory has not offered a sufficient basis on which to define such institutions as marriage and parenthood.

Arguably, contract and exchange principles can foster the social institutions of family life. In the family as well as the marketplace, there are strong arguments for protecting the parties' expectations when agreements are shown or for implying agreement in the face of an uneven exchange. However, the specific location of these boundaries is difficult to address from economics. From an economic perspective, specialization and division of labor in the household serve important purposes whatever the household type. One argument for broadening the recognition of household types is that it would permit and encourage economically and socially useful exchanges to occur. Although the old boundaries, based on a rigid dichotomy between family and market life, seem no longer tenable, the new family economics appears almost entirely agnostic on the complex normative problems implied in redrawing these lines.

Social institutions are constituted by mandatory moral norms, derived from the broader social context and collectively established and enforced. Economists work from individual, con-

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252. See supra notes 64-70, 221 and accompanying text.
253. Becker's analysis can be applied to a wide variety of family types, even those that fall far outside what the law has traditionally been willing to tolerate. For example, he demonstrates that polygamous households produce interesting economic benefits for their members. Becker, supra note 2, at 80-107.
254. Although many family law scholars have argued for expanded use of contract principles in family law for these reasons, different understandings of family roles might also serve this purpose.
255. According to Regan:

The content of these obligations derives from norms that are specific to marriage as a particular social practice, rather than from terms that are a product of rational bargaining. On this view, divorce deals with spouses who are exiting an institution; as such, scrutiny of the substantive terms of a marital agreement is not simply an attempt to replicate what self-interested parties would have done had they had perfect knowledge or bargained with adequate background legal entitlements. Instead, the law seeks to affirm that marriage involves shared norms that may sometimes require the subordination of self-interest for the sake of another.

Regan, supra note 102, at 646.
tractually determined norms, based ultimately on individual self-interest, and their discourse conceives family responsibilities as "flowing from implicit contract terms accepted by a self-interested bargainer." While the goal of contract is to foster individual autonomy, the point of institutional frameworks is to moderate the play of self-interest.

This contrast presents a number of dilemmas. Although economics attempts to be value neutral, channelling rules are not. The traditional contract and restitution principles evince significant gender bias. Thus, although the notion that services within the family are gratuitous is applied to men and women, to carpentry as well as housecleaning, the doctrine has a much heavier impact on those in a conventional housewife role because their work is more likely to go uncompensated. These rules also have significant effects on gay and lesbian couples, who are denied access to the established channels of family life. For such untraditional families, there is particular interest in using contract and restitution as secondary legal frameworks.

The tension concerning the boundaries of family institutions has contributed to significant changes in the legal definition of family life over the past thirty years, such as increased protections for unmarried cohabitants, no-fault divorce rules, and new approaches to illegitimacy and the rights of unwed fathers. These dramatic shifts in the law arise from new understandings of the appropriate range of family membership and behavior. They also reflect the underlying protective purpos-

256. Id.
257. See, for example, the criticisms levied in Paul Finkelman, Family, Crime, and Government Interests: Commentary on Schneider and Stith, 55 ALB. L. REV. 689, 690-96, 700-11 (1992) (including the remarks of Professor Finkelman in a panel discussion).
258. Where a household member can prove a contribution of money or services to another's property, compensation is more likely. See, e.g., Lawlis v. Thompson, 405 N.W.2d 317, 320 (Wis. 1987). But see Wright v. Wright, 289 S.E.2d 347 (N.C. 1982) (husband's extensive improvements to wife's separate real estate presumed to be gratuitous).
259. The Wisconsin Supreme Court also has noted that denying compensation to one party of a meretricious relationship serves to enrich the other, who may be equally culpable. See In re Estate of Steffes, 290 N.W.2d 697, 706 (Wis. 1980).
261. Schneider, supra note 235, at 514-15. Schneider notes the tendency to see the
es of channelling rules.\textsuperscript{262} When courts extend statutory inheritance rights to children unlucky enough to be born out of wedlock, they recognize that these children would also benefit from the protection otherwise considered important for other children. When courts consider property and support claims brought by unmarried cohabitants, they apply the same policies concerning compensation for family exchanges that are structured into divorce rules.\textsuperscript{263}

If the point of social institutions is to balance the claims of individual self-interest against the need to protect a zone in which love and obligation can operate, it is essential that channelling rules define the boundaries of the family with reference to a broader set of norms than economic efficiency. To the extent exchange processes operate in the family, they operate within a set of gendered social and market rules that determine which arrangements are "efficient" and which may seriously disadvantage certain family members.\textsuperscript{264} Albeit imperfectly, family law rules traditionally have sought to limit the potential for this type of disadvantage.

\textbf{C. Property Division in Divorce}

With the advent of no-fault divorce statutes, the financial aspects of family dissolution have shifted as well. As described by Michael Trebilcock and Rosemin Keshvani, the "evolving marriage paradigm that has driven reform" is the model of a joint economic venture with two equal partners "in which the division of functions—financial provision, household management, and child care—are the result of mutual agreement between the partners."\textsuperscript{265} The law now emphasizes equitable division of a

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\textsuperscript{262} Carl Schneider points out that we can question whether society is well served where one form of institution is promoted by disadvantaging its alternatives. \textit{Id.} at 519-21.

\textsuperscript{263} Finkelman argues that this type of problem shows that channelling does not work. Finkelman, \textit{supra} note 257, at 693.

\textsuperscript{264} \textit{See} Myra M. Ferree, \textit{Beyond Separate Spheres: Feminism and Family Research}, 52 \textit{J. MARRIAGE \& FAM.} 866, 878-79 (1990) (literature review).

\textsuperscript{265} Trebilcock \& Keshvani, \textit{supra} note 210, at 540.
broad category of "marital property" and more limited spousal support payments based on need and dependence rather than fault and obligation. These concepts have created a new legal ethic of marriage that fits neatly with the new economic view of the family.

Where property division is concerned, the image of marriage as a partnership has been deployed in support of relatively equal division of "marital assets." The theory presumes that husband and wife both have made significant contributions during their marriage. In some states, marital property divisions are presumptively equal. In many others, statutory language requires that the court begin by considering various factors, including each party's contributions to the marital enterprise. Among those factors, it is commonly provided that the "contribution of a spouse as homemaker" must be considered.

The official comment to the Uniform Marriage and Divorce Act refers to the homemaker contribution provision as a "new concept in Anglo-American law." This language was readily adopted by courts, which read the statutes to define a homemaker as an "equal partner" in a marriage. Early decisions and


Spousal support based on need (rather than fault, obligation, or expectation) existed before the shift to pure no-fault divorce grounds in states such as Washington. See Marsha Garrison, The Economics of Divorce: Changing Rules, Changing Results, in DIVORCE REFORM AT THE CROSSROADS 75, 90-93, 245 n.107 (Stephen D. Sugarman & Herma H. Kay eds., 1990) [collection as a whole hereinafter DIVORCE REFORM].

269. E.g., CAL. FAM. CODE § 2550 (West 1992); WIS. STAT. ANN. § 767.255 (West 1993).
271. Id.
273. E.g., In re Marriage of Smith, 427 N.E.2d 1239, 1244 (Ill. 1981). This interpretation probably was not intended in any technical, legal sense. As Ira Ellman points out: "Marriage is often colloquially referred to as a partnership . . . ." Ellman, supra note 65, at 33.

Other partnership discussions in the case law include: Julsen v. Julsen, 741 P.2d 642, 648 (Alaska 1987); In re Marriage of Rogers, 422 N.E.2d 635, 638 (Ill. 1981); In re Marriage of Calisoff, 531 N.E.2d 810, 814 (Ill. App. Ct. 1988); Kaye v.
commentary emphasized the need to value a homemaker's contributions comparably with those of a breadwinner; in some cases, the language of economics is used to defend these rules.\footnote{274}

The partnership metaphor and a more extensive division of property have been readily assimilated into family law. Disagreement persists over the adequacy of these principles for doing justice between the parties, particularly given the often disparate financial condition of two partners at the end of their marriage.\footnote{275} Increasingly, the debate suggests that a partnership approach to marriage is inadequate without a greatly expanded definition of marital property. In particular, the case is made that the parties' career and earning potential should be treated as subject to division.\footnote{276} The need to redefine marital property is often explained in economic terms with the argument that a career or degree represents a significant increase in one spouse's "human capital."

The treatment of human capital issues in divorce has created

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275. Articles debating the partnership approach include: Ellman, supra note 65, at 33-40; Krauskopf & Thomas, supra note 35; Jane Rutheford, Duty in Divorce: Shared Income as a Path to Equality, 58 FORDHAM L. REV. 539, 553-59 (1990); Bea A. Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, 68 TEX. L. REV. 689 (1990); Stephen D. Sugarman, Dividing Financial Interests on Divorce, in DIVORCE REFORM, supra note 268, at 139-141.

Much of the writing attempts to draw directly from the law of business organizations, such as the statutory and common law rules that provide for winding up a partnership and distributing its assets. See Ellman, supra note 65, at 33-40; Rutheford, supra, at 553-59; Sugarman, supra, at 139-41. As these writers note, these rules are "default" rules, which may be varied by agreement of the parties. Divorce law in effect offers a similar set of default rules governing the division of marital assets at the end of a marriage. Trebilcock & Keshvani, supra note 210, at 551-54, argue that the current "background entitlements" in divorce are inadequate on two counts: they are not sufficiently clear and certain, and they do not reflect "entitlements that rational parties would have chosen ex ante."\footnote{276} See, e.g., WEITZMAN, supra note 211, at 89-97.
an opening for economic argumentation more generally in family law. In addition to the literature on human capital investments and divorce, there is a growing body of normative literature based in economic theory. These writings suggest, implicitly or explicitly, that the answers to questions concerning the legal entitlements of family life can be derived from the norms of economics.

I. Human Capital

Decisional law in divorce cases reflects the economic insight that marriage and the economic organization of family life can have significant effects on human capital. The issue surfaced in many states within a few years after the enactment of divorce reform legislation and reached the pages of law reviews shortly thereafter. The law has developed somewhat independently in five areas: career or celebrity goodwill, academic degrees, goodwill in professional practices, pension benefits, and goodwill in other businesses. Each of these subjects now boasts a significant body of literature.


278. See, e.g., Zelder, supra note 119.

279. See generally supra notes 73-90 and accompanying text.


281. Krauskopf, supra note 277; Combs, supra note 277.

282. Numerous cases and articles have discussed these issues. For example, on the
In all five areas, a tension exists between two definitions of "property." Some courts interpret the term "property" as used in divorce statutes to refer only to assets that are exchangeable with a value determined by the market. Other courts interpret "property" to include everything that has the potential to


283. E.g., Graham, 574 P.2d at 77; Ellis, 552 P.2d at 507; Prahinski, 540 A.2d at 843; Hanson, 738 S.W.2d at 433.
generate income for its possessor and valuation proceeds from the level and security of the income stream generated.\textsuperscript{284} By the first test, most types of human capital are not "property" and therefore fall outside the domain of equitable distribution in divorce.\textsuperscript{285} By the second, virtually all human capital may be considered. Over time, the law has come to rest uneasily somewhere between these two poles.

Law and economics writing increasingly seems to view the distinction between human capital and more conventional assets as untenable and unjustified.\textsuperscript{286} Commentators argue that the failure to recognize and compensate accurately the changes in human capital that occur during a marriage has a broad social impact, discouraging behavior that is socially valuable and economically efficient.\textsuperscript{287} More recent academic argument in both law and economics literature seeks to move the law in two directions: toward making assessment and compensation for human capital changes a routine aspect of divorce litigation and toward measuring more precisely the portion of human capital that constitutes marital property. Moreover, economists argue that to avoid "distorting incentives" the divorce process should consider all changes in human capital during marriage—decreases as well as increases.\textsuperscript{288}

\begin{itemize}
\item \textsuperscript{284} E.g., O'Brien, 489 N.E.2d at 718.
\item \textsuperscript{285} Although these interests may not be treated as "property," courts may be permitted to consider human capital resources as part of the parties' "economic circumstances" in making division of other marital property. See, e.g., UMDA § 307(b)(4) (Alternative B), 9A U.L.A. 239 (1987).
\item Also, in those settings in which business or professional goodwill can be sold, it is generally counted as marital property. Under the broader definition of property, however, the same goodwill could be valued at a higher figure.
\item \textsuperscript{287} Borenstein & Courant, supra note 277, at 992-93; Krauskopf, supra note 277, at 395.
\item \textsuperscript{288} PARKMAN, supra note 286, at 132-34. The literature on decreases in human capital in marriage addresses primarily maintenance and alimony issues rather than property division. These writers' concern lies not so much in protection of divorced spouses as in encouraging marriage and certain types of behavior within marriage, e.g., Brinig & Crafton, supra note 65, at 871-73; Ellman, supra note 65, at 49-50, or discouraging divorce on efficiency grounds, e.g., id. at 41 ("The first goal is to encourage the durability of the relationship.").
\end{itemize}
Where courts attempt directly to value human capital assets, they employ a variety of methods. All of these methods require the use of expert testimony and difficult judgments about such matters as (1) the earning capacity of both partners at the time of their marriage and at its end, (2) the value of educational or career opportunities given up by the other spouse, and (3) where education is concerned, the amount invested in tuition, fees, books, supplies, and living expenses, as well as the amount of income sacrificed in the pursuit of further education.289

In some jurisdictions, divorce law sidesteps these problems by addressing human capital issues with other remedies. Courts may compensate one partner’s contributions to another’s career through the division of other marital assets or through an award of maintenance.290 Alternatively, courts may consider estimates of one partner’s “future earning capacity” in making property and support orders.291 Some jurisdictions permit division of only the more readily valued aspects of human capital, such as pensions and business goodwill.292 Academic degrees have raised the most troublesome problems because these remedies may not be available when divorce occurs at the threshold of


290. In cases in which such compensation was ordered, courts considered estimates of one spouse’s future earning capacity in making alimony awards. See Krauskopf, supra note 277, at 399-409. Professor Krauskopf argued in 1980 that the use of alimony in gross was a “far preferable method” to valuation and division of human capital assets themselves. Id. at 416. As she notes, however, some jurisdictions limit or prohibit awards of alimony or maintenance in ways that prevent this solution. Id. at 409-10.

291. E.g., In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1985); Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982); Stevens v. Stevens, 492 N.E.2d 131 (Ohio 1986); In re Marriage of Lundberg, 318 N.W.2d 918 (Wis. 1982).

292. See Archer v. Archer, 493 A.2d 1074, 1079 (Md. 1985) (determining that a pension is marital property, while a professional degree is not); Mahoney, 453 A.2d at 532 (holding that a professional degree is not marital property subject to division because its value is “nothing more than the possibility of enhanced earnings”). Compare In re Marriage of Grubb, 745 P.2d 661, 665 (Colo. 1987) (permitting division of unmatured pension rights) with In re Marriage of Olar, 747 P.2d 676, 679 (Colo. 1987) (“We find that the value of an educational degree is too dependent upon the attributes and future choices of its possessor to be fairly valued.”).
The literature in this area suggests two directions for career valuation practices. One approach is to attempt a property division whenever there has been an increase in income-earning capacity during the marriage. At its simplest, this method requires only a comparison of premarital and postmarital earnings. On the other hand, it may involve comparing postmarital earnings with a projection of what the individual's earnings would have been but for the human capital investments made during the marriage. Attempting to identify the portion of human capital causally attributable to the marriage is, at best, extremely difficult. The goal of both methods is to identify how much of present earning ability represents a return on marital investment, and the problem with both methods is that the change in earning ability during a marriage may include a return on other factors, such as the investing spouse's talent and premarital education.

An alternative method is to measure and reimburse the investment itself. This approach is reflected in statutes requiring that the marital estate be reimbursed for its contributions to the direct costs of education during the marriage and in decisional law allowing compensation for these costs, sometimes characterized as a restitutionary award.

293. The difficulty posed when a court cannot fall back on these other remedies is sometimes described as the "diploma dilemma." Estin, supra note 85, at 757-59.
294. Krauskopf, supra note 277, at 409-16.
295. Several Oregon cases attempt to separate the portion of the income disparity between husband and wife caused by their division of labor during the marriage and use this as a factor in determining spousal support after divorce. See In re Marriage of Helm, 813 P.2d 52 (Or. 1991); In re the Marriage of Graf, 776 P.2d 46 (Or. Ct. App. 1989).
296. Borenstein & Courant, supra note 277, at 993; Krauskopf, supra note 277, at 382.
297. E.g., PARKMAN, supra note 286, at 131-36. Parkman argues for separating the "separate property" and "marital property" components of human capital. Id.
298. Parkman describes this method as giving the marital estate a debt interest rather than an equity interest in human capital assets. Id. at 134; Parkman, supra note 286, at 454-57.
299. E.g., CAL. FAM. CODE § 2641 (West 1994); IND. CODE § 31-1-11.5-11(d) (Supp. 1991).
300. E.g., Inman v. Inman, 648 S.W.2d 847 (Ky. 1982); De La Rosa v. De La Rosa, 309 N.W.2d 755, 757-59 (Minn. 1981); Mahoney v. Mahoney, 442 A.2d 1062 (N.J. 1982).
way, the reimbursement method can be criticized on the basis that the cost of a degree has little relationship to its value.\textsuperscript{301} The analysis is much more complex when "investment" is defined to include a period of lost income for the trained or educated spouse, the value of household services, and the other partner's lost opportunities for education or career development.\textsuperscript{302} It is still more difficult if the full range of alternative investment issues are factored in.\textsuperscript{303}

For lawyers, applying any of these methods to the division of human capital assets in divorce raises problems. At the most practical level, retaining experts to perform the analysis these computations require will be prohibitively expensive in most cases. Moreover, if the analysis is sufficiently complex to be accurate it may be too complex to be readily understood by the key players in the divorce process.\textsuperscript{304} At a more conceptual lev-

\textsuperscript{301} E.g., \textit{Mahoney}, 442 A.2d at 1068-69. Failure to consider the value of the human capital accumulation allows for an enrichment of one spouse. In two cases which attempted to measure both the cost and present value of education, the difference was dramatic. \textit{See, e.g., De La Rosa}, 309 N.W.2d at 758 n.7, 759 n.9 (finding that the present value of completed professional education was $246,478 and the cost of contributing to that education was $11,400); \textit{Haugan}, 343 N.W.2d at 802-03 (finding that the present value of enhanced earning capacity was $266,000 and the cost of wife's contribution was $13,000).

\textsuperscript{302} E.g., \textit{Mahoney v. Mahoney}, 453 A.2d 527, 534 (N.J. 1982); \textit{Haugan}, 343 N.W.2d at 802-03; \textit{PARKMAN}, \textit{supra} note 286, at 131-35; \textit{Burns & Grauer, supra} note 289, at 518-19 ("cost of acquisition" approach).

\textsuperscript{303} E.g., \textit{Hubbard}, 603 P.2d at 752. Borenstein and Courant developed a theoretical microeconomic model of the investment decision during marriage and propose that the supporting spouse should be reimbursed for support during education compounded at the supporting spouse's marginal interest rate during the investment period. Borenstein & Courant, \textit{supra} note 277, at 1000. They acknowledge, however, that putting their analysis into practice is quite difficult. \textit{Id.} at 999, 1006. In particular, they note three problems: determining the value of the supporting spouse's contributions, fixing an appropriate interest rate, and the overly simplified model they use. \textit{Id.} at 1006-07. Of these, three, Borenstein and Courant discuss the interest rate the most fully, although they note that, at a practical level, this is the easiest factor to determine. \textit{Id.} at 1007; see also Daniel D. Polsby & Martin Zelder, \textit{Risk-Adjusted Valuation of Professional Degrees in Divorce}, 23 J. LEGAL STUD. 273 (1994) (including "risk premiums" in the valuation of professional degrees).

\textsuperscript{304} Cf. \textit{supra} notes 167-80 and accompanying text (discussing forensic economic
el, drawing a distinction between the various components of one individual's human capital presents an extremely difficult problem. Similarly, making a precise measurement of marital investment puts serious strains on the fragile boundary between altruism and self-interest in our understanding of marriage.

The human capital approach to the financial remedies in marriage defines the entitlements of marriage based on norms of investment, exchange, and maximization. The institution of marriage is changed by this definition because the "intangible benefits" of marriage—sharing and sacrifice, love and obligation, "for better and for worse"—have all been pushed to the periphery. Instead, marriage is held to an economic standard of rationality. The effort to quantify changes in human capital also alters our view of the individuals within a marriage, requiring that we define and distinguish the components of their income-earning potential. Because there are serious measurement problems when the intangible aspects are added to the calculus, they are simply eliminated in favor of more monetizable factors.


306. Thus Ira Ellman's proposal suggests reformulating alimony as compensation for economically rational sharing behavior, and he defines this formulation substantially in financial terms. Ellman, supra note 65, at 49-51. Note that Professor Ellman constructs the remedy for human capital changes as spousal support rather than property division. This characterization eases some of the commodification problems discussed in the text. Professor Ellman's effort is impressive, because it attempts to locate a morally neutral basis for divorce rules in economic theory. He rejects contract, restitution, and partnership approaches because each requires moral judgments about parties' behavior during marriage. See id. at 23-24, 27-28, 36-39. But see Schneider, supra note 128, at 235-36.
2. Commodification

There are two aspects to the commodification problem created by human capital assets in marriage. The first arises from treating personal capacities as if they could be purchased and sold, and the second arises from thinking about marital interactions as exchanges between husband and wife. One recurring theme in the case law and commentary on career assets is that it is difficult to distinguish the results of education and career development from the results of personal qualities such as talent, intelligence, ambition, and hard work. Economists note this problem, and some use it to argue for more limited, investment-based measures of compensation in divorce. Judges also worry about it, and their concern is apparent in the published decisions. Another consistent thread is the concern not to commercialize marriage by treating it as a business or financial venture.

Courts are extremely resistant to the commodification of education and professional credentials because of what these accomplishments mean about personhood. Thus, in refusing to hold that a professional degree could be considered property, the Colorado Supreme Court wrote: "An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property." Revisiting the issue nine years later, the court repeated this language and added a discussion of valuation problems, concluding that "the value of an educational degree is too dependent upon the attributes and future choices of its possessor to be fairly valued."

307. For a definition of commodification, see supra notes 199-202 and accompanying text.
308. Margaret Radin notes that the determination of whether an academic degree, pension, or professional practice can be considered "property" in divorce is a contest over commodification. Radin, supra note 141, at 1856-57.
309. See supra notes 296-97 and accompanying text.
310. See infra notes 311-12 and accompanying text.
Given the understanding of academic and professional success as highly individualized, valuation presents substantial practical problems. Some judges object on this basis to the use of aggregate statistical data as the basis for awards in divorce. Projections based on such data seem to be "little more than guesswork." If the valuation proves to be either too low or too high, one of the spouses may suffer significant financial loss.

As with the complex formulas for valuation of homemakers in tort, these issues cast doubt on whether the legal system can or should attempt to structure remedies that require such precise measurement. Judges express the concern that the routine use of experts adds significant expense to the divorce process. From an economic viewpoint, precise valuations of many "career assets" create large additional transaction costs in the divorce process. This expense might be justifiable if it led to substantial reductions in other individual or societal costs of divorce—an unlikely result that is not argued in the literature.

These concerns also echo Professor Radin's argument regard-

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Mahoney, 453 A.2d 527, 532 (N.J. 1982) ("Valuing a professional degree . . . would involve a gamut of calculations that reduces to little more than guesswork.").
313. E.g., Moss v. Moss, 639 S.W.2d 370, 374 (Ky. Ct. App. 1982) (arguing that economic studies can tell us only about "Mr. Average Pharmacist").
314. E.g., Mahoney, 453 A.2d at 532; In re Marriage of Lundberg, 318 N.W.2d 918, 925 (Wis. 1982) (Callow, J., concurring).
315. See supra notes 167-80 and accompanying text (concerning problems in the tort recovery context); see also Levy, supra note 305, at 63 (arguing that the determination of whether professional degrees should be deemed "property" depends in part on efficiency concerns, such as the difficulty of valuation).
316. E.g., In re Marriage of Grubb, 745 P.2d 661, 668 (Colo. 1987) (Erickson, J., dissenting).
317. Litigated divorce cases involving human capital issues or other complex property valuation problems are already quite expensive. Although data from fee award decisions underestimates the expenses of the process, it indicates that these costs are substantial. See, e.g., In re Marriage of Huff, 834 P.2d 244 (Colo. 1992) (holding that $40,000 was "reasonable and necessary" amount of wife's fees in case involving valuation of law firm partnership interest).
318. This problem is recognized in Calabresi's treatment of the costs of accidents, which discusses the uncertainty and expense of individual damages valuations where nonmarket interests are in question. CALABRESI, supra note 193, at 198-235. One response to these difficulties is to recognize that estimating these values may be "the best we can do" and to focus on how best to estimate these losses. Id. at 208-09.
ing the "risk of error" that the process of monetization entails. She argues that the "rhetoric of commodification might lead imperfect practitioners to wrong answers," especially when the analysis requires consideration of many different people and "interests they hold dear" or when many of the "costs" to be evaluated are not readily monetizable.\textsuperscript{319} She argues that, in these settings, important costs tend to be undervalued.\textsuperscript{320}

Another risk of these methods is that the attempt to value investments in human capital pushes the institution of marriage from a relationship based on love and obligation toward one based on self-interest. Even those courts allowing for compensation are careful to reject the discourse of markets and exchange. In a widely quoted passage, the New Jersey Supreme Court commented that "[m]arriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce."\textsuperscript{321}

The human capital cases illustrate Radin's argument that market and exchange discourse may be antagonistic to "the interests of personhood."\textsuperscript{322} These interests include context, or the particulars of family, love, experience, and moral commitment.\textsuperscript{323} Although Professor Radin's writing focuses on the dangers to personhood, these judicial opinions are animated by a similar worry about the dangers to marriage.\textsuperscript{324}

\begin{footnotesize}
\begin{enumerate}
\item Radin, supra note 141, at 1878.
\item Id.
\item Mahoney v. Mahoney, 453 A.2d 527, 533 (N.J. 1982). See generally Estin, supra note 85, at 765-66 (discussing cases resisting "commercializing" marriage).
\item Radin, supra note 141, at 1879-81. Radin writes: Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person. Such a conception makes actual loss of the attribute easier to countenance. For someone who conceives bodily integrity as "detached," the same person will remain even if bodily integrity is lost; but if bodily integrity cannot be detached, the person cannot remain the same after the loss. Moreover, if my bodily integrity is an integral personal attribute, not a detachable object, then hypothetically valuing my bodily integrity in money is not far removed from valuing me in money.
\item Id. at 1881.
\item Id. at 1905-06.
\item The literature on financial remedies for human capital changes in divorce opens the door for another type of valuation. Professor Elliman and others assert
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It is deeply disturbing to our relationships to attempt to separate their moral and financial aspects, and speaking as if they can be detached diminishes the quality of our connections to each other. This separation may have broader social effects as well. Radin argues that when market rhetoric is extended universally, it "transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities."325

In the economic analysis of divorce and its financial consequences, there are signs that the messy, flesh and blood reality of marriage and family life has been transformed into cleaner, simpler, more manageable forms. This work uses a model of marriage with roots in Becker's model of efficient specialization and in the functionalist sociology of the 1950s.326 In this model, the causes of divorce are rational,327 and the problems of divorce are solvable by economic and psychological expertise.328 Primarily, the economic problem of divorce is a problem of wives who have specialized in household production and who are left by husbands at the threshold of their career success.329 There is no domestic violence,330 there is no male unemployment, and

that compensation for a spouse's reduced marriageability may be important, particularly because the empirical evidence suggests that women's prospects decline more quickly than men's. See PARKMAN, supra note 286, at 131-32; Cohen, supra note 60, at 278-87; Ellman, supra note 65, at 80-81. It is difficult even to imagine how reduced marriageability might be measured, and, for now, the proposal lives only in the realm of theory.

325. Radin, supra note 141, at 1884-85.
326. See supra notes 50-60 and accompanying text; see also TALCOTT PARSONS & ROBERT F. BALES, FAMILY, SOCIALIZATION AND INTERACTION PROCESS 3-26 (1955).
327. BECKER, supra note 2, at 327-28; PARSONS & BALES, supra note 326, at 19-20, 24-25; Cohen, supra note 60, at 267.
328. E.g., PARKMAN, supra note 286, at 25-27; Gary S. Becker et al., An Economic Analysis of Marital Instability, 85 J. POL. ECON. 1141, 1144 (1977); Landes, supra note 79, at 36-39.
329. Becker, supra note 73, at 396 ("[N]o-fault divorce hurts women with children whose marriages are broken up by their husbands."). Divorce is also a problem because it discourages women from leaving the work force to care for children. Gary S. Becker, Finding Fault With No-Fault Divorce, BUS. WK., Dec. 7, 1992, at 22.
330. Both Gary Becker and Allen Parkman, in their recommendations to replace no-fault divorce with a mutual consent law, ignore the situation of a spouse who is a victim of abusive behavior but who cannot persuade his or her partner to agree to
there are no breadwinning wives to confuse the picture.

D. Child Support

Providing for children's needs requires enormous commitment from responsible adults in all varieties of families: single-parent families, two-parent families, formal and informal families, and divorcing families. Some children are fortunate to have deep sources of love and support from adults; others struggle to grow to adulthood with much less. Making the best of difficult family situations and protecting a child's resources of love and support is an enormously complex project for the law. Conflicts over children abound in family law, particularly where financial support and the rights of custody are concerned. The economic understanding of the family suggests reasons why these issues are so important for children and society and reasons why they have proved so difficult to address in divorce.

1. Investment

Much of the economic theorizing about the family centers explicitly on children, who are described as both the output and the raison d'être of marriage. At the same time, although much of this literature refers to spending on children as "investment," the contemporary economic reality for adults seems to be

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331. As described by Michael Walzer:

[Some families will be warmer and more intimate than others. Some children will be better loved than others. Some men and women will move into the spheres of education, money, and politics with all the self-confidence that parental affection and respect can produce; while others will step forward hesitantly, full of self-doubt.


332. The law also indirectly affects the care children receive as a result of the rules that affect the financial treatment of caregivers in tort or divorce actions. See generally Estin, supra note 85 (arguing that caregiving is a value in need of "rehabilitation" in the financial aspects of divorce law).

333. See supra notes 61-64 and accompanying text.
that spending on children is viewed as the price of consuming the experience of parenthood. Children cannot depend on the same level of "investment" where a preference for parenthood fades or where it never comes fully into existence. Perhaps the most significant investments in children are not made in money, but in the combination of physical nurture and emotional connection. We have no methods for valuing this care, just as we have no technique to measure the value of a mother's pregnancy and childbirth.

Economic theories suggest that bearing and rearing children is facilitated greatly by the existence of a stable, two-parent family. Such a household can achieve the efficiencies of a division of labor that traditionally permitted mothers to develop expertise in child care while fathers specialized in the role of provider. Although other patterns of labor division are increasingly common, with various advantages and disadvantages, the marital family at its best allows children to share in a wide range of material and emotional benefits.

Spending on children varies widely, but recent empirical research has explored how children share in the financial resources of a household in both absolute and relative terms. A series of studies by Thomas Espenshade have estimated total parental expenditures on children from birth to age eighteen,

334. See supra notes 91-98 and accompanying text.
336. See supra notes 61-64 and accompanying text; see also ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 57 (1993).
337. See Estin, supra note 85, at 781-91.
338. THOMAS J. ESPENSHADE, INVESTING IN CHILDREN (1984); LAZEAR & MICHAEL, supra note 28. For the most part, these studies consider only money spent and not the opportunity costs of time spent with children. See ESPENSHADE, supra, at 1; see also LAZEAR & MICHAEL, supra note 28, at 202-04 (discussing studies of time use in the household).
excluding the costs of college education. His data vary, depending on the parents’ socioeconomic status and on whether the wife is employed. In 1981 dollars, the prices ranged from a low of $58,300 per child to a high of $135,700 per child.339 In comparative terms, data analyzed by Lazear and Michael suggest that spending on each child in a household averages thirty-eight percent of the amount spent on each adult in the household.340

In post marital or nonmarital families, the resources of parental time and money are reduced. In post marital families, even where child support is paid dependably, children’s material living standards drop significantly.341 Children of never-married mothers fare even worse, for their mothers are dramatically less likely to receive child support payments.342 Average awards in both categories fall significantly below the estimates of parental spending on children in intact marital families, and often below the poverty level set by the Social Security Administration.343 In addition, because financial pressures require a greater labor force commitment, these families usually face greater difficulty in investing time in their children.344

Child support rules have become an area of increasing interest in economics. Espenshade’s empirical work has been the basis for “income shares” models for child support guidelines used in many states. However, recent studies have concluded that, even with these guidelines, child support awards are too

339. ESPENSHADE, supra note 338, at 3. At average 1981 prices, a four-year public college education would add another $15,492 to these figures. Id. at 32-33.

340. LAZEAR & MICHAEL, supra note 28, at 111-12. This percentage decreases as more children or adults are added to the household. Id. at 112. The data also indicate that adults with more education allocate greater percentages of income to their children. Id.

341. BELLER & GRAHAM, supra note 336, at 38-39; Another interesting empirical study is ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 128 (1992). The economic analysis of spousal and child support included in the Maccoby-Mnookin book was performed by Professor Elizabeth Peters.

342. BELLER & GRAHAM, supra note 336, at 91-92 (finding that 15.7% of never-married mothers versus 71.6% of mothers married at least once have child support awards).

343. Id. at 39, 138, 142 (discussing receipt rates and amounts for never-married mothers). For a discussion of policy recommendations, see id. at 253-55.

344. Id. at 237-38.
In their research on income allocation within households, Professors Lazear and Michael suggest that child support payments should be tied to predivorce allocations. Their analysis, however, recognizes that this problem goes beyond the realm of microeconomic theory, for they comment that "many of the surrounding issues are noneconomic," requiring "value judgments by society." In a different study, Professors Beller and Graham argue that payment of support has benefits beyond the value of the money received and note that the average new award is far below the average estimates of parental spending on children. Beller and Graham developed an economic analysis to explain why support awards and receipts fall short of predivorce levels. They assume that, "even after divorce, most parents still care about their children's well-being and explain the failure of fathers to pay (and mothers to insist on payment) with a microeconomic model. According to this model, there are four determinants of award and receipt outcomes: "the ability and desire of the father to pay support and . . . the expected costs and benefits of support to mothers." Although Beller and

345. A large empirical study of custody orders and agreements in two California counties discovered a significant decline in the economic well-being of divorced mothers and children, even assuming full payment of support orders. MACCOBY & MNOOKIN, supra note 341, at 259-65. This study suggests that fathers could afford to pay more, and points out a significant irony: the only reallocation of gender roles that results from divorce is that mothers become primarily responsible for both care and financial support of their children. Id. at 271.
346. LAZEAR & MICHAEL, supra note 28, at 153-65. After reviewing four different models, they concluded that income should be allocated between postdivorce households according to family size and composition. Id.
347. Id. at 150.
348. BELLER & GRAHAM, supra note 336, at 212, 246.
349. Id. at 38-39.
350. Id. at 60-81.
351. Id. at 60.
352. Id. at 81. Beller and Graham note that:

Child support presents problems for both mother and the father. She worries that he may not pay what he owes, and that if he does pay, he may try to exert too much control over her and the children. He worries that she will spend the money on herself rather than the children or that she will spend it on the children in a different way than he prefers.

Id. at 59.
Graham use socioeconomic data to approximate these determinants, they acknowledge that none of these factors can be measured sufficiently to explain the variations they observed in support outcomes. Moreover, they note that each of these "may also be influenced by certain relevant social and psychological factors."³⁵³

Economic theory suggests that the law imposes an obligation for support where parental altruism proves insufficient.³⁵⁴ In the United States, the legal system has begun to devote substantial resources to the establishment and enforcement of child support obligations. Federal and state legislation, a bureaucracy devoted to collecting support, and a dramatic increase in paternity determinations for children born to unmarried mothers have increased support collections to record levels.³⁵⁵

Although generally applauded, the increase in collection has also brought controversy. The primary purpose of the federal legislation was to reduce the costs of public support for families through the AFDC program.³⁵⁶ As a result, AFDC program participants now face an obligation to participate in the process as a condition of benefits.³⁵⁷ Still, at the poverty level, statistics demonstrate that the costs of the support collection bureaucracy are barely equal to the amounts collected from low income fathers.³⁵⁸ Given the wide array of enforcement procedures now available, including devices for collection of potentially enormous "arrearages" in support, the result of the program can be to impoverish a second family.³⁵⁹

³⁵³. Id. at 81.
³⁵⁴. See POSNER, supra note 1, at 149-50; Becker & Murphy, supra note 120.
³⁵⁶. Id. at 6. See generally CLARK, supra note 37, at 262-63, 735-39.
³⁵⁷. To encourage participation, $50 of the amount collected each month goes directly to the child's household; the rest is used to offset the cost of benefits. 42 U.S.C. § 657(b)(1) (1988).
³⁵⁹. Professor Harry Krause has argued that we need to reconsider whether, at this level, it is reasonable to expect absent fathers to foot the entire bill. Instead, he suggests we search for a "level of responsibility commensurate with the social reality of the situation." Id. at 21; see also Harry D. Krause, "Family Values" and Family Law Reform, 9 J. CONTEMP. HEALTH L. & POLY 109, 120-22 (1993). As Professor Krause points out, the strict enforcement of support obligations is ironic given the
Support issues are perceived differently in the case of divorce. Here as well, the setting and enforcement of support orders has increased substantially in recent years. The tone of this debate is far different, however, and there is evidence of growing political pressure in the opposite direction, toward limits on the obligations of divorced parents. Support for college education is a particularly controversial point.

Educational expense is a significant aspect of the investment in children's human capital. Although public education is available through the secondary level, college education typically requires major expenditures by parents, often at a considerable sacrifice to their own consumption. Data suggest that paying for children's education increasingly has become the primary form of wealth transfer between generations; this development parallels the emergence of professions and occupations as a form of "wealth" in society. This puts children of divorced and nonmarital families at a significant disadvantage, particularly in states with laws that define eighteen as the age of majority or deny courts the authority to order post majority

massive deregulation of sexual conduct and the changing legal treatment of legitimacy in the past decades. Id. at 117-18; see also J.R. Levesque, The Role of the Unwed Fathers in Welfare Law: Failing Legislative Initiatives and Surrendering Judicial Responsibility, 12 LAW & INEQ. J. 93 (1993); Paula Roberts, Child Support Enforcement for Low-Income Children: Part of the Problem or Part of the Solution?, 1 D.C. L. REV. 143 (1992); cf. Gary S. Becker, Unleash the Bill Collectors on Deadbeat Dads, BUS. WK., July 18, 1994, at 18 ("More men will hesitate to father children if they know they'll have a tougher time evading the duty to support them.").

360. See generally BELLER & GRAHAM, supra note 336, at 124, 156-60 (documenting the changes in award and receipt rates).

361. Public schools can be understood as a social investment in children's human capital that benefits society as well as individual children. See Becker & Murphy, supra note 120, at 6; Stout, supra note 92, at 1947, 1953, 1955.

362. These costs have not been included in the major studies of parental spending on children. See ESPENSHADE, supra note 338, at 76; LAZEAR & MICHAEL, supra note 28, at 50, 96. Espenshade's research did suggest that the average cost of post secondary school increases these numbers substantially. ESPENSHADE, supra note 338, at 76-86.

educational support. 364

Laws providing for emancipation at age eighteen and limiting the obligation for post secondary support appear causally linked to downward mobility of children of divorce, more than half of whom end up in lower socioeconomic strata than either of their parents. 365 Judith Wallerstein and Shauna Corbin write:

Thus, at the point of entry into college, when the young person’s need for financial support and parental encouragement to pursue goals commensurate with his or her intellectual capacity customarily increases, financial support ceased altogether or was maintained at minimal levels, conveying a lack of emotional investment in the youngster’s education strangely at odds with the father’s social position and expressed values. 366

In many states, a battle over support for college-aged children has been fought in the courts. 367 Some divorced fathers’ groups have challenged the obligation to pay support on various constitutional grounds. 368

364. The decrease from 21 to 18 in the age of majority in most states provoked considerable litigation over educational support orders. See Annotation, Responsibility of Noncustodial Divorced Parent To Pay For, or Contribute to, Costs of Child’s College Education, 99 A.L.R.3d 322 (1980). A few states have retained a 21-year-old age of majority for support purposes. See, e.g., IND. CODE ANN. § 31-1-11.5-12 (West 1987). Others permit the award of post majority educational support either by statute, e.g., OR. REV. STAT. § 107.108 (1989), or by court decision, e.g., Ex parte Bayliss, 550 So. 2d 986 (Ala. 1989).
366. Id. at 125.
367. E.g., In re Marriage of Plummer, 735 P.2d 165 (Colo. 1987) (rejecting obligation for post majority support except in cases of physical or mental disability); Newburgh v. Arrigo, 443 A.2d 1031, 1037-39 (N.J. 1982) (recognizing obligation to provide post majority educational support in some situations). The difference in state laws on this point triggers significant choice of law and jurisdictional trouble as well. See, e.g., Williams v. Williams, 387 S.E.2d 217 (N.C. Ct. App. 1990) (enforcing the father’s obligations under his Canadian divorce decree); West v. West, 419 S.E.2d 804 (S.C. Ct. App. 1992) (holding that the law of the daughter’s place of residence, rather than father’s, controls the obligation for educational support).
368. See, e.g., Parents Opposed to Punitive Support v. Gardner, 998 F.2d 764, 768 (9th Cir. 1993). In Gardner the plaintiffs argued that support payments under guidelines “alienate noncustodial parents from their children” and discriminate against the interests of the support obligor’s new children. Id.; see Fender v. Fender, 20 Fam. L.
In other states, the skirmishes have been legislative. One illustration is Colorado where the statutory child support guideline, adopted in 1986, has been revised almost annually. Some of the changes have been proposed by Colorado's state Child Support Commission in order to revise the guidelines on issues such as health insurance premiums and tax dependency exemptions or to update the figures used to reflect inflation and changes in federal tax law. However, a number of highly sig-


The constitutional attack is a regular response to changes in family law; for a constitutional challenge to no-fault divorce legislation, see In re Marriage of Franks, 542 P.2d 845 (Colo. 1975). Mr. Franks represents an extreme case; he was a lawyer whose contributions to the field of family law include two books: MAURICE FRANKS, WINNING CUSTODY: A NO-HOLDS-BARRED GUIDE FOR FATHERS (1983), and MAURICE FRANKS, HOW TO AVOID ALIMONY (1975). Franks was disbarred in Colorado in 1990 for charging excessive fees, converting client funds, filing claims for the purpose of harassment and abandoning his practice. State v. Franks, 791 P.2d 1 (Colo. 1990).

369. The Colorado guideline follows the "income shares" model. COLO. REV. STAT. § 14-10-115 (1987 & Supp. 1993). See generally Ray L. Weaver, New Child Support Guideline Adopted, 15 COLO. LAW. 1662 (1986). The guideline has been amended as follows: House Bill 87-1263, §§ 5, 6, 7, 8, 9, 38, 1987 COLO. SESS. LAWS, ch. 113 (repealing § (7)(b)(II)); House Bill 89-1180, §§ 14, 15, 1989 COLO. SESS. LAWS, ch. 140 (adding § (7)(d.5) and amending § (17)); House Bill 90-1254, §§ 9, 10, 1990 COLO. SESS. LAWS, ch. 113 (adding §§ (7)(b)(III), (18) and amending §§ (7)(c), (13)(a)(III)); House Bill 90-1160 § 35, 1990 COLO. SESS. LAWS, ch. 62 (amending § (7)(a)(I)(A)); House Bill 91-1049, § 1, 1991 COLO. SESS. LAWS, ch. 38 (adding § (1.5) and amending §§ (7)(b), (13), (14)(b), (18)); Senate Bill 91-0144, § 21, 1991 COLO. SESS. LAWS, ch. 60 (amending § (18)(a)); Senate Bill 92-0156, § 1, 2, 1992 COLO. SESS. LAWS, ch. 33 (adding §§ (1.5)(d), (16.5) and amending §§ (1.5)(b)(I), (2), (7)(e), (10)(a)(II), (18)(a)); House Bill 92-1230 §§ 1, 2, 3, 1992 COLO. SESS. LAWS, ch. 39 (adding §§ (13.5), (14.5) and amending §§ (2), (3)(b), (7)(a), (8), (10)(a)(II), (10)(c), (14)(c)(1) (18) and revising and reenacting § (10)(b) and repealing § (7)(e)); House Bill 92-1232, § 9, 1992 COLO. SESS. LAWS, ch. 40 (amending § (15)(b)(I)); House Bill 92-1359, § 18, 1992 COLO. SESS. LAWS, ch. 313 (amending § (17)); Senate Bill 93-0154, §§ 1, 7, 8, 1993 COLO. SESS. LAWS, ch. 270 (adding §§ (1.5)(e), (2)(b), (3.5), (18)(e) and amending §§ (1.5)(b)(I), (2)(a), (10)(c); House Bill 94-1029, § 107, 1994 COLO. SESS. LAWS, ch. 345 (amending § (18)(a)); Senate Bill 94-088, § 5, 1994 COLO. SESS. LAWS, ch. 266 (amending §§ (1.5)(b)(I), (1.5)(e), (7)(a)(I)(A), (7)(b)(III), (7)(d)(I), (18)(e)).

370. These are all aspects of the 1992 amendments cited supra note 369. For health insurance premiums, see Senate Bill 92-0156 § 1 (1992), and House Bill 92-1230 § 1 (1992). For tax dependency exemptions, see House Bill 92-1230 § 1 (1992).
significant changes in the law are the result of lobbying by "fathers' rights" groups or individual unhappy constituents seeking to reduce their obligations to pay support. The laws governing obligations for postsecondary educational support were weakened in 1991 and 1993 and eliminated in 1994.

2. Altruism

In theory, the justification for treating family members as an economic entity arises in part from the fact that they act altruistically rather than selfishly toward each other. Differently stated, they have shared utility functions because what is beneficial to one family member will automatically benefit the others. In the context of divorce, however, this assumption no longer holds. As a result, the law of child support reflects a ten-

371. In some of the more political cases, amendments that pass in late session maneuvering are revisited in the following year, keeping the statute constantly in flux. The issue of "voluntary underemployment" by a support obligor was addressed three times in five years (1987, 1990 and 1991). The original guideline allowed for determination that a parent's potential income from employment was higher than his or her actual income, unless that parent was "gainfully employed on a full time basis." COLO. REV. STAT. § 14-10-115(7)(b)(II) (1987 replacement volume). In 1987, this exception was deleted, in House Bill 87-1263 § 38 (repealing COLO REV. STAT. § 14-10-115(7)(b)(II)). In 1990, the concept of "voluntary underemployment" was deleted entirely, in House Bill 90-1245, § 9, 1990 COLO. SESS. LAWS, ch. 113, (adding § (7)(b)(III)). In 1991 the provision was re-revised to permit a limited consideration of this issue. See COLO. REV. STAT. § 14-10-115(7)(b)(III) (Supp. 1993); House Bill 91-1049, § 1, 1991 COLO. SESS. LAWS, ch. 38 (amending § 14-10-115(7)(b)(III)).

372. In 1991, the age of majority was reduced from 21 to 19. See COLO. REV. STAT. § 14-10-115(1.5) (Supp. 1993). Although subject to an exception for certain postsecondary education expenses, this change was made in a manner to terminate even contractually assumed obligations for support after age 19 pursuant to separation agreements signed prior to the effective date of the new law. The amended statute provides for an end to support at age 19 except for "costs of a program of postsecondary education" in cases in which the court deems it "appropriate" to require parents to make such a contribution. Id.

In 1993, the guideline was amended to put a ceiling on the amount of postsecondary support at a figure equal to the amount the obligor "was required to pay annually under the most recent child support order." COLO. REV. STAT. § 14-10-115(1.5)(b)(I) (Supp. 1993). In 1994, the original version of Senate Bill 94-88 would have eliminated all provisions for postsecondary support. See Colorado Senate Bill 94-88 (1994).

373. See supra notes 103-13 and accompanying text.

374. BECKER, supra note 2, at 278.
sion between the ideal of family relationships based on altruism and the reality that individual self-interest is also a strong motive, particularly after a divorce.375

In the case of divorce and the needs of children in post marital families, many of the assumptions about family life built into economic theory begin to fail dramatically. The determination of child support requires an explicit trade-off between spending on adults and spending on children in a context where bargaining, consensus, and altruistic decisionmaking are rarely feasible. In many cases, the decision maker is by necessity a judge or legislature, and, although these institutions may express sympathy and concern for one party or another, they do not act out of any form of altruism. Even for a support payor motivated by love or altruism, the fact of a court order and the difficulty of maintaining a sense of family and connection shift the analysis to a more complex matrix.

When economic analysis enters this terrain, children are conceived as "public goods," subject to bargains between parents with varying levels of altruism and varying interests in support, nurture, control, and connection.376 Applying this model, economists view allocation of children and resources between parents after divorce as a bargaining problem, suggesting that failure to pay adequate support is tied to the noncustodial parent's loss of control over how resources are allocated by the custodial parent.377

A different economic model views children not as objects but

375. In the common, emotion-laden linkage between financial support and parental right, there is an implicit commodification problem. See supra notes 199-202 and accompanying text. Does child support—the amounts ordered and the amounts actually paid—reflect the value of a child?
376. Weiss & Willis, supra note 100, at 272. See POSNER, supra note 1, at 143-44.
377. Weiss and Willis write:
The problem arises because of difficulties in monitoring the allocation of the custodians' expenditures when they live separately. If, for instance, the wife has custody, then the husband is unable to determine whether the custodian spends a dollar on herself or on the children. She in turn treats all sources of her income (i.e., earnings, alimony, child support) as fungible. There is therefore no self-enforcing mechanism in the divorce state that will induce the custodian to internalize the impact of his choice of child quality on his ex-partner.
Weiss & Willis, supra note 100, at 272.
as subjects—participants in the exchange processes of the family. Gary Becker and Kevin Murphy have argued that the law of parent-child obligations furthers efficiency goals by substituting for the exchanges that might be made between parents and children if children had the capacity to enter into long-term agreements.378 In one example, they suggest that state regulation of divorce may "mimic the terms of contracts between husbands and wives and parents and children that are not feasible."379

The traditional reciprocity of parental obligations and rights seems to suggest an exchange model very similar to the arguments of these economists,380 but the conception of parent-child relations as an exchange is highly problematic for the law. For one thing, to the extent that family values are measurable, the exchange is highly unequal. Raising children requires an enormous investment of time and energy as well as purchased commodities such as food, clothing, shelter, health care, entertainment, and transportation.381 To conceive of this investment as something to be reciprocated or returned is a risky premise. In the event that the relationship proves disappointing, or insufficient, or its costs are perceived as too great—a not unlikely event amid the trauma of divorce—the logic of exchange suggests two solutions: either putting an end to the relationship or attempting to pay less.

Virginia Held addresses this problem, pointing out that the issue is not whether we can theoretically treat human relations as contractual, but whether it is plausible to do so.382 She argues that most aspects of the paradigm of a mother-child relationship differ fundamentally from the paradigm of the economic man in contractual relationships.383 Mother-child relationships are not voluntary, and they are permanent and

378. Becker & Murphy, supra note 120, at 1; see also Posner, supra note 1, at 144 n.2.
379. Becker & Murphy, supra note 120, at 14.
380. See Katharine T. Bartlett, Re-expressing Parenthood, 98 Yale L.J. 293, 297-98 (1988) (examining "parenthood as exchange").
381. See supra notes 338-40 and accompanying text.
382. Virginia Held, Mothering Versus Contract, in Beyond Self Interest, supra note 143, at 287, 293.
383. Id. at 297.
Although there may be reciprocity, it is not enforceable and is not considered a goal of the relationship. The relationship involves significantly different understandings of power and equality and assumes the fact and necessity of dependence rather than autonomy. Privacy is an unusual state, with mother and child continually subjected to the needs or demands and expectations of others.

Given these differences, applying economic models to parent-child relationships may be affirmatively dangerous. Even in the economists' own terms, an obvious problem exists. When children are conceived of as goods or as participants in exchanges, there is less room for altruism. Neither love nor obligation connects consumers to their stereo equipment or creditors to their debtors. The problem is all the more serious because it gives intellectual validation to a growing social trend away from love and obligation and toward contractual understandings of parenthood.

In the academic and popular literature, there is an elaboration of these themes and undercurrents. The story of the divorced father oppressed by the burden of support payments now gets regular play alongside the story of destitute divorced mothers and their children. One issue regularly raised is the connection between payment of financial support and the ongoing relationship between father and child. Not surprisingly, cus-
tody issues have also become much "hotter" in the last decade.\textsuperscript{391}

Various studies, both empirical and clinical, have documented the connection between the parent-child relationship and child support.\textsuperscript{392} This research suggests that parental involvement with a child is correlated with compliance with support orders. It is not clear, however, whether there is a causal connection or a sequence between the two;\textsuperscript{393} the explanation may be simply that committed parents are more likely to visit and to pay.\textsuperscript{394} Although surprising to parents in many divorce cases, the law generally requires a custodial parent to adhere to visitation orders whether or not the other parent is making regular support payments and, correspondingly, requires the supporting parent to continue paying despite interference with visitation.\textsuperscript{395} The trend toward disconnecting the two has accelerated with the enactment of more stringent child support collection laws.\textsuperscript{396}

\begin{footnotes}
\item[393] Pearson & Thoennes, supra note 392, at 331, 337.
\item[394] See Wallerstein & Corbin, supra note 365, at 115-16 (noting "[a] high correlation . . . between the psychological intactness of the father and good or adequate economic support for the children").
\item[395] CLARK, supra note 37, at 746-47; see, e.g., Hayes v. Hayes, 303 P.2d 238 (Colo. 1956); Kane v. Kane, 391 P.2d 361 (Colo. 1964). \textit{See generally} Karen Czapanskiy, \textit{Child Support and Visitation: Rethinking the Connections}, 20 RUTGERS L.J. 619, 621-29 (1989) (summarizing a variety of laws connecting or disconnecting support and access); Krause, supra note 355, at 24 nn.93-94 (listing unusual cases and statutes which have linked the enforcement of child support with the issue of visitation rights).
\item[396] REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (RURESA) § 23, 9B U.L.A. 484 (1968). This section provides that inquiries into custody or visitation conflicts may not be litigated in a support enforcement proceeding under RURESA. \textit{See generally} Greg Geismann, Note, \textit{Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities}, 38 S.D. L. REV.
Some recent commentary supports a move in the opposite direction—arguing that visitation and child support should be linked explicitly together in the law—or suggests that our society already is moving in that direction. Many cases have emphasized the importance of protecting the continuing relationship between the child and the noncustodial parent. The connect-

As Czapanskiy points out, disconnection rules have more dramatic effects on those families in which children are in the AFDC program. Czapanskiy, supra note 395, at 627 n.39, 635, 657-58.

E.g., Geismann, supra note 396, at 604-08 (recommending abatement or termination of child support and tort remedies for interference with visitation rights).

See, e.g., Krause, supra note 355, at 23-24; see also Chambers, supra note 388, at 567 (arguing that informal agreements linking visitation and child support should be enforced under any new legislation). In jurisdictions with "disconnecting" rules, a custodial parent cannot condition visitation with the child on receipt of support, and a support-paying parent must provide financial support whether or not there is regular access to the child. Czapanskiy, supra note 395, at 619-24. Jurisdictions that permit the conditioning of rights and duties of support and visitation do so in a variety of ways. Id. at 624-29; Carolyn E. Taylor, Note, Making Parents Behave: The Conditioning of Child Support and Visitation Rights, 84 COLUM. L. REV. 1059 (1984).

In some jurisdictions, the law allows a paying parent a self-help remedy—withstanding support without prior court approval; in others, an appropriate order is required. Czapanskiy, supra note 395, at 624-25. In a wider range of states, visitation denial is a basis for excusing the payment of support arrearages, especially in extreme cases. See, e.g., Damico v. Damico, 20 Fam. L. Rep. (BNA) 1319 (Cal. 1994) (resolving split among California appellate courts in holding that active concealment of custodial parent and child until child's adulthood may be a defense to action for collection of support arrearages). Czapanskiy, supra note 395, at 624 n.19. According to Czapanskiy, the most extensive interconnections exist in New York law. See id. at 625-29.

Rules that permit the failure to pay support to lead to loss of visitation time are more unusual because denial of visitation is understood to be an extraordinary remedy. See id. at 621 n.7 (Cal.); id. at 624 nn.16 & 18 (Pa.); id. at 625 nn.23-24 (Fla. & Or.); id. at 628-29 nn.45-46 (N.Y., Ala., Ariz., Ark., Md., Utah, Nev., N.J. & W. Va.); id. at 643 n.94 (N.Y.). Given the nature of the remedy it is not tolerated as a matter of self-help, but instead requires a court order. Id. at 651 nn.129-30; see, e.g., Reardon v. Reardon, 415 P.2d 571, 574 (Ariz. Ct. App. 1966).

Professor Czapanskiy argues that although this language is often formulated in terms of the child's interests, it is actually a defense of the parent's rights. Czapanskiy, supra note 395, at 643. As she notes, however, protecting a parent's access to a child is not the same as requiring a parent to maintain a presence in a child's life. Id. The rules, in effect, give a nonresidential parent the option of having a role in raising a child, id. at 644, an option many divorced parents forego. Id. at 637. Czapanskiy is critical of the implicit compartmentalization of financial and caretaking roles in these rules. She argues that, even with disconnecting rules, a nonresidential parent's time is conceived in terms of social and entertainment activi-
tion between visitation and child support presents a serious dilemma for a world in which a large percentage of children will experience their parents' divorce.\textsuperscript{400}

Research by Judith Wallerstein and Shauna Corbin suggests that the child support/relationship issues are heightened for older children, particularly those involved directly in negotiations between their parents over support for college.\textsuperscript{401} This is clearly not an isolated phenomenon, given the highly charged political atmosphere around issues of the divorced parents' obligation to provide college support.\textsuperscript{402}

These difficult problems express a fundamental tension between two different models of parenthood. In one, raising children requires a massive investment of time and money and a commitment to carry through with the venture for twenty years or more, despite changes in individual utility or preference. In the other, children represent a "stream of satisfactions" to their parents, and enjoyment of this stream is apparently essential to sustaining the commitments children require. Our society seems to have shifted increasingly toward a consumer approach to parenthood, in which children are viewed as increasingly similar to homes and hi-fi sets. The risk of a linkage between child support and the parent-child relationship is that it serves to validate self-interest as the basis for legal obligation. Such a rule permits the treatment of children as consumer goods, a source of satisfaction for their parents, and replaces the norms of parent-child relationships with the rhetoric of exchange.\textsuperscript{403}

\begin{footnotes}
\item \textsuperscript{400} Regular visits are often impossible because of the long distances between parents' homes. In some conflict-ridden families, visits may create or contribute to a painfully tense atmosphere that is certainly harmful for children. The clinical evidence suggests that in many cases, support payments have a significant effect on the child's relationship with a nonresidential parent. Wallerstein & Corbin, \textit{supra} note 365, at 114-18. Particular problems arise when a parent uses financial resources to control the behavior of children or an ex-spouse. \textit{Id.} at 117-18, 121. Problems also arise when a parent supports two sets of children at significantly different standards. \textit{Id.} at 120.
\item \textsuperscript{401} \textit{Id.} at 118-24.
\item \textsuperscript{402} See \textit{supra} notes 367-72 and accompanying text.
\item \textsuperscript{403} See \textit{supra} notes 96-98 and accompanying text.
\end{footnotes}
This is not to argue that self-interest plays no legitimate role in parental behavior. Jane Mansbridge argues that institutions or environments that "generate some self interest return to unselfish behavior create an 'ecological niche' that helps sustain that unselfish behavior."\footnote{Mansbridge, \textit{Altruism}, supra note 143, at 137.} As she puts it, "If nice guys always finished last, the cost of niceness would be intolerable."\footnote{Id.} Mansbridge emphasizes that providing protections for altruism is not the same thing as converting altruism into self-interest.\footnote{Id.} But because of the assumptions on which family economic theory has been based, this tension has not been well explored. Economic theory has not paid sufficient attention to the economic and legal struggles of post divorce or nonmarital families, in which one adult routinely bears the burdens of both breadwinner and homemaker. Moreover, economic theory is not much help in deciding what is to be done for children whose consumption value to their parents has diminished.

Other models are possible. Katharine Bartlett has argued that norms of responsibility, rooted in the relationship between parent and child, offer better grounds for handling family disputes.\footnote{Bartlett, \textit{supra} note 380, at 298-300.} She suggests that taking responsibility is more complex than making an exchange because it requires a "personal commitment to how the child 'turns out'."\footnote{Id. at 300.} In her view, responsibility is a better basis for norm-building, because it helps to focus our attention on what kinds of parent-child relationships we want to foster.\footnote{Id. at 303-04.} Along the same lines, Karen Czapanskiy proposes rethinking the linkage of finances (child support) and relationship (visitation) in order to promote responsibility rather than exchange norms.\footnote{Czapanskiy, \textit{supra} note 395, at 658-65. Czapanskiy's discussion also reveals the hidden linkages between gender roles and the responsibility for child care when the parent-child exchange has failed. Id. at 644-58.}
E. Problems of Love and Obligation

Law and economics have traditionally exaggerated the ways in which family life is separate and distinct from other social institutions. In both disciplines, the present trend is toward denying those differences. Although the insight that family behavior has qualities of economic rationality is extremely useful, the simplification of human behavior and emotion that characterizes economic analysis creates different problems when imported uncritically into legal theory. Language that accords economic significance to household work helps immensely to legitimate its value and importance to society. Conversely, language that reduces the spectrum of ideas available for understanding family life to market and exchange metaphors presents serious risks.

The problems of sustaining family relationships and of creating safe places for love and obligation to flourish are complex and mysterious. There are no longer the tidy alignments of law, economics, and social mores that led us to assume that neatly rational solutions of family issues were within our grasp. The variables that economists treat as external to their systems are surely not trivial for law's understanding of family behavior. The effort to rationalize and quantify the family should not be permitted to eclipse our knowledge that the specifics of values and preferences are also important. We cannot understand the family without a theory that can also embrace love, obligation, pride, anger, jealousy, guilt, sacrifice, and faith. In addition, theory cannot be built on a single model of efficient family life. What is most important about the family as an institution is precisely that it allows for the expression of sharing and commitment in an enormous range of forms. Increasingly, "family" includes both nonmarital and post marital families for which few channels have developed. These untraditional "families" struggle to fulfill the same social and economic functions of their more familiar counterparts. The goal should not be to implement an economic master plan for "The Family," but to allow love and obligation to find a foothold in the landscape of self-interest.

Rebecca Blank points out that although mainstream economic models have many important strengths, they are only a "partial
picture of reality."\(^4\)\(^1\)\(^1\) She argues that economists may be tempted to draw sweeping conclusions from "uncomfortably narrow evidence" because they have not been trained to understand the limits of their models,\(^4\)\(^1\)\(^2\) and she characterizes the assumption of "empowered, in-control Westernized individuals" as the central limitation of rational choice models.\(^4\)\(^1\)\(^3\) In the effort to bring useful insights from economics into family law, the limitations of these behavioral models are particularly important.

Economic analysis has a clear role where rules of compensation and questions of distributive justice must be determined. In tort and divorce law—controversies both outside and within the family—the recognition that marriage and family life have a significant economic component is essential. It is not necessary to quantify precisely the value of a homemaker, a professional license, or a life's lost opportunities. Nor can we seek to appraise or divide academic achievement or children. However, we must recognize the emotional connections of the family as deeply meaningful in life, and we must value and support the human relationships that give rise to these goods, both morally and financially, whenever possible.

The challenge of this goal is apparent in each of the settings discussed above. The work of a homemaker is valuable, but its measure does not lie in the other work the homemaker could perform or the price paid in the market for cleaning or child care services. The methods that rely on these measures are rife with value judgments that reflect the biases and constraints of market life. On the other hand, failure to compensate a family for the loss of a care giver would be a far worse result. Tort law rules can be part of a social support system for the love and sense of commitment that make the homemaker's work unique.

In the context of career assets and divorce, similar problems occur. With the attempt to separate and place a monetary value on an individual's personal qualities and achievements, we see *Homo economicus* at his evolutionary extreme. But the effort

\(^{411}\) Blank, *supra* note 135, at 133.
\(^{412}\) Id. at 134.
\(^{413}\) Id. at 140.
demands judgments based on a range of factors that fall outside the ordinary bounds of economic analysis. Who is this person? What real opportunities lie before him? To what extent is his success or failure the result of family relationships? What is the role of particular preferences or talents? Here, the problems of alienation and commodification extend to both the individual and the marital relationship.

Because of the risks that this sort of approach entails for non-contractual aspects of the marital relation, many commentators outside of economics (including most courts that have considered these issues) have rejected attempts at quantification of non-market "assets." Instead, the law has moved toward a system that recognizes the role played by altruism and relationship in individual success without trying to monetize it. The remedies applied and recommended in this literature allow for a "self-interest return" to unselfish behavior, but without allowing that return to convert acts of love and obligation into acts of self-interest and exchange.

Controversy surrounds the use of contract and restitution principles in family relationships because of the same delicate balance. Economic analysis requires that we recognize that services within a household are valuable, just as services between strangers are. At the same time, relationships within a family are far more complex and contextual than what economic analysis can embrace. These disputes require more than a theory based on individual rationality. They require consideration of broader institutional problems and the specific contexts of family life: the nature and duration of the relationship; attention to the presence of selfish and unselfish behavior; and an equal concern with fostering autonomy and preventing exploitation.

The problem of balancing selfishness and altruism is difficult enough where adult relationships are involved, but it is far worse once children are recognized as having a large stake in family life. The law of parent-child relationships cannot be based on a theory which views children as objects of exchange or subjects of bargaining. Instead, the law needs theory that can recognize and support the expression of love and the assumption of obligation.

Neoclassical economists have extended the reach of their theo-
ry by expanding its premises. Where utility maximization is understood to include all of the goals and interests of family life, and self-interest is broadened to include a broader range of motivations for behavior, economic analysis appears unconstrained, no longer tied to a framework of explicit markets. Broadening these premises has made possible the impressive theoretical and empirical achievements of the new family economics, but it has also tended to obscure many of the internal tensions and paradoxes of family life. The theoretical leap has not reconstituted the household, which is still marked by social structures that are entirely distinct from those of the marketplace.

When cut loose from its moorings in the structures of the market, economic theory is less versatile. The examples in this Article illustrate different aspects of this problem. The analysis of tort claims, contract and restitution, and property division in divorce all reveal the limitation which economics encounters in the setting of the family and the difficulties that arise from the application of market principles to nonmarket behavior. Without a framework of well defined commodities, explicit prices, and fully elaborated exchange norms, family economic theory is far more constrained than traditional market economics. 414

In each of the areas this piece has reviewed, economic analysis is useful in part because it leads toward a set of deeper questions about how and whether family relations can be understood to be about exchange and choice. The characterization of these


Economics, it must be admitted, does appear to be more developed than the other social sciences. But the great advantage which economics has possessed is that economists are able to use the "measuring rod of money." This has given a precision to the analysis, and since what is measured by money are important determinants of human behavior in the economic system, the analysis has considerable explanatory power . . . . If it is true that the more developed state of economics, as compared to the other social sciences, has been due to the happy chance (for economics) that the important factors in determining economic behavior can be measured in money, it suggests that the problems faced by practitioners in these other fields are not likely to be dissipated simply by an infusion of economists, since in moving into these fields, they will commonly have to leave their strength behind them.

Id. at 209.
as problems of love and obligation locates them at the boundary line between family and market and suggests that definition of these boundaries poses a large and complex moral problem. An economics without boundaries may not be much help in establishing a healthy working relationship between these spheres.

The economic analysis of child support reflects all of these difficulties and a deeper moral problem as well. Economic theory, along with many other modes of thought, puts children at the center of family life. But while the theory can plausibly treat adults as participants in exchange processes, that premise cannot be applied to parent-child relationships without eroding the theoretical base of the enterprise. There is no analogue in mainstream economics for this problem; the market is simply not "about" guns or butter or cars. The problem this poses is not at the boundaries, but at the very core of our thinking about the family.

CONCLUSION

This Article has contrasted the "new home economics" with an older paradigm which treated the family as a unitary entity and largely ignored its economic functions. The Article argues that the insights of those theorists linking household economic production into the sphere of the market have been useful in areas of the law that relate to household production. Their work has advanced our discussion with a range of vocabulary and concepts that have helped to move the legal debate beyond its traditional paradigms, which also disregarded the work that occurred within households.

At the same time, these economic theories are limited in their scope. Because they seek neutrality where individual choices are concerned, these theories cannot address values that are important in family life. Moreover, because the theories assume certain goals and organization of marriage, they are not as helpful in understanding the full range of family types that law must comprehend. Finally, the theories place rationality and individual autonomy at the analytical center, ignoring the importance of social institutions and the constraints of social/market life, as well as the presence of factors beyond self-interest and altruism. None of these limitations abrogates the power of the economic
methods or insights. Rather, they suggest that economic insights are most useful when incorporated into a larger framework of legal analysis. The goal of the framework is to sustain love and obligation, both of which are essential to family life.

Thus, computation of tort recoveries when homemakers are injured or killed presents a problem that goes beyond the question of economic measurement. The process requires first that a set of entitlements be defined in law, with attention to the importance of redress as well as the risks of commodification. Similarly, enforcement of household exchange relations in contract or restitution is not feasible without a set of norms that structure and interpret the meaning of family relationships. Although those norms are, in part, individually determined, they are also importantly social in nature and effect, drawing on a wide variety of economic and noneconomic purposes. Even in the specific context of property division upon divorce, the economic model of marriage has its limits. The insight of economic theorists that human capital changes have significant and long-term effects during and after marriage is important. But efforts to value and divide precisely the particular aspects of changes in human capital that have occurred during marriage have the effect of objectifying both husband and wife and their relationship.

Most problematic of all is the economic understanding of parent-child relationships. Here, the danger is that parents in fact see their children primarily as consumer goods—that self-interest and exchange have come to widely replace the norms rooted in love and obligation that once governed these relations. This problem is especially serious because the family is the place in which skills, talents, values, morals, and rationality are generated. If the inventory is reduced here, it may be forever lost.

The family is who we are and who we become. We can no more hope to separate the equity and debt investments in human flourishing than we could determine the optimal balance of work and leisure or the socially efficient number and spacing of children. What we may hope to do is to find means of sustaining both the fragile possibilities of human love and the sense of obligation and commitment that sustain it.