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Ann Laquer Estin

University of Colorado Law School

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CAN FAMILIES BE EFFICIENT?
A FEMINIST APPRAISAL

*Ann Laquer Estin**

This Article examines the convergence of feminist and law and economics theory on family law questions, particularly issues of marriage and divorce. Both feminist legal theory and law and economics analysis have come to occupy a significant place in the American legal academy, demonstrated by growing numbers of conferences, journals, casebooks and monographs, and electronic mail lists in each area.¹ Not surprisingly, as the two fields have grown, they have begun to touch, to overlap, and occasionally to come into conflict. This process has been evident in the extensive literature on sex discrimination in employment and is increasingly apparent in writing on family law issues.

Laws governing financial aspects of divorce, including alimony and property division rules, have been subjected to both types of theorizing; in some cases, the policy recommendations of feminist and economics theorists have converged. But the two frameworks are also remarkably different in their goals, their methods and their values. These differences emerge in both the prescriptions for legal change and the descriptive methodology of each approach.

Economists, and many of those in law and economics, have drawn a sharp distinction between positive and normative economic theory. Feminist analysis, however, suggests that the boundary between positive and normative approaches is not easily drawn, or easily maintained, particularly when focusing on non-market behavior, such as in family relationships. My goal with this Article is to put these methodological

* Associate Professor, University of Colorado Law School. I presented an early version of this paper at the Feminism and Legal Theory Workshop, Columbia Law School, on February 25, 1995. My thanks to Martha Fineman, Jane Maslow Cohen, Jennifer Gerarda Brown, Margaret Brinig and the other participants in the workshop for their comments.

1. I use "feminist" to denote theory which centers on women's experiences and the diverse social, economic, and historical contexts of women's lives. For a useful introduction, see *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (Deborah L. Rhode ed., 1990). See also Gary Lawson, *Feminist Legal Theories*, 18 HARV. J.L. & PUB. POL'Y 325 (1995) (elaborating a number of possible definitions of feminist legal theory). For an introduction to law and economics, see ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (1988); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992) [hereinafter POSNER, ANALYSIS]. See also JOYCE P. JACOBSEN, *THE ECONOMICS OF GENDER* (1994).

issues into sharper relief, and to suggest some conclusions as to the potential and limits of economic approaches to family law in light of the feminist critique.

Part I of this Article outlines the conventional distinction between positive and normative economics, describes some feminist responses to economic theory, and discusses how these two distinct frameworks have converged and diverged in the ongoing debate over financial aspects of divorce. Part II elaborates a series of problems that emerge at the intersection of economics, feminism and family law, demonstrates that the boundary between positive and normative theory is highly unstable in this setting, and finally argues that prescriptive economic analysis of the family is problematic for feminist theorists because of the narrow descriptive models on which economic theories are built. Part III poses the question asked in the title of this piece: can families be efficient? After questioning whether normative economic analysis can be sensibly employed in this setting, this article concludes that efficiency norms are not adequate unless the descriptive models more fully address a wider range of issues of particular concern to women.

I. FRAMEWORKS

As many writers have noted, economics as an academic discipline has been resistant to feminist theory.² The primary reason is historical: for most of its life span, economics as a discipline was not interested in women. Classical and neoclassical models of economic activity constructed the market as the sphere of production, the sphere of exchange, the sphere of economic life. The family was seen as entirely distinct, and women's work in the family sphere was invisible and not valued.³

More recent generations of economists have revised this view using economic methods to develop a theory addressing household production and family behavior.⁴ Their "new home economics" has been primarily

2. See generally BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS (Marianne A. Ferber & Julie A. Nelson eds., 1993) [hereinafter BEYOND ECONOMIC MAN]; Marianne A. Ferber, *The Study of Economics: A Feminist Critique*, 107 AM. ECON. ASS'N PROC. 357 (1995).

3. I have described this more fully in another article. See Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 991-99 (1995) [hereinafter Estin, *Love and Obligation*].

4. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY (enlarged ed. 1991) [hereinafter BECKER, FAMILY]. For an early analysis of this work, see Isabel V. Sawhill, *Economic Perspectives on the Family*, DAEDALUS, Spring 1977, at 115, and Marianne A.

descriptive, developing explanations for patterns of family behavior from birth and education through courtship, marriage, divorce and bequests. Some aspects of these new models, particularly the recognition that work in the home has real productive value, are extraordinarily important.

There are many examples of the large gaps in traditional legal and economic thought where women's work is concerned: household labor is excluded from such statistical measures as the Gross National Product (GNP); it is ignored in the comparison of household living standards; it is not fully recognized by public benefits and tax laws; and it is treated differently than market labor in a wide range of tort, contract and family law doctrines. In each of these areas, the new home economics provides a vocabulary and analytic framework that can be usefully employed to begin filling the gaps.⁵ This means that economic theories can help to remedy legal practices that have been consistently harmful to women's interests.⁶

At the same time, feminist theorists in law and in economics have challenged the descriptive model of the new home economics on a number of grounds. Although the model can be useful, it leaves out a great deal. Using the highly abstract approach and streamlined assumptions that are typical of economic proof, the new theory describes courtship, marriage, fertility, divorce, and making gifts and bequests to family members, as rational, utility-maximizing behavior. Economists describe the gender-based division of labor in the household as efficient, in the sense that it allows a family to generate a maximum level of utility with a given set of resources.⁷ But because these models omit much of the context and complexity of family life, the conclusions they yield have often seemed inadequate.

Ferber & Bonnie G. Birnbaum, *The New Home Economics: Retrospects and Prospects*, 4 J. CONSUMER RES. 19 (1977). See also Estin, *Love and Obligation*, *supra* note 3, at 999-1016.

5. See generally Estin, *Love and Obligation*, *supra* note 3.
6. One important example is the growing use of opportunity cost and human capital concepts in the debate over alimony and property division in divorce. See, e.g., E. Raedene Combs, *The Human Capital Concept as a Basis for Property Settlement at Divorce*, 2 J. DIVORCE 329 (1979); Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980). But cf. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2276 (1994) (criticizing the use that has been made of human capital analysis).
7. See BECKER, FAMILY, *supra* note 4, at 30-53.

For feminists, the problem with these economic models is not only that they are so abstract, but that the analysis often assumes precisely those points which we would most like to explore. Writing in 1977, Isabel Sawhill suggested that we should ask whether economists “have done anything more that describe the status quo in a society where sex roles are ‘givens’—defined by culture, biology, or other factors not specified in the economic model.”⁸ Other feminist theorists have been far blunter.⁹ Also, as many have noted, the economists’ conclusion that the traditional, gender-structured household is efficient depends to a great extent on factors the model does not examine, particularly women’s comparative disadvantage in the labor force.¹⁰

In addition, there is a methodological distance between economic analysis and feminist legal theory which makes the two difficult to assimilate to each other. This has been elaborated in writing by a number of feminist economists, who advocate broadening the recognized methods of economic inquiry to include a variety of less quantitative methods. For example, Julie Nelson calls for a process of “imaginative rationality.”¹¹ Along the same lines, Donald McCloskey describes the need for metaphor and story to supplement fact and logic, for questionnaires and interviews

8. Sawhill, *supra* note 4, at 120; *see also* Ferber & Birnbaum, *supra* note 4, at 21 (“Clearly tradition is the dominant factor in determining the division of tasks within the family.”).
9. *See, e.g.*, BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 266–73 (1986) (arguing in response to Becker that men’s economic power is the basis for inequality between men and women within households); MARILYN WARING, *IF WOMEN COUNTED* 37–39 (1988) (referring to Becker as “the new high priest of patriarchal economics”); Marianne A. Ferber & Julie A. Nelson, *Introduction: The Social Construction of Economics and the Social Construction of Gender*, in *BEYOND ECONOMIC MAN*, *supra* note 2, at 1, 6 (describing feminist criticisms of Becker’s work); *see also* Paula England, *The Separative Self: Androcentric Bias in Neoclassical Assumptions*, in *BEYOND ECONOMIC MAN*, *supra* note 2, at 37, 41–49; Diana Strassman, *Not a Free Market: The Rhetoric of Disciplinary Authority in Economics*, in *BEYOND ECONOMIC MAN*, *supra* note 2, at 54, 58–63.
10. *See* Ferber & Birnbaum, *supra* note 4, at 20–21; Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 *Geo. L.J.* 89, 97 (1993); *see also* Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 *Geo. L.J.* 2423, 2437–47 [hereinafter Singer, *Alimony and Efficiency*]; *infra* Part I.B.
11. Julie A. Nelson, *The Study of Choice or the Study of Provisioning? Gender and the Definition of Economics*, in *BEYOND ECONOMIC MAN*, *supra* note 2, at 23, 30; *see* Nelson, *supra*, at 29–31; *see also* Ferber, *supra* note 2, at 359; Myra H. Strober, *Rethinking Economics Through a Feminist Lens*, 106 *AM. ECON. ASS’N PROC.* 143 (1994).

as well as numerical data sets, and for observation and conversation in addition to mathematical proofs.¹²

Some of the feminist objections to economic theories and methods are familiar from other literature critiquing neoclassical economic theory and the uses to which it has been put in law. Thus, many writers have argued that economists' premise that interpersonal utility comparisons are impossible serves to conceal distributive concerns and to defeat the possibility for larger "value" judgments.¹³ There are also numerous critics of neoclassical theory who call for greater attention to issues of power, inequality and other social factors.¹⁴

Although these types of criticism are repeated throughout the legal academy, they seem particularly sharp whenever economic analysis is brought beyond the sphere of explicit market activities.¹⁵ In the context of family law, economic models are less readily tested or falsified than models used to analyze market behavior, because in the family there is no common currency for measuring value. Models based on self-interest also seem less adequate to explain family behavior, because of the broad spectrum of motivations we recognize in "private" life,¹⁶ and the many competing normative visions of the family as a social institution.¹⁷ All of the standard criticisms of the economic approach take on added intensity when economic theory is employed not simply to describe and explain

12. See Donald N. McCloskey, *Some Consequences of a Conjective Economics*, in BEYOND ECONOMIC MAN, *supra* note 2, at 69, 69.
13. See, e.g., C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161, 172-75 (1986).
14. See, e.g., Ferber & Nelson, *supra* note 9, at 12-13 (citing these scholars as examples: KENNETH E. BOULDING, *THREE FACES OF POWER* (1989); ROBERT FRANK, *CHOOSING THE RIGHT POND* (1985); ROBERT M. SOLOW, *THE LABOR MARKET AS SOCIAL INSTITUTION* (1990)). Related points are made in the legal literature. See, e.g., Baker, *supra* note 13, at 37-41; White, *supra* note 13, at 185-93.
15. On the question of "economic imperialism," see generally Robert D. Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books*, 29 UCLA L. REV. 1260 (1982). For a discussion of the advantages of economics beyond its sphere, see Ronald H. Coase, *Economics and Contiguous Disciplines*, 7 J. LEGAL STUD. 201, 209-10 (1978).
16. This is a particularly strong theme in feminist criticisms of economics, which have stressed the importance of factors beyond self-interest, such as empathy, connection, and altruism. See England, *supra* note 9, at 45-48.
17. This is not to suggest that the older models, based upon a rigid separation of public or market life from households and the family, are preferable. See *supra* notes 3-6 and accompanying text; *infra* notes 56-58 and accompanying text.

family behavior, but to provide a normative base for a variety of specific family policy recommendations.¹⁸

A. Positive and Normative Economics

Neoclassical economics is staunchly positivist. Milton Friedman, in his classic essay on economic methods, explains the point this way:

Positive economics is in principle independent of any particular ethical position or normative judgments. As Keynes says, it deals with "what is," not with "what ought to be." Its task is to provide a system of generalizations that can be used to make correct predictions about the consequences of any change in circumstances. Its performance is to be judged by the precision, scope, and conformity with experience of the predictions it yields. In short, positive economics is, or can be, an "objective" science, in precisely the same sense as any of the physical sciences.¹⁹

In order to predict various types of behavior, economists utilize models that are highly abstract and mathematical. To those who object that these models omit too many variables, the customary response is that economic science is descriptive, not prescriptive, and these are not normative findings in any event.²⁰ Economic theorists argue that it is necessary to reduce the number of variables under consideration in order to develop testable hypotheses. Thus, these greatly simplified models of behavior are a prerequisite for rigorous scientific analysis. Again, in the words of Professor Friedman:

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18. Despite the controversies over economic "imperialism," there are a number of "true believers" prepared to enact family legislation based purely on efficiency criteria. Gary Becker writes regularly in *Business Week* magazine, offering proposals on a wide range of policy matters, including no-fault divorce and child support enforcement. See Gary S. Becker, *Finding Fault with No-fault Divorce*, *BUS. WK.*, Dec. 7, 1992, at 22 [hereinafter Becker, *Finding Fault*]; Gary S. Becker, *Unleash the Bill Collectors on Deadbeat Dads*, *BUS. WK.*, July 18, 1994, at 18, 18 [hereinafter Becker, *Deadbeat Dads*]; see also Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 524-29 (1995) [hereinafter Estin, *Economics*] (discussing the application of efficiency theories to divorce decisions).
 19. MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 4 (1953) (citing JOHN NEVILLE KEYNES, *THE SCOPE AND METHOD OF POLITICAL ECONOMY* 34-35, 46 (1891)).
 20. See, e.g., POSNER, *ANALYSIS*, *supra* note 1, at 16-17.

A hypothesis is important if it “explains” much by little, that is, if it abstracts the common and crucial elements from the mass of complex and detailed circumstances surrounding the phenomena to be explained and permits valid predictions on the basis of them alone. To be important, therefore, a hypothesis must be descriptively false in its assumptions; it takes account of, and accounts for, none of the many other attendant circumstances, since its very success shows them to be irrelevant for the phenomena to be explained.²¹

Economists relegate normative work to a second arena of economic inquiry, known as “welfare economics.”²² This type of analysis deploys notions of efficiency to determine whether a “particular proposed policy or legal change[] will make individuals affected by it better off in terms of how they perceive their own welfare”²³ In general, the norms used in welfare economics assume and predict that “private ordering,” based on individual rather than collective decisions, will lead to better outcomes across society.²⁴

Economists recognize that their normative contributions depend heavily on an underlying positive analysis. According to Friedman: “Normative economics and the art of economics, on the other hand, cannot be independent of positive economics. Any policy conclusion necessarily rests . . . on a prediction that must be based—implicitly or explicitly—on positive economics.”²⁵ Friedman is not suggesting that normative economics can be reduced to a positive analysis; rather, his view is that an accurate descriptive account must precede the attempt to make policy prescriptions.²⁶

Law and economics has also laid claim to a positivist methodology. Most of the important early work generated accounts that explained legal aspects of economic regulation, beginning with subjects such as antitrust.

21. FRIEDMAN, *supra* note 19, at 14–15; see POSNER, *ANALYSIS*, *supra* note 1, at 16–18; see also MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 3–6 (1993).

22. See TREBILCOCK, *supra* note 21, at 7–8.

23. TREBILCOCK, *supra* note 21, at 7.

24. See POSNER, *ANALYSIS*, *supra* note 1, at 13–16.

25. FRIEDMAN, *supra* note 19, at 5.

26. See FRIEDMAN, *supra* note 19, at 5 (suggesting that many, but not all policy disagreements trace to different predictions about the effects of a given policy change, and therefore “the progress of positive economics” could help resolve differences about economic policy).

Over time, "law and economics" began spreading to a wide range of other fields.²⁷ In this process, law and economics has followed the lead of economic theorists, who have also directed their attention far beyond behavior in explicit markets.²⁸

In law and economics, it is more difficult to maintain the economists' traditional boundary between positive and normative analysis.²⁹ Thus, although Richard Posner defends his theory against charges of reductionism or essentialism on the basis that it is intended as descriptive rather than prescriptive,³⁰ his critics have noted that he has a tendency to mix normative judgments liberally in his positive analysis.³¹ Other law and economics theorists place themselves more explicitly in the normative or welfare economics tradition.³² As Judge Posner himself suggests, the

27. Judge Richard Posner, in his textbook, describes this as "the economic theory of law." POSNER, *ANALYSIS*, *supra* note 1, at 23–25 (noting that this larger inquiry includes what he calls "the efficiency theory of the common law," which is based on the hypothesis that some legal rules serve economic efficiency goals). *See also* Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979) [hereinafter Posner, *Uses and Abuses*].

The arenas for economic analysis of law now range from antitrust, tax and corporate law, to laws governing a variety of non-market behaviors, including criminal law, civil rights, divorce and adoption. A few examples will serve to illustrate the point. For positive and normative economic arguments in criminal law, see DARYL A. HELLMAN & NEIL O. ALPER, *ECONOMICS OF CRIME: THEORY AND PRACTICE* (2d ed. 1990) and Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). For examples in civil rights, see GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971) and John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986). For arguments in family law, see BECKER, *FAMILY*, *supra* note 4, and RICHARD A. POSNER, *SEX AND REASON* 3, 33–36, 85–88 (1992) [hereinafter POSNER, *SEX AND REASON*].

28. *See* Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385 (1993) [hereinafter Becker, *Economic Way*]. Posner notes that this work has precedent in the work of Jeremy Bentham. *See* Posner, *Uses and Abuses*, *supra* note 27, at 281–82.

29. *See generally* Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978) [hereinafter Michelman, *Norms*]. I share the view that economics is generally more useful to law in its descriptive role than in its normative manifestations. *See* Estin, *Love and Obligation*, *supra* note 3, at 1082–86.

30. *See, e.g.*, POSNER, *ANALYSIS*, *supra* note 1, at 16–18; Posner, *Uses and Abuses*, *supra* note 27, at 284–87.

31. *See* Michelman, *Norms*, *supra* note 29, at 1038–40 ("we can carelessly slip from an approximate empirical Is to a definite ideal Must or Ought to Be"); Baker, *supra* note 13, at 4–6 (arguing that Posner uses efficiency "as a normative, and not merely as a technical standard").

32. *See, e.g.*, TREBILCOCK, *supra* note 21, at 21–22; *see also* WERNER Z. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* 4–10 (2d ed. 1988).

normative bent of law and economics analysis may be inevitable, given the highly normative character of our legal traditions.³³

One reason that the separation between positive and normative analysis is difficult to maintain is that the language of "efficiency" figures prominently in both. In positive analysis, "efficient" is a descriptive term, denoting a utility-maximizing event or state of affairs.³⁴ As a normative guideline, "efficiency" is the economist's criterion for socially desirable legal rules in a wide range of spheres.³⁵ Frank Michelman suggests that while positive economics applies pure efficiency norms, normative analysis or "economic policy studies" are based on modified efficiency criteria.³⁶

In law and economics writing on family law, the confusion between positive and normative theories is also apparent. Positive analysis, describing the perceived productive efficiencies of a traditional marital division of labor based on gender,³⁷ has generated a spate of normative work, prescribing policy changes intended to protect and restore this type of household.³⁸ Other work, based on the descriptive premise that private agreements are value-maximizing for the parties to the agreements, has generated policy recommendations intended to remove courts from the divorce process.³⁹ Throughout, although the touchstone of this writing is "efficiency," it is often difficult to discern which meaning of the term is operating.

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33. See Posner, *Uses and Abuses*, *supra* note 27, at 285; see also Michelman, *Norms*, *supra* note 29, at 1032.
34. See, e.g., Frank I. Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307, 309 (1979) [hereinafter Michelman, *Comment*]; see also Cooter, *supra* note 15, at 1263 ("A process is efficient when it yields the maximum output from given input, or equivalently, when it yields a given output with the minimum input.").
35. See POSNER, *ANALYSIS*, *supra* note 1, at 13-16.
36. See Michelman, *Norms*, *supra* note 29, at 1032-35; see also Estin, *Economics*, *supra* note 18, at 526-29 (arguing that different economic approaches to divorce reflect different efficiency norms).
37. See generally Estin, *Love and Obligation*, *supra* note 3, at 1001-13.
38. See, e.g., ALLEN M. PARKMAN, *NO FAULT DIVORCE: WHAT WENT WRONG?* (1992); Severin Borenstein & Paul N. Courant, *How to Carve a Medical Degree: Human Capital Assets in Divorce Settlements*, 79 AM. ECON. REV. 992 (1989); Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); see also Becker, *Finding Fault*, *supra* note 18.
39. See, e.g., Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. 503 (1993); see also Becker, *Finding Fault*, *supra* note 18.

Further evidence, however, suggests that the two modalities of economic reasoning have in fact been distinguished. Descriptive economic accounts of family life have had significant influence on law, but work that reflects the shift to a normative economic framework has not been as warmly received.⁴⁰ Prescriptive theories seem to be a tougher sell, most likely because law responds to many competing normative visions of the family.⁴¹ Ultimately, it appears that the claim to normative authority draws the most fire from critics and keeps many legal theorists at a cautious and skeptical distance from economic analysis.

B. Feminist Theory and Family Economics

Among feminist theorists, the responses to economic analysis seem to range from moderate discomfort to deep hostility. At one end of the spectrum there are a few writers who argue that feminist and economic theories, properly understood, will often converge.⁴² As Jana Singer points out, economic analysis "seems to cohere with notions of formal gender equality and the rejection of rigid gender roles."⁴³ At the other end of the spectrum, some feminist writers are deeply pessimistic, criticizing the entire enterprise of economic research as presently constituted as unavoidably tainted by the broader system of gender oppression.⁴⁴

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40. The influence of positive economic models is described in Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605, 626-59. For doubts as to the normative sufficiency of economic theory, see, for example, Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197, 217-27. My own work also falls into this category. See Estin, *Economics*, *supra* note 18. See also the feminist writing on economic approaches to divorce which is described in part I.B of this article.
41. Judge Posner has repeated in many settings his view that efficiency is not a sufficient normative foundation for law. See, e.g., POSNER, *ANALYSIS*, *supra* note 1, at 27 ("[T]here is more to justice than economics."). See also Kenneth E. Boulding, *Economics as a Moral Science*, 59 AM. ECON. REV. 1 (1969).
42. See, e.g., TREBILCOCK, *supra* note 21, at 43-48; Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 191-92 ("[C]onservative feminism' . . . is . . . the idea that women are entitled to political, legal, social, and economic equality to men, in the framework of a lightly regulated market economy."); Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533, 553 (1991).
43. Singer, *Alimony and Efficiency*, *supra* note 10, at 2427.
44. See Wanda A. Wieggers, *Economic Analysis of Law and 'Private Ordering': A Feminist Critique*, 42 U. TORONTO L.J. 170 (1992). As a number of writers have noted, many of the differences between these poles echo the long-standing debate over "sameness"

Between these two poles, a number of feminist scholars are interested in the insights and arguments that economic analysis can offer, while remaining troubled by many of the assumptions and methods of neoclassical economics.⁴⁵ Writers in this group have pointed to a number of variables that are normally omitted from economic investigation, but which seem centrally important for understanding women's experiences and concerns.⁴⁶ At a minimum, feminist theorists agree that the subjects of economic inquiry must be expanded to include the specific concerns of women and the effects of gender on experience.⁴⁷ Beyond this, some feminist economists have begun to challenge the predominance of choice theory, the paradigm of the rational, utility-maximizing individual agent, and the heavily mathematical nature of contemporary economic theory.⁴⁸ For these writers, a feminist economics would require entirely new models which do not dichotomize public and private life, which take issues of gender and power into account, and which recognize empathy and connection as well as self-interest and autonomy.

Unfortunately, we do not yet know much about how a feminist economics would work: what new theoretical models it would employ; what empirical methodologies it would develop; and what new information and insights it would generate.⁴⁹ Most feminist economists work within existing methods, exploring a range of important new questions and also challenging the conclusions and policy implications of other economic research.⁵⁰ Their work has led to valuable contributions on important issues including women's wages and labor-force participation,⁵¹

and "difference" issues within feminism. See Marcia Neave, *Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'*, 44 U. TORONTO L.J. 97, 130-31 (1994); Trebilcock & Keshvani, *supra* note 42, at 535-37.

45. See, e.g., England, *supra* note 9, at 41-49; Singer, *Alimony and Efficiency*, *supra* note 10, at 2434-37, 2443-51; Strassman, *supra* note 9, at 56-63.

46. See Sawhill, *supra* note 4, at 120-24; sources cited *supra* note 45.

47. See generally Ferber & Nelson, *supra* note 9, at 2-7.

48. See generally BEYOND ECONOMIC MAN, *supra* note 2.

49. See Rebecca M. Blank, *What Should Mainstream Economists Learn from Feminist Theory?*, in BEYOND ECONOMIC MAN, *supra* note 2, at 133, 136-38. One very helpful source is JACOBSEN, *supra* note 1, which focuses on the economics of gender.

50. Ferber and Nelson refer to this group as "feminist empiricists." See Ferber & Nelson, *supra* note 9, at 8; see also Blank, *supra* note 49, at 134.

51. See BERGMANN, *supra* note 9; see also Symposium, *The Gender Gap in Compensation*, 82 GEO. L.J. 27 (1993); FRANCINE D. BLAU & MARIANNE A. FERBER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* (1986); PAULA ENGLAND & GEORGE FARKAS, *HOUSEHOLDS, EMPLOYMENT, AND GENDER* (1986); Paula England, *The Failure of Human Capital Theory to Explain Occupational Sex Segregation*, 17 J. HUM. RESOURCES 358 (1982).

the economics of housework, child care, and non-market production,⁵² the control and distribution of income within households,⁵³ divorce,⁵⁴ and poverty.⁵⁵ This work has encouraged the development of new mainstream economic theories addressing household production and family organization and bargaining.⁵⁶

Feminist analysis has led many writers to conclude that even positive economic theory requires a new vision of the relationship between family life and market behavior, and an elaboration of the interdependent effects of gender in these two spheres.⁵⁷ This implies new modes of description, which can more adequately model the complexity of women's experience. Thus, although mainstream theory depicts traditional gender-based family roles (and the split between public and private life) as efficient, feminist theorists have raised significant challenges to this view.⁵⁸ For example, Marianne Ferber and Bonnie Birnbaum have proposed a model that addresses the present and future well-being of both husband and wife rather than the total production of the household.⁵⁹

52. See BERGMANN, *supra* note 9; WARING, *supra* note 9.

53. See Marjorie B. McElroy & Mary Jean Horney, *Nash-Bargained Household Decisions: Toward a Generalization of the Theory of Demand*, 22 INT'L ECON. REV. 333 (1981); Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 INT'L ECON. REV. 31 (1980).

54. See Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978); H. Elizabeth Peters et al., *Enforcing Divorce Settlements: Evidence from Child Support Compliance and Award Modifications*, 30 DEMOGRAPHY 719 (1993); H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986).

55. See generally JACOBSEN, *supra* note 1, at 59–61, 201–02.

56. Diana Strassman calls this a “mainstream fix.” Strassman, *supra* note 9, at 63–64. For a defense of the uses of traditional economic models in some settings, see Blank, *supra* note 49, at 138–40.

57. See Hadfield, *supra* note 10, at 96–97; Neave, *supra* note 44, at 99, 109.

58. See, e.g., Hadfield, *supra* note 10; Singer, *Alimony and Efficiency*, *supra* note 10, at 2440. Efforts have been made to correct for these problems within the theory, but as Diana Strassman notes, the likelihood of achieving a “mainstream fix” depends on whether the problems identified lie at the core or in the periphery of mainstream economic theory. Strassman, *supra* note 9, at 63–65. Despite the advances of the new home economics, the conceptual dichotomy between the public and private spheres remains deeply embedded in economic thinking. Revising this aspect of economic theory is a far more radical project, because it calls into question the dominant economic paradigm of the market itself.

59. See Ferber & Birnbaum, *supra* note 4, at 26–27.

C. Alimony and Divorce

At a normative level, there are points at which the feminist and economic understandings of family life converge, both pointing toward the same policy goals. While some legal commentators have sought to abolish alimony,⁶⁰ some feminist and economic theorists have sought to expand it.⁶¹ Their agreement is clearest with the paradigm alimony case: a long-term marriage, children, an older housewife with no recent employment experience, and a husband with a good career and substantial earnings.⁶² Beyond this core, although both frameworks can be utilized to advocate spousal support remedies in divorce, the analysis begins to diverge.

Early discussions of alimony in the law and economics literature were positivist, describing an economic rationale for alimony orders under traditional, fault-based divorce regimes.⁶³ More recent projects have led to a normative argument for alimony awards and against no-fault divorce regimes, based on a description of marriage and family life that emphasizes the benefits of specialization of labor in the family, and the costs in "human capital" terms that these arrangements often entail.⁶⁴

As the economic accounts recognize, specialization within the family has traditionally assumed clearly divided gender roles. Although these roles appear to be efficient during a marriage, they have put wives at significantly greater risk in the event of divorce. Economists, in order to protect the potential for gains from specialization in traditional marital roles, have recommended that both alimony and property division be structured to compensate for the greater investment that wives make in such marriages, or that divorce should be restricted in order to protect homemakers.⁶⁵

60. See, e.g., Louise B. Raggio, *Don't Men Have Rights, Too?—Or Lifetime Alimony, An Idea Whose Time Has Come and Gone*, in *ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE* 33 (Section of Family Law, American Bar Association ed., 1988).

61. Economic theorists advocating alimony remedies include PARKMAN, *supra* note 38; POSNER, *ANALYSIS*, *supra* note 1, at 147–48; Landes, *supra* note 54. See also *infra* notes 64–66. For feminist approaches, see *infra* notes 66–67.

62. See, e.g., Ellman, *supra* note 38, at 17; Ann Laquer Estin, *Maintenance, Alimony and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 745 n.84 (1993) [hereinafter Estin, *Family Care*]. Some feminists are opposed to the continuation of alimony remedies. See *infra* note 67.

63. See, e.g., POSNER, *ANALYSIS*, *supra* note 1, at 147–48; Landes, *supra* note 54.

64. See, e.g., Lloyd Cohen, *Marriage, Divorce and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987); Ellman, *supra* note 38.

65. See, e.g., Cohen, *supra* note 64; Ellman, *supra* note 38; Trebilcock & Keshvani, *supra*

Although feminist theorists do not generally share the goal of propping up traditional marital roles, many feminists have supported the goal of better financial remedies for women facing divorce. The economists' policy recommendations have therefore posed something of a dilemma. Feminists recognize the ways in which the arguments behind these proposals may be helpful to women who are now impoverished by divorce. At the same time, they recoil at the heavily gendered nature of the efficiency norms applied by economists.⁶⁶ As Jana Singer describes the problem, "the economic efficiency justification for alimony rests on assumptions that are extremely troubling from the perspective of feminist theory."⁶⁷

There is also less agreement between feminist and economic theorists on the goal of making divorce more difficult. Elimination of no-fault divorce laws, to force spouses to bargain over the terms of divorce, has been advocated by economists including Nobel laureate Gary S. Becker.⁶⁸ There have not been economic voices raised loudly in support of the current regime. Among feminists, views of divorce law are more divided, with a number of writers pointing out that fault-based divorce was also a problem for women, or taking the view that restraining women's access to divorce may be more problematic than the harms that come from present divorce practices.⁶⁹

These differences are closely tied to the criticisms that feminists have made more generally concerning the "new home economics."⁷⁰ To the

note 42, at 549–58. The original positive economic explanation for alimony awards is in Landes, *supra* note 54.

66. See Margaret F. Brinig, *Comment on Jana Singer's Alimony and Efficiency*, 82 GEO. L.J. 2461 (1994); June Carbone, *Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); Singer, *Alimony and Efficiency*, *supra* note 10, at 2434–37.
67. Singer, *Alimony and Efficiency*, *supra* note 10, at 2424. There are also feminist theorists who oppose the institution of alimony. See, e.g., Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 80–89 (1987) [hereinafter Kay, *Equality and Difference*]. But see Herma Hill Kay, *Commentary: Toward a Theory of Fair Distribution*, 57 BROOK. L. REV. 755, 763–65 (1991).
68. See Becker, *Finding Fault*, *supra* note 18; see also PARKMAN, *supra* note 38; Zelder, *supra* note 39.
69. See, e.g., Kay, *Equality and Difference*, *supra* note 67; Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435 (1992); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989) [hereinafter Singer, *Divorce Reform*].
70. See sources cited *supra* notes 8–10.

extent that the efficiency of traditional roles is a function of gender norms that remain unexamined, or worse, of factors such as discrimination against women in the marketplace, the analysis is circular and unpersuasive.⁷¹ Moreover, even without considering the effects of discrimination against women, it is not clear that traditional gender-based household roles are "efficient." As a number of feminist writers have pointed out, the "economic approach" to the family has ignored empirical evidence suggesting that wives often bear much heavier loads of work and family responsibility than their husbands.⁷² Conversely, as Gillian Hadfield has argued, economists' failure to question the structure of gender roles in the family has led to models of labor markets that ignore serious efficiency problems.⁷³

Singer, in an analysis of the "efficiency" arguments for alimony, points out that even if household specialization were efficient, feminists would be concerned about the link between specialization and gender inequality both within the family and in the larger society.⁷⁴ She points out that traditional household roles have also been the source of significant problems for women. These include the perpetuation of gender-based inequality and power differentials in the wider society,⁷⁵ and the problems generated in divorce when a wife bears a disproportionate share of the costs which may have made these roles "efficient" in the pre-divorce family.⁷⁶ While the economic approach suggests that alimony should compensate some of these costs, the particular remedies these

71. See Carbone, *supra* note 66, at 1490-91; Hadfield, *supra* note 10, at 96. As Gillian Hadfield argues, to the extent that economists explain the "gender gap" in wages as a result of women's greater responsibilities at home, the analysis has not established that this organization of work is efficient. See Hadfield, *supra* note 10, at 96.

72. See, e.g., Brinig, *supra* note 66, at 2469-73; Carbone, *supra* note 66, at 1485-88; Hadfield, *supra* note 10, at 97-98; Singer, *Alimony and Efficiency*, *supra* note 10, at 2440. This suggests the possibility that the division of labor is achieved by the male household head by exploitation rather than by altruism. See Hadfield, *supra* note 10, at 98. At the very least, the data suggest that household heads do not act altruistically in the allocation of the more unpleasant aspects of household work. See BERGMANN, *supra* note 9; see also Mary Ann Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 390-92 (1995).

73. See Hadfield, *supra* note 10, at 97 (calling for more attention to the interconnections between family and market life).

74. See Singer, *Alimony and Efficiency*, *supra* note 10, at 2440-41.

75. See Singer, *Alimony and Efficiency*, *supra* note 10, at 2441.

76. See Singer, *Alimony and Efficiency*, *supra* note 10, at 2441-42; see also Estin, *Family Care*, *supra* note 62, at 780-81.

writers have suggested are clearly less than complete.⁷⁷ Given the potential harm to women in our society from household specialization, Singer asks whether it is sensible to “encourage women to abandon their careers . . . in exchange for a promise to ‘hold them harmless’ financially in the event of divorce.”⁷⁸

Picking up on several of these themes, Margaret Brinig explores in more detail the assumptions on which the economic theory is based, identifying a number of these which give feminist theorists reason to be cautious.⁷⁹ Brinig emphasizes a number of ways in which family life is more complex than the economic models allow: marital decisions generate substantial externalities because they affect children,⁸⁰ and these decisions are not easily reversed at the time of divorce.⁸¹ Brinig also questions the assumption in the mainstream theory that the division of labor must occur only between husband and wife, because this ignores the possibility that other individuals may perform household work. Furthermore, she challenges the assumption that there are always increasing returns to scale from additional hours of home or market production.⁸²

77. As Singer notes, the theory attempts to specify both a justification for alimony in general and a method for computing particular awards. See Singer, *Alimony and Efficiency*, *supra* note 10, at 2441. See also Cohen, *supra* note 64, at 303; Ellman, *supra* note 38. In these formulas, however, factors such as the wife’s “loss in marriageability” or emotional distress are typically excluded. See Estin, *Economics*, *supra* note 18, at 567.
78. Singer, *Alimony and Efficiency*, *supra* note 10, at 2442 (quoting June Carbone, *Economics, Feminism & the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1465, 1493 (1990)). This is a theme many others have sounded. See, e.g., Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 80 (1987); see also Estin, *Family Care*, *supra* note 62, at 778 n.215, 800 n.314 (noting a shift in position by Kay and others who have addressed this point).
79. See Brinig, *supra* note 66, at 2470–73.
80. See Brinig, *supra* note 66, at 2463; see also Carbone, *supra* note 66, at 1488–89.
81. See Brinig, *supra* note 66, at 2465. As she points out, there is more than one “deal” to be considered in any marriage, and alimony makes much greater sense in some settings than others. Brinig, *supra* note 66, at 2466–68.
82. See Margaret F. Brinig, *The Law and Economics of No-Fault Divorce—A Review of No-Fault Divorce: What Went Wrong?*, 26 FAM. L.Q. 453, 456–57 (1993) (book review). In addition, she notes that the analysis may fail to take into account various psychic costs for women and men that result from specialization. See Brinig, *supra*, at 457–58. Ferber and Birnbaum also develop this point. See Ferber & Birnbaum, *supra* note 4, at 23. Along the same lines, June Carbone has argued that a model based on maximizing household income neglects other goods, such as the “psychic satisfaction” of employment or parenthood, and the prestige and security of economic independence. See Carbone, *supra* note 66, at 1488–89.

Feminist writers have proposed different rationales for alimony, which would recognize the economic effects of household specialization on women without fostering sharply delineated gender roles. June Carbone describes a restitution-based system, which she believes would both “encourage[] women to look to their own earnings rather than to marriage for their financial security,”⁸³ and “encourage women to continue to bear the primary responsibility for childrearing and to make sacrifices that will enhance their husbands’ careers.”⁸⁴ Singer proposes an income sharing approach that would “combine the equal partnership ideal that underlies current equitable division schemes with the economist’s recognition of enhancements in human capital as the most valuable asset produced during most marriages.”⁸⁵ Singer argues that this approach could help “to diminish existing power disparities during marriage,” and would “encourage *husbands* to increase their investment in family care.”⁸⁶ Joan Williams, who also recommends income equalization after divorce, would go further. She argues for new entitlements in property, so that both husband and wife would have equal claims to wages that either earns during the time their children are dependent and for a considerable period after divorce.⁸⁷

The differences between feminist and economic approaches to alimony are subtle but significant. If the goal of divorce remedies is to foster “efficiency” within marriage, alimony is important only in those cases in which a significant economic event has occurred. These would include the case in which one partner has increased his or her “human capital” by acquiring a diploma or professional license,⁸⁸ and the case in which one partner has suffered a decrease in market-based human capital by devoting time to childrearing.⁸⁹ While these cases can be stated in

83. Carbone, *supra* note 66, at 1493.

84. Carbone, *supra* note 66, at 1493. Carbone describes Ellman’s alimony theory, *see infra* notes 88–90, as a restitutionary system consistent with her own approach. She argues, however, that if the objective of alimony is to foster traditional household labor division, paying alimony as a form of expectation damages to wives would be most appropriate. *See* Carbone, *supra* note 66, at 1495.

85. Singer, *Alimony and Efficiency*, *supra* note 10, at 2454.

86. Singer, *Alimony and Efficiency*, *supra* note 10, at 2455.

87. *See* Williams, *supra* note 6, at 2257–66.

88. For example, *see* Ellman, *supra* note 38, at 68–71, although he would limit alimony in this case to the amount of the other spouse’s lost earning capacity. Many economists prefer property division remedies in this situation. *See, e.g.*, PARKMAN, *supra* note 38, at 130–32; Borenstein & Courant, *supra* note 38.

89. *See*, Ellman, *supra* note 38, at 71–73.

gender neutral terms, many economists presume that traditional gender roles are more efficient, because of women's "comparative advantage" in reproductive activities.⁹⁰ These are also relatively easy cases, in which arguments could be made on a wide range of grounds.⁹¹

The economic approach does not seem to support alimony in a number of other situations, such as the case in which parties have a premarital or separation agreement excluding alimony,⁹² the case of a relatively short marriage or one in which there had not been much specialization of labor,⁹³ the case in which there was a specialization of labor but no significant human capital changes during the marriage,⁹⁴ or the case in which the partner who would have an alimony claim is the one seeking a divorce.⁹⁵ Indeed, these present much more difficult normative problems, on which our current practice is often divided.

While the specific recommendations of feminist legal theorists are often similar to those of their law and economics counterparts, their approach to these alimony cases is quite different. Feminist analysis has devoted much greater attention to the pool of income and property interests of a married couple, and has sought to redefine these as shared rather than separate.⁹⁶ It has also been less concerned with the project of measuring the contributions or losses of each partner, or specifying the particular form that families should take.⁹⁷ Feminists have emphasized

90. On comparative advantage in reproductive activities, see BECKER, FAMILY, *supra* note 4, at 38–41. Ellman designs his theory to address "economically rational marital sharing behavior" rather than traditional gender roles. See Ellman, *supra* note 38, at 48–49. He notes, however, that because of social mores, wives' noneconomic losses from divorce are generally more severe than husbands'. See Ellman, *supra* note 38, at 43–44, 80–81.
91. See generally, Schneider, *supra* note 40, at 246–47 ("The force of the paradigm case largely arises from the personal and moral relationship between the husband and wife.").
92. See Trebilcock & Keshvani, *supra* note 42, at 542–45. But see PARKMAN, *supra* note 38, at 97–98.
93. For Ellman, this includes most childless marriages. See Ellman, *supra* note 38, at 63–66.
94. See, e.g., PARKMAN, *supra* note 38, at 133–34, 137; Ellman, *supra* note 38, at 66–71.
95. Ellman would recognize an alimony claim in this situation. See Ellman, *supra* note 38, at 56. But other economists who advocate mutual consent divorce rules, would require the spouse seeking a divorce to bargain with the other over terms. See PARKMAN, *supra* note 38, at 137–40; Becker, *Finding Fault*, *supra* note 18. For a housewife who wants out, this would often mean forfeiting any alimony award. See generally Estin, *Economics*, *supra* note 18, at 533–50.
96. See Singer, *Divorce Reform*, *supra* note 69, at 1113–21; Williams, *supra* note 6.
97. See Estin, *Family Care*, *supra* note 62, at 781–91.

support for ongoing care for children and their caregivers in marriage, after divorce, and in non-marital families, rather than seeking compensation for the "lost opportunities" that caring for children may represent.⁹⁸ They are also more likely to look for solutions to the public sector, rather than conceptualizing family matters as a purely private affair.⁹⁹

The economic and feminist approaches to divorce are also divergent. Economists have argued for an end to unilateral no-fault divorce laws,¹⁰⁰ and for greater privatization of the divorce process.¹⁰¹ The theoretical basis for these policy recommendations is that no-fault divorce laws allow inefficient divorces, defined in this literature as divorces in which although one individual may gain from the divorce, the parties' combined gain from divorce is less than their combined gain from remaining married. To address this problem, economists have advocated mutual consent rules, which would force the spouse seeking a divorce to bargain with the other over compensation for his or her anticipated losses.¹⁰²

Although feminist writers have also criticized the effects of no-fault divorce, they have not sought to abolish it. Some have argued that women did not fare appreciably better under the former laws.¹⁰³ Others have focused on the need for divorce in a number of specific situations that many women confront, particularly when one spouse is abusive,¹⁰⁴ or in the situation in which a woman undergoes fundamental personal changes after her marriage that lead her to question or reject more traditional marital roles.¹⁰⁵

Some economists have claimed common ground with feminist theorists on the question of divorce policy, highlighting the points at

98. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995); Estin, *Family Care*, *supra* note 62, at 781-802.

99. Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

100. See, e.g., PARKMAN, *supra* note 38; Becker, *Finding Fault*, *supra* note 18, at 22; Zelder, *supra* note 39.

101. See, e.g., Becker, *Deadbeat Dads*, *supra* note 18, at 18. See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 [hereinafter Singer, *Privatization*].

102. See, e.g., PARKMAN, *supra* note 38; Becker, *Finding Fault*, *supra* note 18, at 22; Zelder, *supra* note 39. See generally Estin, *Economics*, *supra* note 18, at 533-50.

103. See, e.g., Singer, *Divorce Reform*, *supra* note 69.

104. See Lacey, *supra* note 69, at 1443-46.

105. See Lacey, *supra* note 69, at 1446-48.

which the two approaches have converged.¹⁰⁶ These accounts do not acknowledge that in many contexts, economics appears to lead to significantly different answers than a feminist analysis would suggest. The divergence begins with the radically different positive frameworks and methods on which the two approaches depend.

II. METHODOLOGY: THREE PROBLEMS

This section considers a series of methodological problems with the positive economic analysis of households. The first problem addressed is that the process of describing household labor in economic terms requires “valuing” it based on comparisons between labor in the household and in the market. Accurate valuations are impossible, however, because work in the home is structured entirely differently from work in the market, and because gender-based disparities affect the meaning and value accorded to work in both contexts. Second, applying the descriptive methods of economics to the family has proceeded from the assumption that exchange and market metaphors and the concepts of rational choice and utility-maximization are a sufficient language for speaking about the family. Feminist theories suggest that a wider range of conceptions is required. A third problem results from the first two: when the descriptive theory is used as a basis for prescriptive, normative pronouncements about what is “efficient” in family life, it requires that every aspect of family life be subject to this dual process of valuation and exchange. This prospect raises troubling commodification concerns, and tests severely the premises of economic analysis in this setting.

A. Making Comparisons

Because most household work takes place outside the market, it is largely ignored in economic theory and policy-making. Feminist scholars in a number of disciplines have written about this problem, pointing out that the traditional exclusion of nonmarket work from economic analysis creates substantial policy distortions, many of which are heavily gendered.¹⁰⁷ For mainstream economists, where no profits are produced,

106. See e.g., PARKMAN, *supra* note 38, at 116–20; Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 HARV. J.L. & PUB. POL’Y 241, 260–62 (1993).

107. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 204 n.48 (1989); WARING, *supra* note 9, at 36–43; see also MARGARET G. REID, *ECONOMICS OF HOUSEHOLD PRODUCTION* (1934).

an activity is not productive. Marilyn Waring gives a wonderful example: a woman who supplies the labor of childbirth is not thought to be performing work or engaged in production, unless she is a paid surrogate. At the same time, a midwife, nurse, doctor or anesthetist in attendance at the birth is engaged in work.¹⁰⁸ By the same token, argues Waring, "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."¹⁰⁹

As economists have sought to include household production in their models, they have faced an obvious and immediate problem. Because the economic value of work is defined by the wages paid for it in the market, work that is not performed for a price has no measurable value. There are a number of solutions to this problem, all of which are based on comparisons between work in the home and work in established labor markets.¹¹⁰ This type of comparison is made regularly in tort litigation involving injury or death to a homemaker. In this setting, an expert economist testifies as to what it would cost to purchase various household services on the market¹¹¹ or as to what the homemaker's time was worth in the market place.¹¹²

In order to value household services or a homemaker's time, an economist must find an appropriate point of comparison in the market. Can a homemaker's services be "replaced" with a minimum wage domestic worker, or should the comparison be to a teacher, chef, or nurse? Should the computation include the costs of fringe benefits, such as worker's compensation insurance, that would be paid for a market employee? If the homemaker works more than forty hours in a week, should the figures include overtime pay? And, if she performs several tasks simultaneously, should the computation give credit for them

108. WARING, *supra* note 9, at 27–28.

109. WARING, *supra* note 9, at 28.

110. This is not done as a general matter in computing various economic indicators, although there have been efforts to change the practice. See the Unremunerated Work Act, H.R. 966, 103rd Cong. § 3 (1993), and the Economic Equality Act, H.R. 2790, 103rd Cong. § 803 (1993), sponsored by Rep. Barbara Rose-Collins (D. Mich.), which would have required that gross national product be computed to include the value of unremunerated work including household work and child care. Gary Becker has supported this type of change. See Gary S. Becker, *Housework: The Missing Piece of the Economic Pie*, *Bus. Wk.*, October 16, 1995, at 30.

111. This is usually described as a "replacement cost" measure of the housewife's value.

112. This is usually described as an opportunity cost approach. See generally POSNER, *ANALYSIS*, *supra* note 1, at 192–93.

separately? In practice, when these valuations are performed in tort actions, the comparisons are typically limited to a few basic services, those performed by individuals with wages among the lowest in the marketplace.¹¹³

Similar issues arise with the alternative method of computation, which asks what the homemaker would be paid if she sold her labor in the market. Here as well, forensic experts often conclude that a homemaker could only find a relatively unskilled or low-paid position in the labor force, which suggests an equally low value for her household work. More sophisticated economic theory goes a few steps beyond this analysis, pointing out that the market price reflects the lowest possible value for her time, and arguing that it would be more accurate to look at what the homemaker would be earning if she had had the opportunity to invest in the types of skills, training and experience that are more highly valued in the job market.¹¹⁴ This approach has been resisted in forensic circles, however, perhaps because it seems almost impossibly speculative, beyond what our personal injury damages rules can tolerate.

Both of these models incorporate into their valuation methods the lower values accorded by the market to women as workers and to the work of women. As feminist economists have elaborated in some detail, gender issues permeate the labor market.¹¹⁵ If we use the market as a point of comparison, we bring all of these problems into the economic description of the household. Not surprisingly, tort recoveries for housewives who are injured or killed are far lower than those for wage earners.¹¹⁶

This is a real dilemma. Any approach which uses the market prices of women's work and women workers to set the value of household labor does not move us very far beyond the view that women's work does not really count. The feminist literature in economics suggests that the problem of value in the market and value in the home is the same problem: a large portion of the "gender gap" between men's and women's wages relates directly to the greater burdens of family work and caregiving borne by women.¹¹⁷ As Hadfield points out, there is a close relationship

113. See Neil K. Komisar, *Toward a General Theory of Personal Injury Loss*, 3 J. LEGAL STUD. 457, 480-83 (1974).

114. See POSNER, *ANALYSIS*, *supra* note 1, at 193.

115. For an outstanding elaboration of these issues, see BERGMANN, *supra* note 9.

116. See Estin, *Love and Obligation*, *supra* note 3, at 1023-35.

117. Victor Fuchs, in his book *Women's Quest for Economic Equality*, notes that white married women in their forties earn only 85% of what their unmarried counterparts

between the structure of labor in the market and the household. To the extent that differences between men and women in labor markets are based on women's different burdens of family responsibility, most economists see no normative problem, and no lack of efficiency. Hadfield argues that this is because they have not explored very fully either the positive or normative aspects of the typical household division of labor:

Although we have numerous theories of how the labor market contributes to the gender gap, economists have essentially only one theory of why the household is organized as it is. And because this theory concludes that the organization of the household is efficient, there has been no stimulus for economists, wedded to efficiency as a normative criterion, to explore with positive theory the impact that policies aimed at restructuring the traditional household might have on the wage gap.¹¹⁸

While recognizing that the mainstream theory has led to valuable insights, she argues that there is a need to devise richer alternative theories.¹¹⁹ Hadfield recommends that positive economic theory should begin to investigate "what creates and sustains the traditional division of labor in the household."¹²⁰

B. Exchange Metaphors

The "economic model" of family behavior begins with the assertion that individuals decide whether to marry, have children, or divorce based on a comparison of the direct and indirect benefits and costs of different actions. It conceives of people in family relations as rational, utility-maximizing actors, facing a range of choices with limited supplies of time, energy, wealth and other resources. It imagines that for most goods

earn per hour of work. VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 59 (1988). He emphasizes that there are many reasons why married women's family responsibilities lead to lower wages, including: time taken out of the labor market for pregnancy, childbirth and child-rearing; constrained job choices in order to achieve flexibility required for child-care; more absences from work, and a reduced investment in their own "human capital," starting even before marriage and child-rearing begin. See FUCHS, *supra*, at 60-64.

118. Hadfield, *supra* note 10, at 89.

119. See Hadfield, *supra* note 10, at 96-98.

120. Hadfield, *supra* note 10, at 103. As Professor Hadfield notes, this is an area in which feminist legal theory may be useful to economists. See Hadfield, *supra* note 10, at 103.

there are substitutes, although recognizing that these may not be perfect, and postulates that individual actors have an ability to choose freely.

One set of difficulties has arisen as theorists seek to analyze behavior in families with models developed to explore behavior of individuals dealing at arm's length. One approach has been to treat each "family" as if it were an individual, that is, an economic actor with a single utility function. Viewed historically, this approach suggests the common law spousal unity doctrine, which treated husband and wife as one legal person. It is problematic for many reasons, not least of which is that it excludes from analysis all of the interactions that occur within households and between family members. Another approach is to ignore the family entity, and direct the analysis toward the behavior of individuals. Yet treating each family member as an independent utility-maximizer misses something as well, because it does not help us to understand how individuals in relationships with other individuals make decisions.

This problem has been explored by Gary Becker in a theory concerning altruism and its effects on allocations of resources within families.¹²¹ His model describes how an altruistic head of a household can allocate resources in a manner to ensure cooperation and maximize the preferences of all family members. Some economists criticize this model because it also effectively ignores what occurs within families, and it has been particularly objectionable for feminists. Diana Strassman calls this model "The Story of the Benevolent Patriarch," and points out that the model ignores the effects of power: the household head is assumed to be the husband and father, who is in a position of control because he owns the financial resources entering the household.¹²² Feminists point out that male household heads do not always behave altruistically, and in addition, that the model ignores the altruistic behavior of relatively powerless family members.¹²³ Another strand of economic theory treats the family as a type of "firm," and concentrates on understanding and elaborating the process and structure of family economic decision-making. This model recognizes that family members have different access to financial and other resources, which translates into different abilities to bargain within marriage and in the event of divorce.¹²⁴ Bargaining models

121. See BECKER, FAMILY, *supra* note 4, at 277–306.

122. Strassman, *supra* note 9, at 58–59; see also England, *supra* note 9, at 47–48.

123. This type of contribution has always been difficult to capture in legal and economic norms. See Estin, *Love and Obligation*, *supra* note 3, at 1013–22.

124. See Ferber & Birnbaum, *supra* note 4, at 26–27. The pioneering work in this area was done by Manser & Brown, *supra* note 53, and McElroy & Horney, *supra* note

envision marriage as a cooperative process that is always influenced by the parties' awareness of what their opportunities would be outside of the marriage if the marriage were to fail. Where one spouse has relatively more attractive opportunities in the event of divorce, this fact will translate into greater power within marriage. Thus, this analysis leads us directly to questions of real concern for feminist legal theory. It permits us to investigate how women's social and economic opportunities and their legal entitlements affect their power within marriage. Once again, it leads us to consider the question Hadfield poses: what is it that creates and sustains the traditional division of labor in the household?¹²⁵

Market metaphors and exchange rhetoric have some significant precedents in family law, which has long used a contract metaphor to describe marriage. One reason that family law has proved to be a successful location for economic analysis is that our understandings of marriage, divorce, and child-rearing are increasingly exchange-based.¹²⁶ The scope for operation of contract principles has broadened substantially, and family law doctrines are increasingly inclined to view most aspects of family life as purely private.¹²⁷ At the same time, this revolution is not complete, and there is still significant discomfort evident in judicial opinions and academic literature which resist treating marriage "as a business arrangement."¹²⁸

53. Viewing the family as a firm, some economists have described the gains that occur from cooperative behavior among family members, especially over the long term. See, e.g., Douglas W. Allen, *An Inquiry into the State's Role in Marriage*, 13 J. ECON. BEHAV. & ORG. 171 (1990); Yoram Ben-Porath, *The F-Connection: Families, Friends, and Firms and the Organization of Exchange*, 6 POPULATION & DEV. REV. 1 (1980); Arthur B. Cornell, Jr., *When Two Become One, and Then Come Undone: An Organizational Approach to Marriage and Its Implications for Divorce Law*, 26 FAM. L.Q. 103 (1992). Others have theorized about how the coordination process occurs, and how different bargaining endowments lead to different results. See, e.g., Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transactions Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279 (1993); Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988 (1993).

125. See *supra* notes 117–20 and accompanying text.

126. See generally Regan, *supra* note 40 (discussing, in part, why the economic model of the family resonates with modern experience).

127. See generally Singer, *Privatization*, *supra* note 101 (arguing that, within family law, private norms and private decisions have replaced rules and structures imposed by the state).

128. Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 765 (1993) (citing *Mahoney v. Mahoney*, 453 A.2d 527, 533 (N.J. 1982)); see also Estin, *supra*, at 764–67.

The exchange approach to family life is problematic for a number of reasons. The first, and most traditional, concerns the protective function of family law. Historically, this was implemented with rules based on family status rather than contract principles.¹²⁹ Status relationships were not an unmitigated good for women, but they have certain advantages. Along with any contract-based regime come a variety of problems that economists describe as contracting failures, including fraud, duress, and overreaching or problems that result from the more subtle effects of unequal bargaining power and close family relationships. For feminist theorists, these power issues are at the core of the objection to contractual regulation of intimate relations.¹³⁰ A second related question is whether the economists' contract models, based on rational maximizing behavior, adequately describe or explain relations in the family. Feminist critics often emphasize the harsher aspects of family behavior and the presence of many types of force or coercion directed at women both inside and outside the family.¹³¹ To the extent that gender roles are the result of physical force or social coercion, it is not plausible to conclude that relations in the family are the product of contract or exchange within the terms of these models. A third problem is that, if we accept the bargaining view of family relations, we encounter the same valuation problems discussed above. Barbara Bergmann points out that bargaining within a marriage reflects a "market ethic," in which time "trades" at its market price. If a husband's household time is valued at his higher market rate, his lesser contribution to housework counts for more than his wife's more substantial efforts.¹³² Similarly, Marianne Ferber and Bonnie Birnbaum argue that the relative financial contributions that husband and wife make to the family determine how status and power are allocated within the household.¹³³

Historically, there has been a strong appeal for some feminists in the idea of remaking the family on market terms. This has led to arguments

129. See MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 34-35 (1993); see also Estin, *Love and Obligation*, *supra* note 3, at 1046-52.

130. See, e.g., Neave, *supra* note 44; Weigers, *supra* note 44.

131. There is a large feminist literature on violence directed at women within families. See LINDA GORDON, *HEROES OF THEIR OWN LIVES* 250-88 (1988); LENORE E. WALKER, *THE BATTERED WOMAN* (1979); Elizabeth M. Schneider, *The Violence of Privacy*, 23 *CONN. L. REV.* 973 (1991); see also sources cited *infra* note 146.

132. See BERGMANN, *supra* note 9, at 266-73. In economic logic, this seems to "explain" the anomaly of the efficient household in which women work more hours than men. See *supra* note 71.

133. See Ferber & Birnbaum, *supra* note 4, at 22-23.

for the reinvention of housework on an "industrial" model, or for the integration of women's household labor into the market economy.¹³⁴ At times, an argument has been made to require wages for housework.¹³⁵ Other feminist writers have argued that the structure of the family and market spheres make it impossible to bring the two together in this way.¹³⁶

Finally, the exchange models of family interaction are especially problematic when we wish to consider children's interests. An analysis that assumes that family behaviors are motivated by altruism is clearly inadequate to help explain and address the failures of altruism in families.¹³⁷ Also, models based on exchange must take into account the powerlessness of most children. Some of the economic literature, including writing by Gary Becker, explores the barriers that prevent children from contracting directly with their parents.¹³⁸ Because of these difficulties, economists commonly treat children's interests as a type of "external effect" of parental bargaining, and describe the law as regulating these effects through rules governing abuse and neglect, custody and support, and historically, the availability of divorce.¹³⁹ Much of the bargaining analysis is based on an assumption that at least one parent, usually the mother, will incorporate the children's best interests into that parent's own bargaining position. So far, however, the literature has not explored in much detail what effects this would have on that parent's ability to negotiate.¹⁴⁰

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134. In the last century, proposals for the "industrialization of housework" referred to the new science of home economics. See SUSAN STRASSER, NEVER DONE 202-23 (1982). Today, the phrase is more likely to refer to purchasing prepared food, day care, or housecleaning services in the market. See, e.g., BERGMANN, *supra* note 9, at 275-98.
135. See BERGMANN, *supra* note 9, at 209-12; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1539 (1983). A different proposal would define both partners in a marriage as equal owners of all wages earned by either partner. See Williams, *supra* note 6 (arguing that a single income in a traditional household represents the labor of two people, and proposing that women who provide a household with domestic labor receive a portion of their husbands' salaries as an entitlement).
136. See generally CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Okin, *supra* note 107, at 181; Olsen, *supra* note 135.
137. See Estin, *Love and Obligation*, *supra* note 3, at 1074-81.
138. See Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1 (1988).
139. See Becker & Murphy, *supra* note 138; see also POSNER, ANALYSIS, *supra* note 1, at 149-57.
140. For a rare example, see Brinig & Alexeev, *supra* note 124. See also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992).

An alternative approach in the economic literature conceives of children not as participants but as one of the goods produced by marriage and bargained over in divorce.¹⁴¹ This writing often focuses on money-custody trades, or explores the connections between child support and visitation.¹⁴² But the children-as-goods approach risks treating them as merely an expensive commodity, and it raises serious concerns analogous to the concerns of many feminists with surrogacy and prostitution. That is, economic writing on the family, which alternates between models that define children as either members of a family or as goods produced by a family, demonstrates the inadequacy of these models.

Children are central to the economic description of the family. Economists describe the purpose of marriage as the rearing of children, the type of household production which seems to require a gender-based specialization of labor is childrearing, and the harms identified in economic writing on divorce concern women with children who are left with inadequate financial support. In most of the analysis, however, children are externalized, commodified, or their interests are simply collapsed together with the interests of mothers.¹⁴³

C. Commodification

One risk of the use of market rhetoric is that it will be taken literally rather than metaphorically. What matters most about family life is not commodified: it cannot be bought and sold, and cannot be valued in money. This social reality creates problems for all but the most theoretical economic analysis, for although most family economists speak in terms of "utility" rather than money, the models they have used have depended upon the universal "measuring rod of money."¹⁴⁴

141. See e.g., Yoram Weiss & Robert J. Willis, *Children as Collective Goods and Divorce Settlements*, 3 J. LAB. ECON. 268 (1985); Zelder, *supra* note 39, at 505.

142. See, e.g., Weiss & Willis, *supra* note 141; Zelder, *supra* note 39.

143. See, e.g., BECKER, FAMILY, *supra* note 4, at 37-38 and 375-76; POSNER, ANALYSIS, *supra* note 1, at 143-44; Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 BYU J. PUB. L. 91, 104 (1994). This practice also has some currency in feminist writing, but its usefulness for women may be questioned: To what extent does it operate to justify the increasingly tenuous relationships between divorced fathers and their children, and the unequal burdens mothers are expected to assume after divorce?

144. Coase, *supra* note 15, at 209. As Margaret Radin argues, our legal discourse reflects this problem in the conflict over tort remedies for nonpecuniary harms. Economic theories of corrective justice depict the process as one in which harms to persons are compensated by the payment of money damages, suggesting that harms and dollars

This is difficult enough if we are only concerned with housework, but when we understand "household labor" to include the entire spectrum of human reproduction and family life, the market paradigm raises troubling issues of its commodification. Feminists have been concerned with the commodification of women's reproductive capacities (surrogacy)¹⁴⁵ and sexual capacities (rape, prostitution, and pornography).¹⁴⁶ Much of the current law and economics analysis of the family treats children explicitly as commodities "produced" by the family from a variety of monetary and nonmonetary inputs,¹⁴⁷ or treats children implicitly as commodities in the context of divorce bargaining.¹⁴⁸

Economic models which treat family choices as if various goods were commensurable have allowed testing of hypotheses which produce interesting insights. It is not clear, however, that economic theory can move from these descriptive and explanatory contributions to policy proposals without creating serious problems of commodification. Once economists begin to prescribe certain policies on efficiency grounds, the analysis no longer simply treats various goods as if they could be substituted or exchanged in implicit, market-like transactions. To base family policy on efficiency norms is actually to promote exchange relations within the family, requiring the explicit commodification of whatever goods are subject to the policies.

In divorce law, the prospect of "money for custody" bargains, as well as aspects of property division and alimony, raise this concern. Although various property division divorce statutes speak of taking into account the contributions of both husband and wife to a marriage, the prospect of actually trying to list and measure them all has been steadfastly resisted. Judges deciding these cases typically presume that the wife's and husband's contributions have in fact been equal. In those cases

can be ranked on a single scale. See Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); see also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*].

145. See, e.g., MARTHA A. FIELD, *SURROGATE MOTHERHOOD* (1988); PATEMAN, *supra* note 136, at 209-18; Radin, *Market-Inalienability*, *supra* note 144, at 1925-26; Debra Satz, *Markets in Women's Reproductive Labor*, 21 PHIL. & PUB. AFFAIRS 107 (1992).

146. On rape, see, for example, CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 171-83 (1989); Radin, *Market-Inalienability*, *supra* note 144, at 1879-81. On pornography, see, for example, MACKINNON, *supra*, at 195-214. On prostitution, see, for example, PATEMAN, *supra* note 136, at 189-209; Radin, *Market-Inalienability*, *supra* note 144, at 1921-25.

147. See, e.g., POSNER, *ANALYSIS*, *supra* note 1.

148. See, e.g., Zelder, *supra* note 39.

in which a court feels compelled to notice a significant inequality, there is often a disclaimer attached: marriage is just not about keeping track of each party's debits and credits.¹⁴⁹ Judges have also resisted, in most jurisdictions outside New York, the argument for defining and valuing a marital property interest in one spouse's professional degree or license.¹⁵⁰

These trends have contradicted the economic theories addressing divorce that have urged much greater use of remedies that would compensate for gains and losses in human capital. Despite the scholarly attention that has been brought to this question, it is not apparent that such measurements are possible, and it is even less clear that such a process would be worth the commodification risks it would entail.¹⁵¹ There are certainly other possibilities: looking to the tort analogy, one could explore the possibility of social insurance schemes rather than direct financial remedies.¹⁵² Or we might prefer rules which seek to recognize wrongs done and provide redress without attempting to rectify them. This might involve defining formulas for payments in the event of divorce, such as child support guidelines or income-splitting spousal support awards, which do not require us to "value" individuals in dollars and cents.

These three problems—of making comparisons between production in the family and the market, of using exchange metaphors to model family relationships, and of commodifying family life—all complicate the positive economic analysis of families, and prevent it from generating the sort of testable hypotheses and solid data that are the hallmark of economic analysis in other contexts. Here, the effort to reduce the complexity of social life to the elegant abstractions of theory requires eliminating too much. The project can succeed only if a set of normative judgments is admitted into the analysis at a very early stage. Thus, the descriptive analysis only succeeds if it begins with a framework of traditional gender norms. This is not the pure, positive analysis depicted in the theory of economic methods.

149. See *Pyeatte v. Pyeatte*, 661 P.2d 196, 207 (Ariz. Ct. App. 1982); *Mahoney v. Mahoney*, 453 A.2d 527, 533 (N.J. 1982).

150. See, *In re the Marriage of Olar*, 747 P.2d 676, 682 (Colo. 1987) (collecting cases in other jurisdictions); *Graham v. Graham*, 574 P.2d 75 (Colo. 1978). *But see* *O'Brien v. O'Brien*, 489 N.E.2d 712, 713 (N.Y. 1985).

151. For examples of these proposals, see, PARKMAN, *supra* note 38; Borenstein & Courant, *supra* note 38. See also Kristian Bolin, *The Marriage Contract and Efficient Rules for Spousal Support*, 14 INT'L REV. L. & ECON. 493 (1994).

152. See, e.g., Rhode & Minow, *supra* note 99.

III. CAN FAMILIES BE EFFICIENT?

Economists writing about the family make both positive and normative efficiency claims: the positive claim that family life is (or can be) productively efficient, and the normative claim that law should promote efficiencies in the family. The positive analysis begins with the postulate that households are productively efficient, and then "explains" this efficiency with a model of specialization and division of labor by gender. In the normative analysis, policies that appear to undermine the traditional gender-based division of labor in the family, such as the advent of no-fault divorce, are then subject to criticism on efficiency grounds. Nowhere in this cycle, however, is the initial postulate closely examined.

Feminist economists, of course, have pointed out this mistake.¹⁵³ Their more traditional colleagues regularly miss this point for two important reasons. First, in most economic analysis, social facts are simply taken as given, treated as exogenous or outside the scope of analysis. This is particularly true of social facts based on gender, which writers including Becker regularly render in biological terms, suggesting that they are inevitable and immutable.¹⁵⁴ If, as feminists argue, gender roles are a more complex phenomenon, socially constructed and subject to challenge, debate, and reformulation, then any analysis based on assumed gender facts is subject to question as well.

Second, the economic analysis understands the family based on the model of the market as an arena in which rational behavior prevails and in which individuals are well informed and able to make free choices. As discussed above, this analysis tends to suppress the reality of serious conflicts over wealth, power, and other goods in the family, substituting an assumption that behavior is not only rational, but benevolent and

153. See *supra* notes 44–58, 63–66 and accompanying text.

154. See, e.g., BECKER, FAMILY, *supra* note 4, at 37–40, 44–48; see also POSNER, SEX AND REASON, *supra* note 27, at 85–110; Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL'Y 331, 333–43 (1995). Professor Epstein, for example, is willing to make both positive and normative arguments from biology. He asserts that societies can increase their overall social welfare if biological sex differences are exploited through a specialization of labor. This leads to the conclusion that traditional, gender-structured social roles will be more efficient. See Epstein, *supra*, at 339–43. The assumption of these roles is described by Epstein in terms of "voluntary transactions between the sexes," a phrase which masks the deterministic nature of his model. Epstein, *supra*, at 343. For a persuasive critique of how biology is used in Epstein's writing, see Case, *supra* note 72.

altruistic.¹⁵⁵ For feminists, who have been particularly concerned with the constrained opportunities women face and with the role that force and violence play in controlling women, both in the family and in the larger society, this is an impossibly idealized view of how family relationships are constituted.

With the narrow language economists have employed to describe the family, the issues most central to feminist concerns are defined out of the project. At best, we can say that the understanding proposed in this work is interesting, and occasionally useful, but too narrow to encompass all of the concerns and values we hold with family life. At worst, we may be suspicious that economic efficiency arguments serve to further reinforce and justify a social reality which is often systematically harmful to women. Because economic theory has been oblivious to so many of these conflicts, it is hard to imagine what a different economics could tell us.

Feminist theory suggests that the terms of a descriptive system are heavily influenced by the normative commitments of its practitioners. This interdependence of descriptive and prescriptive accounts is an important reason why the boundary between positive and normative economic theory is so difficult to maintain. The limitations of the current descriptive theories in family economics are the reason for much of the present difficulty with its prescriptive judgments.

The problem is deeper than a question of whether a certain set of practices is efficient. We cannot determine whether resources are allocated efficiently until we know what resources to consider, what types of uses count and what values we wish to maximize. When different claims or interests conflict, we cannot resolve which should prevail unless we have a means for comparison. In the market, the metric for such a comparison is money; in the family, there is no comparable scale. Without a common denominator, there is no basis for testing the assertion that one arrangement is more efficient than another.¹⁵⁶

155. See *supra* notes 118–20 and accompanying text. But see Becker, *Economic Way*, *supra* note 28; Boulding, *supra* note 41.

156. This statement assumes that a financial metric is not a satisfactory basis for measuring or comparing different family arrangements, for the reasons discussed in part II. As Cass Sunstein argues, wealth maximization is too narrow a normative grounding for law because it does not enable consideration of various incommensurable goods at stake in a given situation, and the risks of harm to those goods from a proposed decision. He suggests that part of the normative project of law is determining which kinds of valuation are appropriate in which contexts. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 818–19 (1994).

The validity of any normative analysis depends on the validity of the descriptive system on which it is based. To the extent that the current economic descriptions of the family are flawed, these models cannot be the basis for useful policy recommendations. Feminist theorists cannot use or accept efficiency-based arguments for family policy, because they are based on a descriptive theory premised on the continuation of the traditional gender system in marriage and in the world outside the family sphere. Gender is one of the inputs into the family production function. Until the existing positive theory can be restructured, feminist normative economic analysis is not possible.

Feminist theorists have devoted a great deal of attention to the forces that create and sustain the specialization of labor in the family. To a large extent, specialization has been based upon the subordination of women, through labor markets that do not value women or women's work, cultural norms that channel women into domestic roles, and a system of divorce that often results in a "family" with no specialization of labor at all. Economic theory does not take these factors into account, nor does it recognize problems of violence against women and discrimination in the workplace. It also fails to acknowledge the importance of reproductive freedom and the need for both high-quality, affordable child care and dependable public financial support for women with children. Efficiency arguments that ignore these issues are not neutral, nor can they be as long as the problems that many women face inside their families and in the world beyond remain unresolved. ✽

