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How to Plot Love on an Indifference Curve

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FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW. By *June Carbone*. New York: Columbia University Press. 2000. Pp. xv, 341. Cloth, $49.50; paper, $18.50.

INTRODUCTION

In *From Partners to Parents: The Second Revolution in Family Law*, June Carbone[1] offers nothing less than a whirlwind tour of the current doctrinal and policy debates of Family Law — an astounding feat in a book whose main text (excluding endnotes and appendices) does not reach 250 pages. There seem to be few controversies about which Carbone has not read widely and come to a conclusion, and usually a fair-minded one: from the effect of no-fault divorce reforms on the divorce rate,[2] to the long-term consequences of slavery for the African-American family (pp. 67-84), to whether the Aid to Families with Dependent Children ("AFDC") program (prior to the recent reforms) influenced the number of nonmarital children (pp. 32-33, 96), just to name three. As it seems impossible to give a faithful overview in a few pages of a text which is already a remarkable work of concision, this Review will focus on three themes highlighted or implicated by the book: (1) the title theme — the way family law has changed its focus from the behavior of adults within a marital or nonmarital relationship ("partners") to the behavior of adults towards their children ("parents");[3] (2) the problems for legal reform when our choices are so deeply affected, and perhaps determined, by history and social norms; and (3) how an attention to history and culture can be used

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2. Pp. 86-90. In the course of her discussion, Carbone points to data showing a surprisingly constant increase in divorce rates over the last 140 years, with slight drops for marriages begun in the 1950s and 1980s. Pp. 86-87.

3. In the language of the subtitle, this is the "second revolution," with the change from a fault system of divorce to one that is largely no-fault being the first. P. xiv.

both to deepen and to oppose an economic approach to domestic relations. In connection with this third theme, this Review will also offer some brief comments on the modern hybrids of law and economics and family law scholarship.

I. FROM PARTNERS TO PARENTS

There was a time when the common law (and society) created severe legal and social handicaps for children born outside of wedlock, with this being justified as a reasonable way to encourage marriage.[4] Starting in the late 1960s, the United States Supreme Court decided a series of cases holding that legal distinctions grounded on legitimacy were to be subject to heightened scrutiny.[5] Constitutional Law courses do not spend much time on this issue any more due to the fact that it is rare to come across cases,[6] in large part because the states have removed many of the laws that discriminate facially between what we now call "marital" and "nonmarital" children.[7] As a related matter, the Uniform Parentage Act, adopted by eighteen states,[8] has the pur-

4. The traditional perspective was well summarized by James Fitzjames Stephen:

> Take the case of illegitimate children. A bastard is *filius nullius* — he inherits nothing, he has no claim on his putative father. What is all this except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favour marriage in every possible manner as the foundation of civilized society? . . . It is a case in which a good object is promoted by an efficient and adequate means.

James Fitzjames Stephen, *Liberty, Equality, Fraternity*, *in* LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS 156 (University of Chicago Press 1991) (1873).

Even more telling, if also more strange to modern sensibilities, there was a time when regulating access to marriage was considered sufficient to control (or at least, to affect strongly) population. *See, e.g.*, DANIEL J. BOORSTIN, THE CREATORS 674 (1992) ("Under the Austro-Hungarian laws designed to curb the Jewish population, only the eldest son in any Jewish family was allowed a marriage license.").

5. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (invalidating a state rule which prohibited illegitimate children from recovering under a worker's compensation law when their fathers died); Levy v. Louisiana, 391 U.S. 68 (1968) (striking down a Louisiana statute excluding illegitimate children from recovery for the wrongful death of a parent). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-24, at 1553-58 (2nd ed. 1988) ("Discrimination Against Illegitimates"). Like discrimination on the basis of sex, discrimination on the basis of illegitimacy has been held to warrant "intermediate" scrutiny, somewhere between rational basis review and strict scrutiny. Clark v. Jeter, 486 U.S. 456, 461 (1988).

6. By way of example, one current constitutional law casebook devotes less than four pages, out of over 1500, to "Illegitimacy and Related Classifications." WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 1308-11 (8th ed. 1996).

7. What few cases there have been in the last twenty years have mostly arisen not from laws which directly discriminate against nonmarital children by denying them some right or benefit, but which discriminate indirectly, for example, by making it difficult to bring a paternity action. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91 (1982) (striking down a highly restrictive rule for bringing paternity actions on behalf of illegitimate children).

8. UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1987 & Supp. 2000).

pose and effect of "providing substantive legal equality for all children regardless of the marital status of their parents . . . ."[9]

The removal of most legal disabilities for nonmarital children exemplifies the basic theme of Carbone's text: Within American family law there has been a growing doctrinal disconnect between the parents' relationship with one another and their rights and obligations regarding their children.[10] There was a time when one's rights and obligations towards one's children were defined in a large part indirectly, by one's relation to the children's other parent. Married parents had rights and obligations that unmarried parents lacked (p. 164), and one's chances of gaining custody after divorce (or even after the other parent's death)[11] depended on one's relationship with and behavior towards the other parent. Marital misbehavior, for example, would be "punished" by denial of custody (p. 181). The rights of nonmarital children, and the rights and obligations of unwed parents (especially unwed fathers)[12] to those children, are only the sharpest examples of this theme. Another prominent piece of evidence for the change of focus is the growing trend of courts to hold allegations of immorality by a parent irrelevant to a child custody decision unless and only to the extent that this alleged immorality affects the fitness of that person *as a parent*.[13] That approach has two apparent advantages: (1) it changes

9. *Id.* at 289.

10. Pp. xi-xiv, 40-41, 131-32, 154-79, 227-41. Ironically, though the legal treatment of nonmarital children is a good example of the point Carbone is making, the topic is treated only briefly in the book, p. 35, and there primarily as an example of the state regulation of sexual morality.

11. See, for example, *Stanley v. Illinois*, 405 U.S. 645 (1972), where the Court considered, and invalidated, a state statute that conclusively presumed that unmarried fathers were unfit parents, whose children should be taken from them; the case involved an unmarried father whose children were taken from him under the statute after the mother, with whom he had cohabited, had died.

12. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983) (holding that unwed fathers have constitutionally protected rights in their relationship with their children, but only if they act to create a connection with those children); Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating on equal protection grounds a state statute that presumed conclusively that unwed fathers were unfit parents, when no similar presumption was made for unwed mothers). As Carbone points out, pp. 164-79, the Supreme Court's jurisprudence on unmarried fathers' rights is not easy to rationalize, and may be explicable in part on the basis of an unstated preference for unwed fathers who have maintained some sort of connection with their children's mothers. (This usually unstated preference is connected to, but goes beyond the more frequently expressed preference for marriage. *See, e.g., Lehr*, 463 U.S. at 263 ("The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences.").)

13. *See, e.g.*, Hassenstab v. Hassenstab, 570 N.W.2d 368 (Neb. App. 1997) (refusing to modify custody based on the custodial parent's homosexuality and alcohol consumption); Sanderson v. Tryon, 739 P.2d 623 (Utah 1987) (holding that an initial custody award could not be made based solely on one parent's continued participation in polygamous practices); Judith R. v. Hey, 405 S.E.2d 447 (W. Va. 1990) (reversing a court order that conditioned continued custody on that parent's either marrying the man with whom she was cohabiting or ending that relationship). Not all courts have followed this trend. *See, e.g.*, Roe v. Roe, 324 S.E.2d 691 (Va. 1985) (reversing the award of custody to a parent, the reversal based

the focus more prominently to the interests of the child, rather than using the children as rewards for complying with societal norms; and (2) it reduces the number of times when courts must make controversial judgments about what is sometimes called "personal morality."[14] This approach, however, can also lead to problem cases: As Carbone notes (pp. 186-87), courts sometimes seem predisposed to ignore even bad acts that *should* be seen as evidence of parental unfitness — most egregiously, domestic violence.[15]

The growing legal disconnect between behavior to one's partner (the decision to marry, followed by proper marital behavior) and one's parental rights and obligations exemplifies a more basic shift in the way family life is structured, perceived, and regulated. There was a time when a combination of social norms and economic circumstances meant that a woman who was pregnant would either marry the father or give up the child for adoption; in an earlier era, such marriages lasted because divorce was difficult and often (especially for marital wrongdoers) expensive,[16] and because women, with limited prospects in the workplace and the legal disabilities under coverture, could rarely afford to leave a bad marriage (pp. 88-90, 95). Today, a man who gets a woman pregnant is less likely to feel obligated to marry her, and a woman will frequently be willing either to raise the child on her own or get an abortion (pp. 90-95).

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solely on that parent's active homosexual relationship); *cf.* Lynn D. Wardle, How Children Suffer: Parental Infidelity and the "No-Harm" Custody Presumption (1999) (unpublished manuscript) (arguing that a parent's adultery *should* be a factor against that parent's receiving custody).

14. There is an ongoing debate about the extent to which the government should be concerned, through criminal prohibitions or otherwise, with adult actions which affect only the actors themselves. *See generally* John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND UTILITARIANISM 1-133 (Bantam ed., 1993) (1859); Stephen, *supra* note 4; H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963). For an overview of the debates, see BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 145-54 (2nd ed. 1999).

15. *See, e.g.*, Collinsworth v. O'Connell, 508 So. 2d 744 (Fla. App. 1987) (affirming a decision granting both parents shared responsibility for their child, despite evidence of the father's violence against the mother). As Carbone also observes, however, p. 187, more recent court judgments, abetted at times by legislative directives, *have* considered evidence of domestic violence in making custody decisions. *See, e.g.*, Custody of Vaughn, 664 N.E.2d 434, 438 (Mass. 1996) (holding that in custody decisions the court must consider "the special risks to the child in awarding custody to a father who had committed acts of violence against the mother"); *see also* ARIZ. REV. STAT. ANN. § 25-403 (West 2000) (prohibiting the awarding of joint custody where there has been domestic violence).

16. Divorce was expensive in the sense that the former husband's obligation to pay alimony would likely turn on whether he or his wife was at fault in the marriage — the "fault" of one party (and the innocence of the other party) had to be shown before a court would dissolve the marriage. *See, e.g.*, GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 15, 38, 48, 50 (1991) (discussing alimony during the fault-divorce period). It may be, though, as one historian has recently suggested, that for some unhappy spouses, "leaving was a possibility, even where legal divorce was not." HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 1 (2000).

Carbone's attitude towards such changes in family life is implied more than expressed; it is a mixture of resignation and approval: resignation, in that the changes seem the result of our reaction and adaptation to other societal changes (for example, the greater equality of women, including greater workplace opportunities; and the greater availability of contraception and abortion);[17] and approval, in that the author, tacitly, seems to favor the greater autonomy and lower level of moral supervision and criticism of people's romantic, sexual, and marital lives. There is also a note of regret: however problematic the former approach to family life may have been in many ways (not least in its exploitation of women), it appears to have been largely successful in ensuring that children generally had the care of two parents, and that resources were passed from one generation to the next. Carbone raises reasonable doubts that our current approach to marriage, family, and children can work nearly as well (pp. 49-52, 126-27, 132).

II. THE IMPLICATIONS FOR REFORM

Carbone gets to the heart of questions about family law reform and policy: "With the dismantling of the fault system [of divorce] that had championed the sexual division of marital labor, neither law nor feminism supplied what should be the core of family regulation — the identification of the distinctive *family* values for the law to promote and protect" (p. 27). She is not referring to the "family values" of conservative political rhetoric, but simply the sense of having some vision of an ideal regarding how intimate and family life should be structured (and regulated) within society.

In his dissent in *Bowers v. Hardwick*, Justice Blackmun wrote: "We protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households."[18] While that may be an accurate characterization of what the Constitution does or should protect, as a matter of policy it is dubious at best. We *do* have some notion as to the *social* benefits of marriage and families, even beyond their undoubted role in the happiness and fulfillment of individuals. Stable marriages and families may be valuable to society, not only as a good context in which to raise children, but also for the same reason that other intermediate institutions (whether volunteer organizations, social organizations, or religious institutions) are valuable to society's flourishing (pp. 38-40). However, even were we to have a clear sense of where we wanted to go — which social institutions and family structures to strengthen and which to discourage — it is far from clear how we can get there. As Carbone ac-

17. Pp. 53-66, 85-110. Carbone's general approach to historical analysis and social change will be discussed in the next section.

18. Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).

knowledges, there are difficulties in "linking public policy concerns to individual behavior at a time when older norms have given way, and there is no consensus on their replacement" (p. 42).

Carbone brings light and insight to many current family law debates by placing them in their larger historical context. She effectively uses history to undermine the arguments for certain current reform proposals, and to alter the way many family law issues are perceived.[19] However, her way of presenting our current social situation as the, perhaps inevitable,[20] result of long-term factors, factors largely beyond our control and more or less impervious to manipulation through law, works equally to undermine her own suggestions regarding legal and social reform.[21]

If one goes back not just decades, but generations, even centuries, one comes across a family structure quite different from the one that predominates today: where the married couple and their children were very much a part of the larger community, and under the constant supervision of that community (pp. 100, 123-24). "The household was the basic unit of production *and* reproduction in a hierarchical society in which church, community, and family overlapped. Without clear boundaries between public and private, the individual never escaped supervision."[22] That family structure changed over time into one more recognizable to modern eyes. Borrowing a term from Milton Regan, Jr.,[23] Carbone speaks of the "Victorian family" and describes it as developing around the eighteenth century in both England and America (pp. 99-100). Married couples gained separation from the community, with significant consequences: (a) the raising of children became the main responsibility of and, increasingly, the primary focus of, individ-

19. Looking at the longer term can clarify how we may be seeing current phenomena against a false "baseline." Carbone is effective in reminding us that we seem constantly to be comparing our current situation to the actual or imagined situation in the 1950s, when that period was, over the longer historical view, the anomalous period. P. 88.

Attention to history can also lessen the tendency to speak of "the nature of marriage," for history shows how the institution has changed radically over previous centuries, and even in the course of the most recent decades. See Brian Bix, *Reflections on the Nature of Marriage*, *in* REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE 21ST CENTURY (Alan J. Hawkins, Lynn D. Wardle & David Coolidge eds., forthcoming, 2001).

20. In Carbone's discussions, as in much historical work, it is hard to distinguish explanations that society changed in a certain way, from more ambitious claims that these changes were *inevitable* given the prior conditions.

21. Carbone's inconsistency on the efficacy on legal intervention is set out insightfully and at length in Katharine Silbaugh's review. Katharine B. Silbaugh, *Accounting for Family Change*, 89 GEO. L.J. 923, 964-66 (2001) (reviewing *From Partners to Parents*).

22. P. 100. One might add that, especially prior to the industrial revolution, one's marriage partner was often also a partner in one's business, a needed extra hand in one's work, whether one was working on the farm or as an artisan; this fact had obvious and important implications for the way people thought about marriage and divorce. See E.J. GRAFF, WHAT IS MARRIAGE FOR? 11-16 (1999) (describing the historical "working marriage").

23. MILTON REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 4 (1993).

ual families; and (b) there were growing demands on and greater expectations for marriage, as the haven from commercial and public life, and as the source of intimacy and emotional support (pp. 100-10).

Carbone portrays domestic life as being produced by broad ideas regarding the family, combined with (related) ideas regarding gender roles and sexuality. The Victorian family contained the earlier-mentioned isolation from the larger community and the separation of public and private spheres, along with a strong sense of gendered roles, both within and outside marriage (p. 101). The structure of domestic life was also strongly influenced by the sexual mores, as already discussed[24] (for example, that it was understood that when premarital sex resulted in pregnancy, the couple married, and this understanding was reinforced by strong social norms and sanctions (p. 91)).

The Victorian family has been transformed (or, if one prefers, "undermined") by a series of societal changes in attitude and opportunity: greater emphasis on individual fulfillment, higher levels of premarital sex combined with the greater availability of contraception and abortion, greater opportunity for women in the workplace, and more social acceptance of nonmarital cohabitation, nonmarital births, and divorce (pp. 93-110). The result has been significantly higher levels of divorce,[25] nonmarital births, and children raised by single parents (pp. 88-90, 118-27).

There is currently much talk about, and some action toward, reforming family law, often to try to bring us back to the allegedly better, more moral, and more responsible past. Many recent enacted and proposed reforms in the family law area have been driven at least in part by the general belief that children are harmed by current trends in family structure, and that these trends can and should be fought. AFDC benefits were modified in part because of the belief that the prior benefit structure discouraged marriage and encouraged the birth of nonmarital children;[26] and various divorce reforms, including the "covenant marriage" laws enacted in Louisiana, Arizona, and

24. *Supra* text accompanying note 16.

25. Where marriages were once held together by dependence, the stigma of divorce, or strongly internalized feelings of duty and role, marriages now grounded on intimacy and companionship are more fragile, for they have little reason to continue when those values have faded. Pp. 104-05.

26. P. 94; *see also* Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 425-27 (1999) (summarizing the pro-marriage, anti-illegitimate birth rhetoric related to welfare reform).

Arkansas[27] were justified in part by the harm allegedly being done to children by divorce.[28]

While there are studies that seem to show that the children of single parents or divorced parents do less well than the children of intact two-parent homes,[29] Carbone argues that all this may show is that they fare less well *in this society*, a society that is arguably built around the "traditional" two-parent family (p. 49). Martha Fineman has argued that our society does not do enough to support "inevitable dependency" (those who cannot care for themselves – the very young, the very old, and the seriously ill) or "derivative dependency" (those, usually women, who cannot support themselves because they are devoting most or all of their time to caring for the "inevitably dependent").[30] Fineman suggests shifting the state subsidization of the traditional family to those providing the care, be they single parents, divorced parents, or married parents.[31] Carbone returns again and again to the fictional character "Murphy Brown" because that character (and many real-world counterparts with similar resources) has the wealth to protect her child(ren) from many of the usual effects of not having a second parent.[32] If the problem of single parenthood is (only or primarily) that there is no one to support the caregiver, then (a) single parents who *have* sufficient resources should not be criticized; and (b) we should consider creating greater community and/or government support for single caregivers who do not already have such resources (pp. 51-52).

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27. *See* ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (West 2000); LA. REV. STAT. ANN. §§ 9:272-275.1 (West 2000); 2001 Ark. Acts 1486.

28. *See, e.g.*, Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 63-72 (1998) (summarizing the child-focused justifications of the covenant marriage proposal).

29. These studies are complicated by related findings: The children of widowed parents do not seem to be harmed (relative to the children of two-parent families) the way the children of unmarried single parents and divorced parents are, and the children of step-parents do less well than those in other two-parent households. Pp. 111-14.

30. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES 161-66 (1995) (discussing the inadequate societal responses to inevitable and derivative dependencies).

31. P. 28 (quoting FINEMAN, *supra* note 30, at 233).

32. Pp. 44-47, 51. One can and should ask about the social forces and circumstances that encourage the belief, including among many of the caretakers themselves, that taking care of children is normally or ideally seen as primarily the responsibility of an isolated parent (usually a mother) for whom caretaking is that parent's exclusive or predominant job. *See* Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495 (1997) (reviewing FINEMAN, *supra* note 30) (suggesting that it is important for caretaking to be degendered).

While Carbone has her doubts about most of the current crop of reform proposals,[33] she has her own ideas for change. For example, she is concerned that the nuclear family can no longer work effectively for the welfare of children because it can no longer shield children, especially teenagers, from the dangers and temptations of the larger world (pp. 221-26, 241). She calls, therefore, for some way of re-establishing the ties between family and community that might bring in societal resources for helping to protect and raise those children (p. 241). Additionally, she promotes a model of a generally egalitarian "supportive partnership" in marriage (pp. 235-38). Far less clearly expressed is what should or could be done in either case (by way of legal or social action) to get there from here.

This "black box" in Carbone's analysis, the mystery element that explains the changes in family life over time and why certain reforms have succeeded or failed, seems to be the same as the "black box" in many economics-driven discussions of law: the internalized beliefs/attitudes/values that some call morality, others sentiment (pp. 99, 235), and others "social norms."[34] What is crucial for change is that people's values and attitudes change. When such changes occur, parallel legal reforms tend to follow (Carbone's example is no-fault divorce following a more individual- and autonomy-focused attitude towards marriage and a more tolerant attitude towards divorce (pp. 89-90)). However, when proposed reforms act *against* such values and attitudes, they are bound to fail. The question, then, is how to get people to adopt desirable values and attitudes. For this most basic question, Carbone offers no answers.[35] This is neither surprising nor the justification for criticism; if we *did* know how to change "hearts and minds," we would have the key to political (and utopian) change, which politicians, reformers, and philosophers have sought for millennia.

III. ENGAGEMENT WITH ECONOMICS

Beyond its clear merits as a guide to the current theoretical, empirical, and policy debates within family law, Carbone's book is important in the way it exemplifies the current engagement between family

33. She writes: "It is possible to demonstrate conclusively that children have suffered from family instability without uncritically embracing proposals to restrict divorce or nonmarital births." P. 118.

34. *See infra* note 53.

35. At one point, Carbone summarizes Stephanie Coontz's work on the connection between women's increasing autonomy and the divorce rate by saying, "changes in behavior preceded the changes in attitudes." P. 90. This only leads to the question, however, "what (changes in values or attitude) caused the changes in behavior?" There is no obvious stopping point to such explanatory regresses.

law and law and economics.[36] Economic analysis, understood broadly to include public choice, game theory, and other variations of rational choice analysis, has become dominant, or at least highly influential, in nearly every area of (American) legal scholarship.[37] Family Law has been one of the areas most resistant to the encroachment of economic analysis,[38] but in recent years the emphasis has been more on how to co-opt, adapt, or modify economics analysis than on how to avoid or refute it. Efforts to apply or adapt economic analysis to family law have come from both directions: from economically minded theorists trying to explain domestic relations (and domestic relations law), and from family law scholars considering the value and limitations of economic analysis.[39] Standard economic analysis as applied to domestic relations starts from the assumption that individuals are trying to maximize their self-interest (even) in that part of their lives; decisions

36. "Engagement" may be just the right word, as its two primary meanings show the contrary aspects of the current connection between family law and law and economics: (1) (romantic engagement) as a close connection, in contemplation of an even closer one; and (2) (military engagement) as an event that is part of a larger struggle.

37. Some things are lost when "law and economics" is defined this broadly, with the implication that it is a monolithic whole. In fact, there are important debates and disagreements *within* this large category. For example, game theory entails a sharp critique of traditional economic analysis, *see infra* note 43, and the approach of "new institutional economics" used in Margaret Brinig's work, *see* MARGARET F. BRINIG, FROM CONTRACT TO COVENANT 6 (2000) also deviates from and criticizes the traditional approach, *see* Thráinn Eggertsson, *Neoinstitutional Economics*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 665, 665 (Peter Newman ed., 1998) (describing how this approach varies from "neoclassical economics"). Many of the modern economic writers on "social norms" also argue that traditional economic analysis is subject to basic criticisms. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS 4 (2000) (criticizing "[t]he positive branch of law and economics" for assuming that individuals are "unaffected by the attitudes of others" when they make choices).

38. The first important contribution to the economic analysis of family law may be GARY S. BECKER, A TREATISE ON THE FAMILY (enlarged ed., 1991) (1981). Economic attention to domestic relations is relatively recent. As Becker observes, "[a]side from the Malthusian theory of population change, economists hardly noticed the family prior to the 1950s . . . ." BECKER, *supra*, at 3.

39. The first group would include Gary Becker, BECKER, *supra* note 38; Allen Parkman, *e.g.*, ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? (1992); Eric Posner, POSNER, *supra* note 37, at 68-87 ("Family Law and Social Norms"); and Eric Rasmusen and Jeffrey Stake, *e.g.*, Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998). The second group would include Margaret Brinig, *e.g.*, BRINIG, *supra* note 37; June Carbone, *e.g.*, CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000); *see also* Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988); Ann Estin, *e.g.*, Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989 (1995); Rhona Mahony, *e.g.*, RHONA MAHONY, KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER (1995); Milton Regan, *e.g.*, MILTON C. REGAN, JR., ALONE TOGETHER (1999); Katharine Silbaugh, *e.g.*, Katharine B. Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Amy Wax, *e.g.*, Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998); and Joan Williams, *e.g.*, JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

whether and whom to marry, how to structure marital life, whether to have children and how many, whether to divorce, etc., are all treated as explicable in terms of preferences, incentives, and disincentives.[40] (A core insight of law and economics, the Coase theorem, states that in cases of incompatible rights or activities, it is the individuals' preferences and valuations that determine what occurs; law, the effect of legal rules, is reduced to near irrelevance[41] — though the application of this claim to family law has been, strangely, relatively muted.[42])

40. *See, e.g.*, ALLEN M. PARKMAN, GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY 4 (2000) ("Economists view the decision to marry and, sometimes, to divorce as based on the benefits and the costs associated with those choices. . . . Over time, the costs and the benefits of marriage and divorce can change, and then the incentives to marry and to stay married also change.").

41. The Coase theorem states that in a world without transaction costs, the initial distribution of entitlements (for example, whether one party has the right to pollute or the other party has the right to enjoin the pollution) will have no effect on the eventual distribution of entitlements: entitlements will end up with the parties who value them the most. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), *reprinted in* R. H. COASE, THE FIRM, THE MARKET, AND THE LAW 95-156 (1988). Among the many efforts to summarize Coase's Theorem are RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 55-61 (5th ed. 1998), and BIX, *supra* note 14, at 183-87. Thus, whether, for example, *A* pollutes *B*'s land or not depends entirely on whether *A* values the right to pollute more than *B* values the right not to be subject to pollution, and depends *not at all* on whether *A* or *B* starts with the right. If *A* values the right more than *B*, but does not start with the right, *A* will simply pay *B* for the right. *See* COASE, *supra*, at 97-114. The Market trumps the Law. Of course, and this is Coase's point as well, our world is one of pervasive and often substantial transaction costs, and under such conditions, the initial distribution of entitlements *can* affect the eventual distribution. The extra costs of transacting (contacting the relevant parties, negotiating, drafting the contract, etc.) may mean that *A* will not be able to buy out *B*'s right, even though, transaction costs aside, *A* values the right more than *B*. *See id.* at 114-19.

42. The most obvious and prominent battleground for the application of the Coase theorem to family law is the question of whether the move to no-fault divorce caused the recent rise in divorce rates. Some economic commentators, following the Coase theorem (or a close analogue), and purporting to have data to back up the theorem's predictions, *do* claim that the move to no-fault ("unilateral") divorce laws has had *no* effect on divorce rates. *See, e.g.*, H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437, 437, 452 (1986) (arguing that data supports a Coase theorem-like model: "empirical results show that the divorce rates are not significantly different in unilateral and mutual consent states"); *cf.* BECKER, *supra* note 38, at 15, 324-41 (modifying the conclusion of an earlier edition, that the change in divorce laws should have *no* effect on divorce rates, but only to the conclusion that the change of divorce laws explains *a small part (only)* of the change in divorce rates). On the other hand, many commentators, also apparently supported by empirical data, argue that no-fault *has* made a difference. *See, e.g.*, BRINIG, *supra* note 37, at 153-58; BECKER, *supra* note 38, at 15. One might argue that the latter position is consistent with the Coase theorem on the basis that the theorem allows for legal rules to have effects when there are significant transaction costs. *See supra* note 41. "There is, however, little evidence that such problems [transaction costs] are more pressing in the context of divorce than in other bargains. Even under fault-only regimes, the great majority of divorcing couples resolved their differences before litigation through a separation agreement." BRINIG, *supra* note 37, at 154 (footnote omitted); *see also id.* at 157 (summarizing an empirical study by Martin Zelder which concluded that "transaction cost barriers do not prevent the parties from bargaining around the divorce regime").

An interesting development is a shift towards using game theory in family law scholarship.[43] Game theory, with its emphasis on strategic behavior and imperfect and asymmetric information, seems particularly apt for discussions of "negotiations" between partners before, during, and after marriage.[44] The application of game theory to family law appears promising in many ways, but it is still at an early stage, so its strengths and limitations remain difficult to discern.

One point of tension between (many) family law scholars and (many) law and economics scholars is the idea, assumption, or contention that people acting in love, within marriage, or with their immediate family are best understood as attempting to maximize their self-interest.[45] (One must be careful about terminology: "self-interest should not be confused with selfishness; the happiness (or for that matter the misery) of other people may be a part of one's satisfactions."[46]) The reason family law has always seemed a good candidate to resist law and economics (rational choice theory) is that our actions in the context of love and family seem to be among the actions *least* likely to correspond to the "rational self-maximizer" model. Milton

43. Game theory has been defined as the study of the question: "How do, or should, individuals conduct themselves when each realizes that the consequences of his individual acts will depend in part on what other independent actors do?" Stephen W. Salant & Theodore S. Sims, *Game Theory and the Law: Ready for Prime Time?*, 94 MICH. L. REV. 1839, 1846 (1996) (reviewing DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994)) (footnote omitted). The advantages of game theory over traditional neo-classical economic analysis are well summarized by Kenneth Dau-Schmidt:

> Under traditional analysis, you have a variety of basic assumptions: people act rationally, perfect information, zero transaction costs. Under game theory, you can relax some of those assumptions. In fact, the point of game theory is to examine problems of imperfect information, strategic behavior or transaction costs. Where transactions costs and strategic behavior are important, game theory can provide a superior model.

Kenneth Dau-Schmidt et al., *On* Game Theory and the Law, 31 L. & SOC'Y REV. 613, 616 (1997) (reviewing DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994)).

44. *See, e.g.*, Wax, *supra* note 39 (showing how differences in bargaining power and bargaining position between men and women can lead to inequalities within marriage); *cf.* MAHONY, *supra* note 39 (using a negotiation-based analysis of domestic life that approximates game theory); POSNER, *supra* note 37, at 68-87 (discussing family law issues using a "social norms" analysis that is in turn built in large part on game theoretical notions, like "signaling").

45. Becker writes: "In this book I develop an economic or rational choice approach to the family.... The rational choice approach ... assumes that individuals maximize their utility from basic preferences that do not change rapidly over time...." BECKER, *supra* note 38, at ix.

46. POSNER, *supra* note 41, at 4. Becker is similarly careful to note that people can be, and often are, altruistic, altruism being defined as when an individual's "utility function depends positively on the well-being of" another person. BECKER, *supra* note 38, at 278. Becker does not deny that individuals have altruistic feelings towards their close relatives; to the contrary, he goes to some length to consider the (economic) effects of pervasive altruism within the family. *Id.* at 277-306.

Regan's work[47] picks up one aspect of that claim, by arguing that married individuals are (and often should be) thinking basically in "we" terms rather than "I" terms. Regan argues that spouses move back and forth between an "external stance" towards their marriage — a critical and reflective stance that can be roughly equated with that of economic analysis and utility maximizing — and an "internal stance," within which the marriage is part of a universe of shared meaning, a starting place quite different from that of individual utility maximization.[48] Thus, Regan's response to a comment like "spouses will stick with a marriage only if it produces a marital surplus — in the form of potentially utility-enhancing gains for each party — and only if each spouse receives some share of the surplus,"[49] is that it misses the extent to which married people do[50] think in terms of the couple or the family as the agent whose interests are to be maximized, and not each person as an individual agent.[51]

The problem of bounded rationality offers another basis for resisting law and economics[52] — in general, but especially in the area of domestic relations. There are certain kinds of choices most individuals do not make in a rational fashion, as "rational" is defined in economic analysis.[53] These types of choices would seem to include many of those

47. *See* REGAN, *supra* note 39. For an insightful critique of Regan's book, see Katharine B. Silbaugh, *One Plus One Makes Two*, 4 GREEN BAG 2d 109 (Autumn 2000).

48. On the difference between "internal" and "external" stances, see REGAN, *supra* note 39, at 5-6, 15-30; on the equation between the economic perspective and the external stance, see *id.* at 33-86.

49. This is Amy Wax's summary of the rational choice approach to marriage. Wax, *supra* note 39, at 529 (footnote omitted). Wax expressly indicates that she is not affirming the validity of the rational choice model and that she is aware of the problems bounded rationality may create for that model. *Id.* at 526-27 n.32.

50. And, Regan might add, "should."

51. *See* REGAN, *supra* note 39, at 62-73 (arguing that economic analysis cannot account for the "internal perspective"). Such a claim goes beyond, and is more complicated than, a Beckerian concession that individuals can be altruistic. *See supra* note 46. Under Regan's analysis, spouses do not merely altruistically desire good things for their partners and children; they *identify* themselves with marriage or the family. *See* REGAN, *supra* note 39, at 5-6, 22-30, 62-73.

52. *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) (collecting articles about bounded rationality); BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000) (collecting articles discussing the implications of bounded rationality for law and economics). It should be noted that some more recent variations of economic analysis do try to take account of bounded rationality. *See, e.g.*, OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 7 (1975) (describing the importance of bounded rationality to Williamson's approach to new institutional economics).

53. When people do not act as they might be expected to under a rational choice model, economic theorists would once have looked only to high transaction costs, or to some other sort of identifiable "market failure." *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 40-43 (3rd ed., 2000) (discussing "market failure"). More recently, the law and economics theorists have looked towards "social norms" to explain the deviation from "rational" behavior — but this has only led to efforts to explain and predict the development of

central to family law: the decision to marry, the decision to divorce, the decision to sign a premarital agreement, and so on.[54] To the extent that the central model of law and economics significantly distorts the decisionmaking process it purports to represent, there are reasons to doubt the efficacy of the approach. Law and economics theorists might reasonably respond, to this criticism and to other similar challenges, that even if their approach falls short of a full explanation, it *can* explain some phenomena that might otherwise seem mysterious, and therefore should be kept as a tool, even as we recognize that this tool is inadequate for offering a *complete* explanation of domestic and intimate relations.[55]

Carbone's contributions to this ongoing dialogue include her ability to synthesize — concisely and in understandable prose — a vast amount of work by economists, the critics of economics, and people working in other fields. More pointedly, she shows how economic analysis in the domestic relations area has sometimes fallen short because of insufficient attention to culture and history.[56] She favors theories that "pay attention not just to financial incentives . . . but [also] to the psychological and cultural factors that underlie decisionmaking . . ." (p. 95). Carbone's summary of the historical work on the development of the family shows how explanations grounded solely or primarily on economics have failed,[57] while simultaneously showing how attention needs to be paid to economic class *within* work about the family (pp. 55-110, 124-26, 308 n.1).

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social norms in rational choice terms. *See, e.g.*, Conference, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537-823 (1998) (discussion by a number of prominent scholars of the law and economics approach to social norms).

54. *See, e.g.*, Lynn A. Baker & Robert Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993) (using survey data to show that couples about to marry tend to be overly optimistic about the chances that they will be able to avoid divorce, or if divorced, that the child support obligor will pay the full amount owed); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 193-200 (1998) (discussing the rationality problem in the context of premarital agreements); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 254-58 (1995) (describing how "bounded rationality" can explain the restrictions on the enforceability of premarital agreements); Ziva Kunda, *Motivated Inference: Self-Serving Generation and Evaluation of Causal Theories*, 53 J. PERSONALITY & SOC. PSYCH. 636, 636 (1987) (describing how people generate self-serving theories to convince themselves that their chance of divorce is far less than the general divorce rate).

55. *Cf.* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 4-5 (1991) (making a similar claim for public choice theory).

56. As Carbone recognizes, economists have not entirely ignored history. *See, e.g.*, BECKER, *supra* note 38, at 85 (discussing some historical aspects of polygamy); pp. 55-57 (summarizing Friedrich Engels' historically based economic analysis).

57. Pp. 58-59, 90-99. Purely economic explanations that seem to have been rebutted by more careful study of the data include purported connections between industrialization and the development of the nuclear family, pp. 55-59, and between welfare benefits and nonmarital birth rates, p. 94.

While economic explanation might be adequate (and more) for "snapshot" analyses — given people's preferences, how will they react to a particular choice, or how will the sum of choices within a population be affected by a change in incentives caused by (say) a new law? — it is often less useful in explaining and predicting over the longer term. That is, economics is better at discussing how people will act given their preferences, and less good at predicting how and why people's preferences will change. There are a number of examples in Carbone's book of longer-term explanation and the shortfalls of economic analysis there. For example, there is currently a divergence in expectations between men and women regarding marriage roles, differences that in turn vary as one moves from class to class, and among different ethnic and racial groups (p. 19). In subgroups where women generally expect or demand a relatively egalitarian division of roles and men generally expect or demand a relatively traditional/hierarchical division of roles, the result has been a lower rate of marriage.[58] The question then becomes: if people value marriage (and the benefits that can be received from it) significantly, why do they not "renegotiate" the terms of marriage (and adjust their attitudes accordingly) in order to marry?[59] If the answer is because the individuals in question value those terms of marriage and attitudes towards marriage so much higher than the benefits of marriage that there is no point where the trade-off would be worthwhile,[60] then one can ask, how did the individuals come to value these attitudes or terms of marriage so highly? While the change in values *might* have an economic explanation, most of the evidence to date seems not to support that conclusion.[61]

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58. P. 19. The most extreme example may be in the African-American community, which once had marriage rates far higher than that for whites, but now has much lower rates. Pp. 78-80. While the explanation of this change is controversial and likely reflects a multitude of factors, at least one commentator has attributed the change in large part to differing attitudes among African-American men and women to marriage roles. ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 93-132 (1998).

59. Pp. 18-19. Carbone indicates that just such a "renegotiation" took place in the nineteenth century, after "women's greater economic independence, however minimal in today's terms, corresponded with a greater degree of family instability." P. 230.

60. There are other factors and explanations worth considering. As Eric Posner reminded me (in commenting on an earlier draft), the state, through its laws, puts some limits on the renegotiation, for example by prohibiting polygamy and (in most jurisdictions) same-sex marriage. Robert Gordon (also commenting on an earlier draft) speculated that men and women sometimes view marriage as a bundle of goods, and when those bundles overlap very little (as might be the case between an egalitarian/romantic view of marriage and a traditional/hierarchical view) and the parties are unwilling to unbundle the goods, fewer people might reach negotiated arrangements.

61. *See supra* note 57; *see also* PATTERSON, *supra* note 58, at 93-132 (offering a largely non-economic explanation for attitudes within the African-American community).

The current generation of family law theorists and law and economics theorists have shown that there is much that rational choice analysis can offer to the understanding of the domestic life and law, but they have also shown this approach's limits. The areas that interest many family law scholars the most — explaining familial and intimate behavior on one hand, and trying to predict, control or reform such behavior on the other hand — may be the areas where law and economics has the least to offer.[62]

CONCLUSION

While it seems a truism that every generation believes it is living at a crucial moment, and that change is occurring at unprecedented levels, when Carbone makes claims of this kind about the modern family — and family law and policy — it is hard to disagree. As she writes: "In the [last] twenty years . . . there is very little about the family that has not changed, and few verities that remain unchallenged" (p. 48). *From Partners to Parents* gives an excellent field guide to these changes, offering perspectives from history, economics and political theory.[63] Carbone shows how both family law doctrine and social thought have focused on the care of children but have unmoored that concern from any focus on the parents' behavior toward one another. The result has been a confused drifting in family law policy in general, and the regulation of marriage in particular. Additionally, Carbone's text, not always intentionally, leaves one cautious, even pessimistic, about the ability of government (or anyone else) to do much about the problems relating to the family. However, such caution may not be entirely a bad thing.

62. Which, of course, is not to say that any other single school or approach has done significantly better in this area.

63. Three small corrections and amendments should be offered:

(1) The reference to "Carl MacIntyre," p. 38, is an unintended conflation of the family law scholar Carl Schneider and the moral philosopher Alasdair MacIntyre.

(2) A footnote, p. 295 n.40, misstates the holding of *Ireland v. Smith*, 547 N.W.2d 686 (1996). That decision — an appeal from a highly publicized lower-court custody decision that seemed to punish a young woman's decision to put her child in day care while she went to university — did not "uph[o]ld an award of custody to a father whose own mother planned to care for the child." P. 295 n.40. In fact, the decision upheld an intermediate appellate court, which had *reversed* and remanded the lower court award of custody to the father. *Ireland*, 547 N.W.2d at 692.

(3) The reader should be told that the (initially startling) 1646 Colonial Massachusetts statute, p. 296 n.1, for the *execution* of recalcitrant children, simply restates (almost verbatim) Biblical language. *See Deuteronomy* 21: 18-21. As Carbone writes, there is no evidence that any child was ever actually executed under this statute. P. 296 n.1.