GARY BECKER, LEGAL FEMINISM, AND THE COSTS OF MORALIZING CARE

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Feminist theorists in a variety of fields have contributed unrelenting energy and invaluable insights to academic and policy-making work on the issue of women's unpaid work as homemakers.[1] Indeed, feminists have

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[1] Even though Gary Becker is often said to be the first one to develop formal economic models on household production he is by no means the first theorist to direct attention to household work as economically productive. As early as the nineteenth century, prominent feminist author and activist Charlotte Perkins Gilman extensively discussed the economic condition of housewives. According to Gilman, housework is economically valuable, even though it does not produce wealth and therefore places women in a state of absolute economic dependency on men. Gilman did not challenge the unpaid nature of women's work and treated instead women's market idleness as the problem calling for a solution. CHARLOTTE PERKINS GILMAN, WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION (Univ. of Cal. Press 1998) (1898). Within the field of economics, Margaret Reid's doctoral thesis, entitled *Economics of Household Production*, contained many of the basic ideas later formalized and expounded upon by Gary Becker, who was Reid's student at the University of Chicago. *See* MARGARET G. REID, ECONOMICS OF HOUSEHOLD PRODUCTION (1934). For an account suggesting that Reid's contributions to the field of economics in general and household economics in particular have not been duly acknowledged, see Yun-Ae Yi, *Margaret G. Reid: Life and Achievements*, FEMINIST ECON., Nov. 1996, at 17. In sociology, Ann Oakley first challenged the division of sociological study into distinct fields of market and family, in which the latter was not understood as a productive domain. *See* ANN OAKLEY, THE SOCIOLOGY OF HOUSEWORK (1974).

been struggling with the problem of housework, its valuation, and its (non-) remuneration for as long as feminism has been around.[2] As economic theories of the household have developed, so have the feminist responses to them. This article explores the tension between economic methodology and the premises of certain schools of feminist thought, focusing on the reaction of legal feminists to economic thought in the context of the care work debates.

Legal feminists in the 1970s and '80s were concerned with the ways in which law reinforces women's subordination in both the family and the market, especially through the endorsement or toleration of sexual violence and discrimination.[3] Discussions of the value of "homemaking" revived in the legal domain right after the no-fault divorce revolution and the consequent preoccupation with the financial destitution of divorced homemakers.[4] Legal scholars debated alimony in the no-fault era and

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[2] As Reva Siegel has aptly demonstrated, contrary to popular perception nineteenth-century feminists, the so-called "first-wave feminists," were not only concerned with voting rights but also argued for recognition and remuneration of household work, especially through joint property proposals. These projects were later eclipsed by the transformation of the economy and the rise in prominence of liberal feminism. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

[3] In this respect Catharine MacKinnon's work has been highly influential, setting the tone for many of the legal feminist work in the last quarter of the twentieth century. MacKinnon argued that women's subordination is pervasive and has at its foundation men's domination of women's sexuality through violence and coercion, direct and indirect in all domains of social life. *See* Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983). For an overview of feminist legal projects, and the case-law and legislation they led to in a variety of fields such as violence against women and discrimination, see MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY chs. 5, 6, 10 (2d ed. 2001).

[4] The debate was fueled by sociologist Lenore Weitzman's study of post-divorce household economics in which she concluded that divorcing wives' incomes drop by 73% after divorce, while divorcing men experience a rise in their income by 42%. LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL & ECONOMIC CONSEQUENCES FOR WOMEN & CHILDREN IN AMERICA 362 (1985). Weitzman's figures have been widely discredited after it was discovered that there were transcription errors in her data set. The rise and drop in post-divorce men and women's incomes after correcting the errors was calculated at 10% and 27%, respectively. Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 532 (1996). Recently, it has been argued the gender gap in post-divorce incomes between wives and husbands has been "seriously overestimated" because the studies have not taken into account disparate taxation benefits and shared child expenses. Sanford L. Braver, *The Gender Gap in Standard of Living After Divorce: Vanishing Small?*, 33 FAM. L.Q. 111, 131 (1999).

sought to redefine its basis in a way that would lead judges away from the idea of alimony as an award based on need.[5] They proposed a variety of approaches as improvements over the need-based one, such as a contractual theory of marriage that included rewarding a reliance interest and encouraging efficient breach[6] and a more traditional partnership theory.[7]

The alimony debates of the '80s developed into a broader debate—the care work debate—in which feminist scholars began to frame questions

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[5] Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

[6] Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988).

[7] One of the first scholars to bring attention to the potential results of the no-fault divorce revolution within the legal field was Martha Fineman. *See* Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789. Professors Weitzman and Davis specifically addressed a legal audience, claiming that alimony awards were being made on the basis of the male judges' beliefs regarding how much a male divorcee could actually afford. Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference*, 14 FAM. L.Q. 141, 181 (1980). Ira Ellman proposed a reconceptualization of alimony on the basis of a return to investments in the other spouse's human capital, transposing to some extent Gary Becker's ideas to the legal domain. Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989). Professor Parkman also offered an alimony model based on the idea of opportunity costs. Allen M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439 (1987). *See also* Lloyd Cohen, *Marriage, Divorce and Quasi Rents; Or "I Gave Him the Best Years of My Life"*, 16 J. LEGAL STUD. 267 (1987). Offering a variation of these models, Professor Jana Singer proposed a continued income-sharing scheme based on the idea of marriage as an economic partnership, in which both partners are presumed to be contributing equally important assets. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989). Professor Singer also criticized an efficiency-only based approach to alimony. Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994). For a partnership based model of post-divorce distribution that is not relying on economic ideas of partnership, see Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 198-201 (1987); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141 (2004). For the idea that women's homemaking work should earn them claims to their husbands' assets upon divorce based on the notion that they were relying on their husbands' earnings as security for a joint decision, see Katharine K. Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193 (1988).

regarding alimony and property division against the backdrop of the allocation of costs for dependent care (children, elderly, infirm) in both the family and the market.[8] At the same time, the idea of housework as economically productive came to the fore in large part due to the influence of economist Gary Becker, the father of the school of "New Home Economics" that flourished from the late '60s through the '70s.[9] The economic concept of housework as productive reinforced existing concepts of marriage as a partnership and started playing an important role in the debates over the allocation of the costs of dependent care. In addition, the economic emphasis on the valuation of household work became aligned with increasingly strong cultural feminist voices theorizing women's relationships to an "ethic of care" and the traditional undervaluation of this ethic through androcentric bias.[10]

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[8] For an overall theorization of marriage as a fundamentally unjust institution, which set the tone for feminist works inquiring into the justice of the distribution of work and resources within families see SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 134-86 (1989). Okin suggested that one way to deal with the injustice of one spouse earning all the cash for work jointly contributed would be to split the wage earner's check into two parts to be divided between the wage earner and the homemaker. *Id.* at 181. Martha Fineman provided the most thorough articulation of the idea that dealing with post-divorce entitlements as a matter of justice between marital partners was woefully inadequate. She reoriented the focus of legal scholarship from one involving justice between spouses to one involving justice for caretakers, whose dependency is at least partially constructed by the legal system through the allocation of entitlements on the basis of marriage rather than on the "inevitable dependency" of childhood and the "derivative dependency" of motherhood. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

[9] For an account of the development of the New Home Economics school and its relationship to the work and personality of its founders, Gary Becker and Jacob Mincer, see Shoshana Grossbard-Shechtman, *The New Home Economics at Columbia and Chicago*, FEMINIST ECON., Nov. 2001, at 103.

[10] The idea that women have a privileged relationship to an ethic of care gained popularity—as well as notoriety—through the work of psychologist Carol Gilligan, examining the moral language used by college-aged boys and girls. Gilligan challenged the results of a psychological study that presented girls as reaching lower moral development than boys of the same age. Her challenge was based on the idea that the study included mainly boys and therefore its results were tilted towards a principle-based type of moral thought, favoring the kind of moral thought characteristic of boys, while leaving out of the picture a more relational-type of moral thought that was characteristic of girls. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). The work spurred a host of writings in a variety of different domains. In philosophy, Professor Eva Kittay further explored the idea of women's ethic of care especially in relationship to mothering. *See* Eva Feder Kittay, *Taking Dependency Seriously: The Family and Medical Leave Act Considered in Light of the Social Organization of Dependency Work and Gender Equality*, HYPATIA, Winter 1995, at 8; Eva Feder Kittay, *Human Dependency*

However, the alliance of economics and feminism has been an uneasy one. Although feminists use economic methods or conclusions, they have repeatedly criticized economics as a tool limited in its usefulness for feminist purposes. Feminist scholars have produced a number of compelling critiques of economic methodology,[11] specific policy proposals,[12] and the male domination in economics as an academic field.[13] However, many feminist thinkers repeatedly returned to the idea that something about economic rationality makes it particularly inept at capturing the realities of family life, and some even suggested there is something inappropriate about the use of economics to describe family life or women's labor.[14]

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and Rawlsian Equality, *in* FEMINISTS RETHINK THE SELF 219 (Diana Tietjens Meyers ed., 1997). In the field of education and philosophy of education, Nel Noddings had a similar impact to Gilligan in psychology. *See* NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984). Inside the legal field, Robin West is one of the most sophisticated proponents of a relational ethic of care as a basis for a theory of justice. *See* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000); ROBIN WEST, CARING FOR JUSTICE (1997). For a critique of West's work based on the idea that it "has acquired the totalitarian zeal of slave morality," see Janet Halley, *The Politics of Injury: A Review of Robin West's* Caring for Justice, 1 UNBOUND 65, 79 (2005), http://legalleft.org/wp-content/uploads/2007/05/1unb065-halley.pdf. For West's response to Halley, see Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1 (2006).

[11] For an example of a critique to the methodological approach employed by the New Home Economics school see Marianne Ferber & Bonnie G. Birnbaum, *The "New Home Economics": Retrospects and Prospects*, 4 CONSUMER RES. 19 (1977). *See also* Rebecca M. Blank, *What Should Mainstream Economists Learn From Feminist Theory?*, *in* BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 133 (Marianne A. Ferber & Julie A. Nelson eds., 1993); MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (1988); Myra H. Strober, *Can Feminist Thought Improve Economics?: Rethinking Economics Through a Feminist Lens*, AM. ECON. REV., May 1994, at 143.

[12] Divorce and the allocation of post-divorce entitlements in regards to property and child custody has been one of the most intense battlegrounds for policy-oriented legal feminists. For a concise summary of the variety of different positions taken by a number of different feminists, see June R. Carbone, *A Feminist Perspective on Divorce*, THE FUTURE OF CHILDREN, Spring 1994, at 183, 194-99.

[13] *See, e.g.*, Marianne Ferber, *The Study of Economics: A Feminist Critique*, AM. ECON. REV., May 1995, at 357.

[14] *See* Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1, 3-5 (1996). For the idea that valuing women's labor in market terms is degrading, see Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 80-87 (1990). Notable exceptions to this trend include the work of Margaret Brinig, who has extensively written on family law from a feminist law and economics perspective. In this endeavour she has engaged with Gary Becker's work critically from points of view both internal and external to economics. *See* Margaret F. Brinig, *"Money Can't Buy Me*

This Article argues that although some of the critiques of economics—especially normative economics—are warranted, many of the feminist objections to the adequacy or desirability of economics as a tool for capturing family life can be traced to feminist impulses that tend to entrench the male/female dichotomy in a number of ways.[15] The goal is to highlight the insights that feminists can gain from developments in economic thought and reclaim the assumption of selfishness as a core part of "methodological individualism"[16] and a useful and appropriate tool for feminists.

This Article responds to a growing trend in legal feminism to moralize women's work in the family in the attempt to get greater benefits for the women who perform it. It revisits the work of Gary Becker, analyzing the reactions to his work by feminists working within economics and law, and proposes a reading of his theories that pinpoints the elements

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Love": A Contrast Between Damages in Family Law and Contract, 27 J. CORP. L. 567 (2002); Margaret F. Brinig, *Comment on Jana Singer's* Alimony and Efficiency, 82 GEO. L.J. 2461, 2471 (1994); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 990-91 (1991). June Carbone's book, *From Partners to Parents*, also includes a critique of Becker's theories from the angle of its internal incoherence. JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000). Katharine Silbaugh has offered an analysis of the ways in which the legal system obfuscates the productive value of housework, thus furthering some of Becker's ideas in the legal domain. Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

[15] According to this impulse, economic rationality is regarded as fundamentally male, either because of its disregard for motives and actions that do not properly fall under the profit-maximizing assumption or because of its disregard for women's behavior, which doesn't properly fall under the same assumption. *See* Paula England, *The Separative Self: Androcentric Bias in Neoclassical Assumptions*, *in* BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 37 (Marianne A. Ferber & Julie A. Nelson eds., 1993). Another variant to this line of thought posits the inadequacy of economics for capturing the complex behavior that takes place in the family (as opposed to the marketplace) and also warns against the dangers of using the language of costs and benefits to describe relationships that are constructed on a fundamentally different basis. *See* Estin, *supra* note 14, at 3-5.

[16] Max Weber introduced the idea of "methodological individualism" in the social sciences. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Bedminster Press 1968) (1922). The Stanford Encyclopedia of Philosophy defines methodological individualism as the proposition that "social phenomena must be explained by showing how they result from individual actions, which in turn must be explained through reference to the intentional states that motivate the individual actors." Methodological Individualism, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/methodological-individualism/ (last visited May 14, 2007).

useful for feminist purposes. The Article further examines the reception of economic work in the legal field in the context of the care work debates. It reveals that, upon closer inspection, feminist proposals to remunerate household work because of its productive but unpaid character rely on an idea of household production that sounds in economics but ultimately borrows little from economics as an analytic method. Rather, many legal feminists' ideas of household work as productive rely on an underlying moralization of the family, dependency, and women's roles in both. This tendency to moralize conflates women and mothers, mothers and children, and mothers, children, and poverty, and only makes analysis of the issues at stake more difficult.

The Article consists of three parts. Part I develops a critical examination of developments in the field of household economics. Stepping out of the feminist tendency to regard mainstream economic methodology, and Becker's work in particular, with suspicion,[17] it offers a close reading of Becker's work to produce a feminist critique that engages his ideas internally, without hinging upon normative assumptions about women's relationships to empathy and care. It retraces feminist reactions to the school of "New Home Economics" to separate the elements of these critiques that are useful and to the point from those that can be attributed to disciplinary assumptions specific to feminism. Part I concludes by proposing some elements of economic work post-Becker that provide useful insights to feminist theory.

Part II presents an analysis of the modes in which economic thought has been received in feminist and legal feminist discussions to show that although some feminists appropriate conclusions from economic thought that they believe will be helpful to feminist policy-making, they consistently convey a deep ambivalence about economic methodology. This Part examines the arguments that feminists have been exchanging in the context of the care work debate, which has been revitalized over the last fifteen years, to locate feminist reactions to economic analysis. This examination reveals that cultural feminist understandings have predominated, setting the tone not only for what kinds of policy proposals feminists can put forth, but also for what modes of argument a "good" feminist should put forth. Feminist resistance to and partial appropriation of economic thought can be best understood against the context of this growing cultural feminist consensus on women's work.

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[17] For an account of the alleged methodological points of disagreement between mainstream economics and feminism, *see* England, *supra* note 15.

Finally, Part III offers an articulation of the costs of this consensus and how developments in economics and feminist economics might help us rethink it. Becker's altruist and the negotiation models that followed can actually help to refocus attention on women's agency and the "carrots and sticks" that make a gendered division of labor persist, even within the framework of a dual-earner family. More broadly, economic methodology can help articulate the potential consequences of legal reforms on different groups of women and men.

I. GARY BECKER, FAMILY ECONOMICS, AND FEMINIST THOUGHT

A. The New Home Economics

Gary Becker is a Nobel Prize winner.[18] Everyone who has read family law literature in the past ten years knows that. Without actually reading Becker's work, however, the family law reader will learn little beyond this minor fact. She may have some general idea about Becker's role as a pioneer in bringing economics into the family realm and as an avid legitimator of the patriarchal family. In reality, Becker's writing on issues related to the family has been extensive,[19] and he is one of the most frequently cited authors in economics and family law, including the fields of feminist theory[20] and law and economics.[21] As Robert Pollak, one of

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[18] Nobel Foundation, All Laureates in Economics, http://nobelprize.org/nobel_prizes/economics/laureates/ (last visited March 12, 2007).

[19] For a collection of Gary Becker's most important essays on the economics of the family, including his work on fertility, the sexual division of labor and human capital, see THE ESSENCE OF BECKER (Ramon Febrero & Pedro S. Schwartz eds., 1995). Becker's *A Treatise on the Family* is perhaps his most well-known and often-cited work outside the field of economics. GARY S. BECKER, A TREATISE ON THE FAMILY (enlarged ed. 1991) [hereinafter BECKER, TREATISE].

[20] *See generally* BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS (Marianne A. Ferber & Julie A. Nelson eds., 1993); Isabel V. Sawhill, *Economic Perspectives on the Family,* 106 DAEDALUS 115, 120-21 (1977); Marianne A. Ferber & Bonnie G. Birnbaum, *"The New Home Economics:" Retrospects and Prospects,* 4 J. CONSUMER RES. 19 (1977); Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics,* 36 WM. & MARY L. REV. 989 (1995); BARBARA R. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 266-73 (1986).

[21] Becker's arguments on the efficiency of the gendered division of labor provided scholars with an argument against the no-fault revolution in divorce, which was deemed Pareto inefficient since it encouraged one party, the husband, to run off after a long marriage with a younger trophy wife, even though husband and wife would have been on the

Becker's most prolific critics—and continuators of his work—within the field of economics, put it: "In its contemporary form, the economics of the family is Gary Becker's creation."[22]

The two aspects of Becker's work that have provoked the most active controversy in the field of family law and the most intense condemnation from feminist theorists are his theories regarding the sexual division of labor[23] and his "altruist" model of the family.[24] The former purports to explain the widespread sexual division of labor observed even in modern liberal societies on the basis of sex differences that, according to Becker, make this division efficient.[25] His altruist model, on the other hand, is an effort to formally model the ways in which "altruism" in the family leads to coordinated behavior.[26] I will briefly sketch the main elements of Becker's theories before analyzing the reactions that Becker provoked among feminists, both in economics and the law.

1. The Household Production Function

Becker's theories of the sexual division of labor and altruism in the family both rely on an extension of traditional utility maximization theory to include household activities. According to Becker, inside the household, "time and goods are inputs into the production of 'commodities,' which directly provide utility. These commodities cannot be purchased in the marketplace but are produced as well as consumed by households using market purchases."[27] In Becker's view, the utility function includes not only

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aggregate better off if the marriage continued. Furthermore, some legal scholars argued that the no-fault regime also discouraged spouses from making the decisions that would lead to "efficient" results, which led them to work longer hours in the market rather than concentrate on specializing in household work. *See* Allen M. Parkman, *The Contractual Alternative To Marriage,* 32 N. KY. L. REV. 125, 134 (2005); Allen M. Parkman, *Why Are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41 (1998); Ellman, *supra* note 7.

[22] Robert A. Pollak, *Gary Becker's Contributions to Family and Household Economics*, 1 REV. ECON. HOUSEHOLD 111, 112 (2003).

[23] *See* BECKER, TREATISE, *supra* note 19, at 30-53.

[24] *See id.* at 277-306.

[25] *Id.* at 37.

[26] *Id.* at 283.

[27] *Id.* at 23. For the full version of Becker's household production function, see Gary S. Becker, *A Theory of the Allocation of Time*, 75 ECON. J. 493 (1965).

preferences for goods and services to be bought in the marketplace, but also preferences for the allocation of time between market work and household production and consumption. According to Becker, "full income is spent in part directly on market goods and in part indirectly on the time used to produce utility rather than earnings."[28]

There are two aspects of Becker's extension of the traditional utility maximization theory that are relevant to this article. The first is that household activities are productive. The Beckerian family functions like a firm using inputs of money and labor to produce "household commodities," which enter the household's utility function as arguments.[29] The second is that these commodities are consumed at home, not simply produced there. Such commodities include family time together, a vacation, sexual pleasure, and even children. The first aspect of this theory has been widely taken up and used by feminists in a variety of different domains, while the second has been extended, criticized, and transformed by feminist economists and legal feminists alike.[30]

2. Comparative Advantage and the Sexual Division of Labor

Becker's theory of the sexual division of labor proposes that the utility function described above is maximized when members of households specialize in either household or market work. Becker transposes insights from comparative advantage theory in the context of the household: "The theory of comparative advantage implies that the resources of members of a household . . . should be allocated to various activities according to their comparative or relative efficiencies."[31] If family member *A* has a

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[28] BECKER, TREATISE, *supra* note 19, at 22.

[29] For an explanation and criticism of Becker's household production function from the economic perspective see Robert A. Pollak & Michael L. Wachter, *The Relevance of the Household Production Function and Its Implications for the Allocation of Time*, 83 J. POL. ECON. 255, 256 (1975).

[30] In a sense, the field of feminist economics originally sprang out of a reaction to the theories and underlying assumptions of the school of "New Home Economics" that Becker initiated. *See* sources cited *supra* note 20. Feminist economists have implicitly challenged the notion that household commodities are consumed at home by discussing, for example, the "public goods" aspects of reproduction. *See* Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86, 96-90 (1994); Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 194 (1999). Legal feminists often refer to the productive aspects of household work even though there does not appear to be a consensus on what exactly is produced. *See infra* Part II.A.

[31] BECKER, TREATISE, *supra* note 19, at 32.

comparative advantage over family member *B* in household work relative to market work, then an hour spent by *B* doing housework has less value in terms of production than an hour spent by *A* doing the same work.[32] It is important to note that on an absolute scale both could be equally good at market work, but if *B* is *worse* at housework than *A*, consequently *A* will have a comparative *advantage* at housework.

Although the theory does not require it, Becker explicitly starts from the premise that there are intrinsic biological differences that explain why women have traditionally done the bulk of the housework.[33] From this premise flows the conclusion that "[h]ouseholds with only men or only women are less efficient because they are unable to profit from the sexual difference in comparative advantage."[34] However, Becker insists that it does not matter what the source of the comparative advantage is. In fact, market discrimination against women could constitute the source of their comparative advantage at home.[35]

3. The Altruist Model

Becker's altruist model assumes a male head of the household, whose motives are at least partially "altruistic," to account for coordinated behavior in the family that maximizes a single utility curve.[36] Becker begins by assuming that only one actor in the family is altruistic while all others are "selfish beneficiaries" of his altruistic preferences.[37] In explicating his theory, he assumes that the husband *h* is the altruist and the wife *w* is the selfish beneficiary.[38] He uses the phrase "effectively altruistic" to describe

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[32] *See id.* at 32-37.

[33] *Id.* at 37-38.

[34] *Id.* at 38-39. Notably, this position necessarily leads to the problematic conclusion that same-sex couples are, according to Becker, less efficient than heterosexual couples.

[35] *Id.* at 4.

[36] *Id.* at 282.

[37] *Id.* at 280-84.

[38] In a move that is clearly set to provoke feminists, Becker introduces the altruist model via the husband/wife distinction in a passing footnote: "To distinguish the altruist from the beneficiary, I use the masculine pronoun for the altruist and the feminine pronoun for the beneficiary." *Id.* at 278 n.1. This assumption in particular has been, as Julie Nelson put it, "raising feminists' blood pressure since the mid-1970s when it first appeared." JULIE A. NELSON, FEMINISM, OBJECTIVITY AND ECONOMICS 61 (1996).

an actor whose altruistic preferences actually influence his behavior;[39] an *h* with effectively altruistic preferences will spend some of his own income on *w*.[40] It is important to note that in the context of Becker's analysis, an "altruist" simply means an actor whose utility function positively depends on the beneficiary's well-being,[41] and he purports to use the terms "altruistic" and "selfish" to describe only people's observable behavior, not their motivations.[42] Thus, an "altruist" could be motivated by perfectly selfish reasons for helping out his beneficiary, such as when he expects that his altruistic behavior will maximize the family income (and therefore his own share of it)[43] or even when he simply gets a kick out of helping out.

Furthermore, altruism "the Becker way" does not inform us of the relevant weight of the altruist's *preferences* as compared to those of his beneficiaries. The Beckerian altruist might weigh his own and his wife's utility equally, or he might give substantially more weight to his own utility than to *w*'s. As Pollak puts it: "Some altruists may give equal weight to every family member; others may give virtually all the weight to themselves and virtually none to other family members."[44] However, if *h* is an effective altruist, the family income will be the sum of his own and his beneficiary's income.[45] Family income then is closely connected to the altruist and his preferences:

> An altruist is made better off by actions that raise his family income and worse off by actions that lower it. Since family income is the sum of his own and his beneficiary's income, he

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[39] BECKER, TREATISE, *supra* note 19, at 280-84.

[40] *Id.* For the mathematically inclined, Becker makes extensive use of mathematic formulae to describe formally what he has already explained with words. For the mathematic formulae, see *Id.* Robert Pollak has suggested that the use of the word "altruistic" creates confusion, especially between different disciplines. He advocates the use of the term "deferential preferences," which is a special case of interdependent preferences. Pollak, *supra* note 22, at 119.

[41] BECKER, TREATISE, *supra* note 19, at 278.

[42] *Id.* at 279.

[43] *Id.* at 60.

[44] Pollak, *supra* note 22, at 119. Bergmann also makes the same observation in Barbara R. Bergmann, *Becker's Theory of the Family: Preposterous Conclusions*, FEMINIST ECON., Mar. 1995, at 141, 147 [hereinafter Bergmann, *Preposterous Conclusions*].

[45] BECKER, TREATISE, *supra* note 19, at 282.

> would refrain from actions that raise his own income if they lower hers even more; and he would take actions that lower his own if they raise her income even more.[46]

A key consequence of Becker's model is that due to the existence of an altruist in the family, the selfish members of the family act as if they were altruists themselves. According to Becker, "sufficient caring by an altruist *induces* even a selfish beneficiary to act as if she cares about her benefactor as much as she cares about herself."[47] This idea leads to Becker's famous Rotten Kid Theorem, which proposes that no matter how selfish a beneficiary is, he can be induced by the reactions of the altruist to internalize the effects of his actions on the altruist's own income and consumption.[48] Since *w*'s total income is a function of *h*'s contribution, she will refrain from actions that directly increase her own income in order to maximize her total income, if she expects that doing so will lead to *h* lowering his contribution by more than the amount produced by her actions. Under this theory, *w* can expect that *h*'s contribution to her will decrease when the increase in her income causes *h*'s income to go down. Inversely, she *will* take actions that lower her income, if she expects doing so will lead *h* to increase his contribution by more than the decrease in her own income, and *w* can expect that *h*'s contribution to her will increase if the decrease of her own income causes *h*'s income to go up. As Becker asserts, "This simple, yet remarkable theorem has major implications for efficiency, the division of labor, and many other aspects of family behavior."[49]

B. The New Home Economics and Its Feminist Discontents

1. Feminist Critiques of Economic Methodology

Unsurprisingly, feminist theorists reacted strongly to Becker's theories. In her article *Can Families Be Efficient?*, Ann Laquer Estin examined some of these reactions, which have been formulated as part of a more general feminist attack on the application of economic models to the family.[50] Estin usefully summarizes feminist objections to economic theory

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[46] *Id.*

[47] *Id.* at 284 (emphasis added).

[48] *Id.*

[49] *Id.*

[50] Estin, *supra* note 14.

as "suggest[ing] that the boundary between positive and normative approaches is not easily drawn," even though "[e]conomists, and many of those in law and economics, have drawn a sharp distinction" between the two.[51] Furthermore, neoclassical economics, according to some of its critics, ignores "issues of power, inequality and other social factors."[52] Barbara Bergmann, for instance, has claimed that "[a] major characteristic of this mode of analysis is the paucity of the factors taken into consideration."[53] Estin argues that "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."[54] She notes that feminists call for less quantitative methods of analysis, such as Julie Nelson's process of "imaginative rationality."[55] Some feminist economists, in fact, suggest that "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."[56] Finally, according to Estin, feminism objects to the "paradigm of the rational, utility-maximizing individual agent, and the heavily mathematical nature of contemporary economic theory."[57]

These views accuse economics of being reductive, not representing the way women (or most people) behave, and encompassing a fundamental male bias. Comparing feminist and law and economics approaches to divorce and alimony, Estin concludes that "the two frameworks are also remarkably different in their goals, their methods and their values."[58] This stance is not merely descriptive. It is essentially a normative stance that misleadingly represents feminism as having unified goals, methods and values, which set it apart from economic methodology. Thus, it obstructs the use of economic methodology for inquiring into the potentially different

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[51] *Id.* at 1-2.

[52] *Id.* at 5 (citing a number of articles critical of neoclassical economics) (footnote omitted).

[53] Bergmann, *Preposterous Conclusions*, *supra* note 44, at 142.

[54] Estin, *supra* note 14, at 4.

[55] *Id.* (footnote omitted).

[56] *Id.* at 11.

[57] *Id.*

[58] *Id.* at 1.

ways in which policy proposals aimed at uniformly benefiting women might in fact impact different groups of women—and men—across class, race, and age lines.

2. Feminist Critiques of Becker

Becker's work has always been controversial among feminists,[59] and even non-feminist economists showed reluctance about the Becker-led expansion of economics into other disciplines.[60] Feminists from both the economic and legal fields have had particular difficulty dealing with Becker's theories, but perhaps even greater difficulty with his politically-enraging—particularly from a feminist point of view—style than economists with no professed affiliation or sympathy to feminism.[61] In an article published in the inaugural issue of *Feminist Economics*, Barbara Bergmann condemned Becker's "results" as "preposterous" on the issues of polygamy, altruism and fertility.[62] However, though Bergmann's point that his altruist theory could be accurately renamed "The Present-Giving Male Dictator and His Selfish Wife" is correct,[63] this in and of itself is not an adequate critique of the theory or its implications.

Picking up on these weaknesses in Bergmann's analysis, Frances Woolley suggested that the only way to "get the better of Becker" was to ignore his flair for offensive word choice and instead try to profit from what Becker could *contribute* to the study of the family.[64] She pointed out that it

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[59] *See, e.g.*, Ferber & Birnbaum, *supra* note 11; Barbara R. Bergmann, *The Economic Risks of Being a Housewife*, AM. ECON. REV., May 1981, at 81.

[60] Pollak, *supra* note 22, at 113 (pointing out that Becker himself noted economists' hostility to the idea of economics as a method used to describe family related decisions). Another economist, Edward P. Lazear, has characterized the phenomenon as "economic imperialism," even though he describes it as a positive development. Edward P. Lazear, *Economic Imperialism*, 115 Q.J. ECON. 99 (2000). This expression is sometimes picked up in feminist writing as well. *See* CARBONE, *supra* note 14, at 3.

[61] *See, e.g.*, Bergmann, *Preposterous Conclusions*, *supra* note 44; Frances Woolley, *Getting the Better of Becker*, FEMINIST ECON., Mar. 1996, at 114. *See also* Grossbard-Shechtman, *supra* note 9, at 107-08 (providing an account of how Becker's gendered assumptions became an issue with feminist economists during the 1970s, even though they had been previously working with Becker).

[62] Bergmann, *Preposterous Conclusions*, *supra* note 44, at 149.

[63] *Id.* at 146.

[64] Woolley, *supra* note 61, at 115.

was precisely in response to Becker that a variety of alternative models of the family emerged in economic literature.[65] These models showcase bargaining theories that avoid collapsing family behavior into a single utility curve.[66]

For some feminists part of what triggers the "allergy" to Becker, beyond the general methodological objections mentioned above, is his effective identification of the "altruist" with the husband head of household.[67] Many of the critiques focus on the proposition that historically husbands have exploited wives and have not behaved in what one would describe as an altruistic manner.[68] Paula England observes that "[f]rom a feminist point of view the overarching problem with Becker's work is that he fails to consider seriously that men are often *not* altruistic to their wives and children."[69] Even Bergmann, one of the most rigorous of Becker's feminist critics, seems to be thrown off by the mere characterization of the husband as altruist. She claims that "Becker implicitly assumes that all males are altruists, which implies there are enough altruists to go around: at least one to a family."[70] The characterization of the head of household as an altruist distracts her analysis, despite the fact that under Becker's limited definition of altruism, most male heads of household qualify as Beckerian altruists because they are, in fact, spending part of their income on their families.

This take on Becker's theories leaves feminists open to the accusation that they are interpreting an economic model too literally and not

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[65] *Id.*

[66] For an overview of the economic literature that tries to break up Becker's 'unitary' model of the family and instead inquire into the ways decisions within multi-person households are being made and resources distributed, see M. Browning & P.A. Chiappori, *Efficient Intra-Household Allocations: A General Characterization and Empirical Tests*, 66 ECONOMETRICA 1241 (1998). For a more accessible explication of the models that have been developed in economics, see Robert A. Pollak, *Bargaining Power in Marriage: Earnings, Wage Rates and Household Production*, Mar. 2005, http://www.olin.wustl.edu/faculty/pollak/Barg%20Power%20Mar%2005.pdf.

[67] BECKER, TREATISE, *supra* note 19, at 283.

[68] Estin, *supra* note 14, at 24 (describing various feminist critiques).

[69] Paula England, *Separative and Soluble Selves: Dichotomous Thinking in Economics*, *in* FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN 33, 46 (Marianne A. Ferber & Julie A. Nelson eds., 2003).

[70] Bergmann, *Preposterous Conclusions*, *supra* note 44, at 148.

trying to figure out its use. For example, in her book *Sex and Social Justice*, prominent legal feminist scholar Martha Nussbaum argues that:

> Becker assumes that the family's goal is the maximization of utility, construed as the satisfaction of preference or desire, and that the head of the household is a beneficent altruist who will adequately take thought for the interests of all family members . . . . The picture of male motivation does not fit the evidence.[71]

However, as family economist Robert Pollak points out, Nussbaum is mistaken to think that Becker's theory is reducible to a descriptively inaccurate claim about the historical altruism of male heads of household.[72] Nussbaum's critique of Becker is illustrative of the fundamental misunderstandings "new home economics" ideas have generated within other academic disciplines.[73] To be sure, as Pollak acknowledges, Becker's idiosyncratic and misleading use of the term "altruism" is partly to blame for this misunderstanding. Nonetheless, reactions that take the model literally do not say much for the potency of the critiques to Becker's altruist model either.[74]

3. A Critique of the Critiques

The project of challenging the dichotomization of the human psyche into the male/female paradigm and its corollaries (reason/sentiment, abstraction/concreteness, mathematics/imagination) is a worthy one.[75] Claiming emotions for women and reason for men as a means to comprehend and analyze the world is far less useful. On a strategic level, attacking a model of economic analysis for a lack of emotional or imaginative rationality does little to destabilize it. An internal critique is far more powerful, as it would expose that a conceptual apparatus that aspires to rational analysis and coherence lacks both. Pointing to the problematic *use*—an external critique—of economic models of efficiency as a guide for

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[71] MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 33 (1999) (footnotes omitted).

[72] Pollak, *supra* note 22, at 119.

[73] *Id.*

[74] *Id.*

[75] For a thorough description and critique of the modes in which these dichotomies repeatedly structure legal reform proposals, see Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

policy recommendations is another meaningful response. An effective critique ideally combines both elements. But refusing to engage with an analysis because it uses mathematical models or is "too rational" is self destructive, particularly in a world where both mathematics and rationality hold special positions as descriptive and explanatory methods.

Even though some of the feminist objections above provide compelling reasons why many feminists would not engage in a neoclassical economic analysis of the family themselves, these objections are not in and of themselves a powerful critique of economic methodology. Critiques such as Estin's, that "because these models omit much of the context and complexity of family life, the conclusions they yield have often seemed inadequate,"[76] miss the point of working with such hypotheses, which always rely on simplifying assumptions. The relevant question is not whether most people actually are selfishly motivated, but whether the method of *assuming* that most people behave in a profit maximizing way can yield interesting or useful analyses of their behavior.[77] Feminist methodologies are no different. Feminist theories also assume away many of the complexities not only of family life but also of interpersonal relationships by positing, for instance, the uniform exploitation and subordination of women by men. However, that doesn't always disqualify these analyses from being theoretically relevant tools for interpreting the world.

Furthermore, objections to the quantitative, mathematical, and abstract nature of economics reproduce the male/female dichotomy and all the baggage that goes with it at the core of the feminist project itself.[78] The recognition of empathy and connection at the descriptive level will not necessarily make economics more feminist, unless one believes that any method assuming rational, selfish actors excludes women's behavior en bloc. Under this belief—to which some cultural feminists appear to adhere—a feminist approach should account for the ways in which women behave, and by definition economic rationality fails do that. Thus, altruism would belong only to women, also by definition—feminist definition.

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[76] Estin, *supra* note 14, at 3.

[77] Besides this central methodological point, critiques that hinge upon the "complexity of family life" assume an implicit simplicity of business life, presumably because we can plausibly posit selfishness in that domain, whereas we are less likely to do so in the family, thus reiterating, however, the infamous family/market distinction that feminists have spent energy criticizing as ideological. *See* Olsen, *supra* note 75.

[78] For the classic formulation of women's concrete vs. men's abstract rationality, see GILLIGAN, *supra* note 10.

Furthermore, even if we were to accept this claim, a more accurate description of women's behavior in economics would not necessarily render the method more feminist, unless we were to also accept the idea that describing women's altruism is the normative goal that defines feminism.

By comparison, within economics, Becker's work still raises "feminists' blood pressure,"[79] but feminist economists have moved beyond "Becker bashing"[80] and developed work that even employs some of Becker's models for feminist purposes. For example, development economist Vegard Iversen enlists Becker's model for a feminist cause by using it to show that the Senian capability approach that equates the presence of women's choices as an indicator of freedom may very well be misguided.[81] He observes that "Becker's theory makes it unambiguously difficult to accept choice-mediated control as a robust indicator of freedom."[82] Ten years after Woolley observed that Becker's work spurred interest in family consumption patterns and distribution of resources within the family,[83] economic journals are filled with work that analyzes intra-family distribution and further studies the ways in which institutional economics can supplement or correct for some of behavioral economics' most misguided assumptions, such as the idea that preferences are exogenous and constant.[84] This work showcases a willingness to inquire into women's active participation in a gender system that distributes

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[79] NELSON, *supra* note 38, at 61.

[80] Woolley, *supra* note 61, at 118.

[81] Vegard Iversen, *Intra-household Inequality: A Challenge for the Capability Approach?*, FEMINIST ECON., July 2003, at 102-03.

[82] *Id.*

[83] *See* Woolley, *supra* note 61, at 115-16.

[84] *See* ROBERT A. POLLAK & TERENCE J. WALES, DEMAND SYSTEM SPECIFICATION AND ESTIMATION 102 (1992) (challenging the assumption that preferences are fixed and exogenous); Jungmin Lee & Mark L. Pocock, *Intrahousehold Allocation of Financial Resources: Evidence from South Korean Individual Bank Accounts*, 5 REV. ECON. HOUSEHOLD 41 (2007); Orazio Attanasio & Valérie Lechene, *Tests of Income Pooling in Household Decisions*, 5 REV. ECON. DYNAMICS 720 (2002); Zhiqi Chen & Frances Woolley, *A Cournot-Nash Model of Family Decision Making*, 111 ECON. J. 722 (2001); Elizabeth Katz, *The Intra-Household Economics of Voice and Exit*, FEMINIST ECON., Nov. 1997, at 25; Greta Friedemann-Sánchez, *Assets in Intrahousehold Bargaining Among Women Workers in Colombia's Cut-Flower Industry*, 12 FEMINIST ECON. 247 (2006).

advantages and disadvantages differentially along and within the lines of gender, class, and race.[85]

The situation within legal feminism is somewhat different. Legal feminists struggle with a partial relationship to economic thought that in some ways runs deeper than the feminist economists', who are obliged to engage with economic analysis simply by disciplinary location. Becker comes up here in two ways. The first is when he is acknowledged for his recognition that the household is a productive domain. The second is when he is criticized for male bias. In general, legal feminism has incorporated a number of conclusions coming from the economic literature,[86] but economic analysis itself is rarely employed in feminist legal scholarship.[87] This becomes acutely evident in the context of the care work debate. Within the debate, legal feminists have adopted the idea that household work is productive, but they have transformed it into a moral concept that guides efforts to ensure greater legal entitlements, for example, for divorcing homemakers. This transformation makes the discussion of the costs and benefits of specific policy proposals for different groups of women difficult to sustain, while also rendering discussions of women's own contributions to the current gender system unpalatable.

C. An Internal Critique of Becker from a Feminist Perspective

This section offers a reading of Becker's theories that doesn't hinge on feminist commitments related to women's subordination or their relationship to care and altruism. Instead, it is an attempt to disentangle the elements that are unfounded and truly "preposterous"[88] from those that actually offer some insight and could potentially even be enlisted to serve a feminist cause. In this way, this section is an exercise in exploring the potential to "dismantl[e] the master's house," using the "master's tools."[89]

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[85] See discussion *infra* Part III.A-B.

[86] For example, the conclusions that household work has productive value and that child rearing could potentially be considered to generate positive externalities have been appropriated for specific policy proposals. *See* discussion *infra* Part III.A.

[87] *But see* Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998).

[88] Bergmann, *Preposterous Conclusions*, *supra* note 44.

[89] Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* THIS BRIDGE CALLED MY BACK 98, 98-101 (Cherrie Moraga & Gloria Anzaldua eds., 1981).

In so doing, it questions the very idea that the tools are—or should remain—the master's in the first place. [90]

1. Becker's analysis of efficiency is incomplete and contradictory

a. Becker's biological comparative advantage hinges on a process of gendering in pink and blue

Upon close scrutiny, Becker's idea of a "biological[] orient[ation] to market rather than household activities"[91] is almost indistinguishable from a process that any feminist would recognize as gendering. Despite the apparent biologism in Becker's analysis, it is the mediating concept of investment in household-related human capital that allows the sexual division of labor to be the efficient arrangement between spouses. In his scheme, women are not born with a fully-developed comparative advantage in household work, but only with a greater chance of wanting to devote themselves to the rearing of children.[92] This tendency makes it sensible for women to invest in household-related human capital and increase their productivity in this sector, resulting in efficient labor-segregated households.[93] Becker readily acknowledges that "comparative advantage cannot be readily disentangled from specialized investments,"[94] especially since "specialized investments begin while boys and girls are very young" and what he calls "the biological orientation" of children "is often not revealed until the teens and even later."[95]

Even if we assume, for argument's sake, that there exists such a thing as a biological orientation to market or household work, Becker cannot explain to what extent this biological orientation contributes to a comparative advantage. In fact, his analysis depends on the heavy

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[90] The best analysis and critique of Becker's work from within legal feminism, mostly regarding the sexual division, are June Carbone's in her book *From Partners to Parents*. She makes a particular effort to discover the elements that family law theorists, including feminists, can take away from his controversial work. CARBONE, FROM PARTNERS TO PARENTS, *supra* note 14, at 8-52.

[91] *Id.* at 40.

[92] *Id.* at 37-38.

[93] *Id.* at 38.

[94] BECKER, TREATISE, *supra* note 19, at 40.

[95] *Id.*

investment in human capital starting "while boys and girls are very young."[96] He acknowledges that even in "deviant" cases, where little girls are biologically oriented to market rather than household work, they might still end up oriented to household work if they receive investment in household work,[97] the difference being that, according to Becker, their orientation would be weaker than in normal persons, because of their initial, deviant orientation. Unfortunately, he does not provide any formulas describing the correlation between efficiency and the strength of orientation. Would these "deviant" persons with "normal" human capital investment end up less efficient in household work than their "normal" counterparts who were oriented toward household activities from their biological beginning?

If the answer is yes, then his conclusion that it is rational to heavily invest in household capital for all girls and market capital for all boys from early on makes less sense, especially given his assertion that very small amounts of biological differences result in huge gaps in the activities of men and women.[98] Given the existence of "deviant" persons, there is no explanation why it wouldn't be more efficient to initially invest equal human capital in both boys and girls and only provide specialized investment once their "biological orientations" reveal themselves. Those who are "normally" oriented would not lose out, since their biological difference would combine with the later heavy human capital investment to produce the comparative advantage that would make them more efficient household producers. More importantly, those who are "deviant" would end up being *more* efficient, since they would be able to follow investment aligning with their "biological orientation" and avoid the less efficient orientation that would result from their "deviance" and heavy human capital investment from very early on.

On the other hand, if the answer is no, then presumably biological orientation plays no part in the creation of the comparative advantage that leads to efficient sexual division of labor—human capital investment has determined all outcomes. "Deviantly"-oriented girls would end up just as

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[96] *Id.*

[97] *Id.* (quotation marks omitted). Even though Becker advises the reader in a relevant footnote that "deviance" and "normality" are only used in a statistical and not a pejorative sense, *id.* at 40 n.4, I cannot help but think that there must be something non-statistically perverse in the way he likes to provoke the basic reactions of the political correctness impulse.

[98] *Id.* at 4, 77.

efficient in household work as the ones with a biological proclivity for it. If this is true, then there is no reason why efficiency alone would explain heavy household capital investment in girls rather than boys, unless one establishes that even "deviantly"-oriented girls end up more efficient in household work through human capital investment than boys would through the same process. Therefore, Becker's analysis remains incomplete; at the very least, it is inaccurate to assert that efficiency explains parental investment in gendered terms.

Becker might object to this reasoning based on his assertion that "rates of return to human capital investments are higher at younger ages,"[99] and therefore postponing the investment of human capital until children reveal their "biological orientation" would prove costly, because the "foregone value of time spent investing is cheaper" the younger the children.[100] In order for his theory to work, he needs human capital investment that "mainly" raises productivity in either one or the other sector. Becker claims that "[s]ome investments such as on-the-job training mainly raise productivity of market time; others, such as classes in child care, cooking, or art history, mainly raise the productivity of household time."[101] However, this presumes the presence of adults and does not appear to distinguish between young children and adolescents. Given the "on-the-job-training" and "classes in child care" examples of what constitutes specialized investment in sector-specific human capital, therefore, his analysis loses coherence. Truly specialized investment in sector-specific human capital under this understanding cannot start until adolescence at the earliest, unless one comes up with a very different, and surely unacceptable, list of examples of sector-specific human capital. Surely a housewife will be more efficient at keeping track of household expenses in Excel than on a notepad, not to mention the possibility that she could produce higher quality children at lesser cost.

In fact, when Becker talks about differential investment in human capital at a very early stage and not child care classes or on-the-job training, he is describing a gendering process of pink and blue. This interpretation is more realistic and provides a possible solution to Becker's problem with the utility maximization. However, it reveals that the argument that rational decisions lead to this bifurcated human capital investment is actually

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[99] *Id.*

[100] *Id.* at 27.

[101] *Id.*

circular, or as June Carbone puts it, "a self-fulfilling prophecy."[102] If a girl receives human capital investment according to an expectation of "normal" orientation from very early on, and she learns to identify with the gender roles that have been reserved for women and, more importantly, to like the types of activities associated with her gender such as taking care of her Barbie doll or baby sister, then even a utility maximization approach to the efficiency of the sexual division of labor becomes less problematic. The disutility that might be generated by household work is less intense if she has already developed a taste for the types of activities associated with a gendered division of labor. In other words, cultural feminists would find it hard to challenge Becker's efficiency analysis.

b. Utility maximization turns into wealth maximization

Becker's exposition does not clarify whether he is talking about utility or wealth maximization, and he claims that the question of exploitation is largely independent of the question of efficiency.[103] Even if we assume that men want only to exploit—maximizing their own "take" of family output—and that they have complete control over the allocation of resources, they will only send women to the household chores if it is efficient and will ultimately maximize the household output, that is, if women have a comparative advantage at household work. However, this analysis presupposes that the spouses either have no preference regarding how they spend their time or their preferences do not generate significant disutility. The first proposition contradicts his previous definition of utility vectors that clearly include preferences over allocation of time.[104] As for the second proposition, Becker recognizes that "[t]he degree of specialization in a marriage would be less extreme if one of the sectors, perhaps housework, were considered more boring and less worthwhile."[105] In so conceding, Becker implicitly recognizes the difficulty of treating such activities as interchangeable in terms of utility (more boring) or comparative rates of return (less worthwhile). Therefore, it is unclear how exploitation would be independent of efficiency, unless Becker had wealth maximization in mind.

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[102] CARBONE, FROM PARTNERS TO PARENTS, *supra* note 14, at 6.

[103] BECKER, TREATISE, *supra* note 19, at 62. He develops this argument in response to feminists' claims that exploitation, not efficiency, keeps women at home.

[104] *Id.* at 21-22.

[105] *Id.* at 4. Margaret Brinig aptly makes this critique of Becker's theory by discussing the "psychic costs" involved for both spouses who completely specialize. Brinig, *Comment on Jana Singer's* Alimony and Efficiency, *supra* note 14, at 2472.

His explanation hinges on the idea that "exploited women may have an 'advantage' at unpleasant activities only because the monetary value of the disutility tends to be smaller for exploited (and poorer) persons, or because exploited persons are not allowed to participate in activities that undermine their exploitation."[106] However, he does not cite any literature in support of this claim, and moreover, it contradicts his assertion that division of labor would be less extreme if one of the sectors were considered more boring or less worthwhile. Becker's assertion that the sexual division of labor is efficient holds only if he is referring to a wealth maximization approach, in which dollar amounts of market and household products are maximized, rather than a utility maximization approach that takes into account preferences regarding one's allocation of time.

If that is the case, it is not clear why Becker fails to consider an obvious wealth maximization alternative, such as the husband and wife both specializing in market work, and hiring someone outside the home to clean and care for the children.[107] Furthermore, throughout his analysis he assumes a highly remunerated market job of the sort that requires extensive education, and non-remunerated household activities that require only skill, not education. If we do away with the middle class presumption of a highly remunerated market job, his analysis becomes largely irrelevant. In what ways does the human capital necessary for the performance of low-wage manual labor, like cleaning services, differ from the human capital necessary for the performance of household chores? If there is no difference in the quality of the human capital investment needed, Becker cannot continue to assert the rationality of the choice to specialize in either the household or market along lines of gender. Therefore, Becker's theory of the sexual division of labor can be challenged, not only because he uses biologistic terms, but because on his own terms, his analysis depends on a process of gendering, and his failure to clarify the effects of disutility undermines his assertion that utility—however he defines it—is maximized.

Nonetheless, his theory provides useful insights that remain crucial for feminist purposes in spite of these failings. In particular, Becker's model reveals why even very small amounts of market sexism lead to very large

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[106] BECKER, TREATISE, *supra* note 19, at 62. Becker does not provide any indication as to how he proceeds with this calculation, either directly or by reference to other literature.

[107] *See* Brinig, *Comment on Jana Singer's* Alimony and Efficiency, *supra* note 14, at 2471. Of course, such a solution bears the cost of transferring care from one woman, the housewife, to another, the hired help. Becker, however, would probably not flinch at such objections to the hiring out solution, which makes the omission from his discussion even more glaring.

differences in human capital investment, and therefore to a very pronounced sexual division of labor. This should be of interest to feminists, because it means that even a small wage gap in the market can have a huge effect by creating channels for women's career choices over a lifetime. This insight aligns with sociological studies that find that even though the majority of women are today wage earners, most are considered secondary wage earners who also take on the bulk of the child-rearing duties.

Within economic theory, Becker's altruist model is regarded as being "in retreat" because of its restrictive assumptions, such as that couples pool their resources and that their arrangements are presumptively efficient.[108] Some empirical work appears to provide support for negotiation models that describe marriage as a "game" in which each spouse has endowments in his or her favor and each maximizes his/her own utility function, rather than a single utility function.[109] These models further allow for inefficient as well as efficient equilibriums, rather than assuming efficiency.[110]

Despite this understanding of Becker's theories as being in retreat, the way in which Becker models the effects of the altruist *h*'s "bribes" of *w* in an implicit exchange between the spouses, even absent an open "negotiation," is insightful. It offers a description of gendered marriages that captures some of the ways in which coordinated behavior is the result of internalizing costs on the part of the spouse who cares about the contributions of the other to her income. Finally, flipping Becker's model to take the wife *w* to be the altruistic actor—the way much of feminist theory assumes—results in a conceptualization of how *w*, even without monetary income of her own, can use her household contributions as the contribution she can withhold from *h*. This allows for an understanding of homemakers' agency that provides a more realistic set of possibilities than the assumption of powerlessness implicit in some of the feminist legal work on care work.

Part II provides an overview of the incomplete ways in which economic thought has been appropriated in the legal care work debates, sketching the main lines of an emerging feminist consensus on women's household work, which has its roots in cultural feminism. Within these debates, the valuation of women's work in the household has taken on a moral dimension that obscures the analysis of differential costs and benefits to different groups of men and women and obstructs the formulation of any

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[108] Pollak, *supra* note 22, at 138.

[109] *See* Pollak, *supra* note 22; Browning & Chiappori, *supra* note 66.

[110] *See* Pollak, *supra* note 22; Browning & Chiappori, *supra* note 66.

objections to the project of assuring more money for women upon divorce. Part III will return to the insights from Becker's work and economics more generally to urge feminists to take heed of them in the context of the care work debates.

II. ECONOMICS IN THE CARE WORK DEBATE

Becker's work brought into the foreground the idea that work taking place within the home is productive and generates income. Although feminists have not missed this point,[111] the preoccupation of feminist legal writing with assuring remuneration for housewives has led to an uneven use of economic models within the context of the care work debate, limited by constraints both internal and external to feminism.

Externally, feminists writing in support of assuring remuneration for divorcing homemakers have limited their arguments to the confines of what they expect to be an acceptable argument within mainstream legal scholarship. The result is a debate in which family structures are largely taken as a given,[112] and the analytical possibilities of economic thought are restrained by fears of commodification that are still very present in mainstream legal scholarship.[113] Within feminist scholarship, there is an emerging consensus around which arguments are acceptable—excluding others as unacceptable—in the context of the care work debate, limiting the modes in which economic thought can be employed in feminist debates. This section outlines the "argument bites"[114] that define the emerging consensus and relates them to cultural feminism. The reactions to both economic thought in general and to Becker's work in particular can be better understood against the backdrop of this emerging consensus within feminism. The final section analyzes some elements of economic thought

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[111] *See, e.g.*, Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359, 360 (2007).

[112] For an analysis of the mainstream character of the debates, see Kerry L. Quinn, Note, *Mommy Dearest: The Focus on The Family in Legal Feminism*, 37 HARV. C.R.-C.L. L. REV. 447 (2002). The most notable exception to this trend is Martha Fineman. *See* FINEMAN, *supra* note 8.

[113] For a classic formulation of a commodification critique, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). For an analysis of how commodification fears might work against women's interests, see Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997).

[114] I borrow this expression from Duncan Kennedy. *See* Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1178 (2001).

currently left out of the care work debate and explains the cost of their omission in the discursive economy of arguing about women's work.

A. A Summary of the Care Work Debates

The care work debate has developed in a wide range of academic domains, from political philosophy,[115] to sociology,[116] to law and public policy,[117] to economics,[118] and development.[119] The level of interest and the range of issues covered by the debate has broadened and deepened so much over the past decade that the task of covering the relevant literature in more than one academic field has become nearly impossible.[120] The debate includes various different threads of inquiry including globalization and its transformative effects on the workplace, the transformation of contemporary familial structures and its effects on the work of taking care

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[115] *See* OKIN, *supra* note 8. *See also* EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY (1999).

[116] *See* ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989).

[117] In 2001, the Chicago-Kent Law Review organized a symposium, *Structures of Care Work*, on care work policies and theories, which provides a good overview of the state of the debates in the legal domain. 76 CHI.-KENT L. REV. (2001).

[118] In the field of economics the discussion on the productive value of care work performed in the household was revitalized through the debate following the publication of Gary Becker's work. The first issue of Feminist Economics was to a large extent devoted to providing a feminist economics response to Becker's theories. *See, e.g.*, Nancy Folbre, *"Holding Hands at Midnight": The Paradox of Caring Labor*, FEMINIST ECON., Mar. 1995, at 73.

[119] *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 189-204 (1999). *See also* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000). For the classic articulation of women's role in development, see Ester Boserup, Women's Role in Economic Development (1970). For a feminist revision of this work based on the idea that women's domestic and reproductive work was underestimated, see Lourdes Benería & Gita Sen, *Accumulation, Reproduction, and Women's Role in Economic Development: Boserup Revisited*, 7 Signs 279 (1981).

[120] One good resource is the Sloan Work-Family Research Network of Boston College, which monitors issues that affect the lives of working families. http://www.wfnetwork.bc.edu/ (last visited March 8, 2007). Another is WorkLife Law, a Center of UC Hastings College of Law directed by Joan C. Williams. http://www.worklifelaw.org/ (last visited October 14, 2007).

of dependents, and the so-called "feminization of poverty."[121] Within the legal field, the challenges posed by the caretaking responsibilities of family members have traditionally occupied the fields of employment law,[122] discrimination law,[123] and family law.[124] Feminist critique has occupied a multiplicity of different positions regarding, in particular, women's roles as both market workers and mothers and the problem of the "second shift."[125] By some accounts, these debates took on proportions of gender wars between women, fighting out the sameness/difference issue during the '80s.[126] Central to these debates was the question of whether women should be rewarded for what they already do or should instead be pushed into the marketplace to ensure their financial independence.

Among feminist scholars, it is generally agreed that women's care work in the family is undervalued and underpaid (or not paid at all), and there are several proposals that aim at correcting the resulting injustices.[127] This section describes some of the most important positions in the legal feminist debates on care work. After describing the reactions against some feminist positions which were articulated from outside the care work viewpoints, this Article will show how the different layers of the emerging

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[121] *See* Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB. & SOC. CHANGE REV. 28 (1978).

[122] *See* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 708 (2000); Hiromi Taniguchi, *The Timing of Childbearing and Women's Wages*, 61 J. MARRIAGE & FAM. 1008 (1999).

[123] *See* Ruth Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. DAVIS L. REV. 761 (1986); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Maxine N. Eichner, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990). For a critical view, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

[124] See *supra* note 7 and accompanying text.

[125] *See* HOCHSCHILD, *supra* note 116, at 6.

[126] Joan Williams, *It's Snowing Down South: How to Help Mothers and Avoid Recycling the Sameness/ Difference Debate*, 102 COLUM. L. REV. 812, 817 (2002).

[127] For some examples of such proposals, see Katharine B. Silbaugh, *Foreword: The Structures of Care Work*, 76 CHI-KENT L. REV. 1389 (2001).

consensus stem at least in part from cultural feminist ideas. This emerging consensus takes a moralizing view of women's care work, obscuring what is at stake in particular legal policy proposals. The idea of the "valuation" of women's work inside the care work debates sounds in economics, but emerges as an essentially moral idea, resisting articulation via cost and benefit analysis. Furthermore, the moralization of the debates seems to be taking place at a meta-theoretical level as well. The care work debates have produced a set of positions that go beyond the nature and value of care work, and attempt to define what should count as feminist legal scholarship.[128]

1. The Evolution of the Debate in the Legal Field

A major turning point in the legal debates on alimony was Lenore Weitzman's claim that the no-fault revolution and the "clean break" approach to post-divorce maintenance that it produced had left an entire generation of divorcing homemakers destitute, after their husbands had run away with trophy wives, wallets, and what not.[129] Her work spurred a literature of legal feminist and law and economics scholarship on the issues of post-divorce property distribution and alimony.[130] Some law and economics scholars proposed schemes of post-divorce maintenance that would discourage "inefficient" choices during marriage, choices that would discourage women from becoming homemakers, and some even went as far as to propose ending the no-fault divorce scheme.[131] These efforts were

[128] I should note at this point that I am not claiming that all participants in the care work debates would identify as cultural feminists; indeed, some of them have openly criticized the essentialism of cultural feminism. *See* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 803-13 (1989). Instead, I claim that ideas originating in cultural feminism are increasingly accepted as the terrain upon which feminists debate the nature, value, and legal regulation of women's care work.

[129] WEITZMAN, *supra* note 4, at 76.

[130] Chapters 4-7 of Weitzman's book first drew attention to "new property" at divorce and the consequences of the fact that increased earning capacity of usually the male spouse does not count as marital property, while alimony awards have also decreased. *See id.* at 70-214. The care work literature in the legal field draws heavily from Weitzman's work, even if only to assert that gender-neutral rules have had unexpected, negative consequences for women. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 31, 174, 179, 180 (1991); Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 43 (1987).

[131] Parkman, *supra* note 7. Gary Becker himself has criticized the no-fault regime, even though he has been careful not to do so in his academic work. *See* Gary Becker, *Finding Fault With No-Fault Divorce*, BUS. WK., Dec. 7, 1992, at 22.

vigorously criticized by feminists, yet some of these scholars had to defend the granting of more property and more support for divorcing homemakers without resorting to efficiency arguments.[132]

Joan Williams was one of the first feminists to try and redefine post-divorce entitlements on a larger scale based on a description of the ways in which the market functions on the implicit assumption of an "ideal worker" who can derive the full benefit of "domesticity" at home for his caretaking needs.[133] She sought to find normative basis for alimony awards and to redefine entitlements and perceptions about how family wealth is generated in the first place.[134] She proposed an income sharing scheme, claiming that it is the homemaker's labor that allows that breadwinner to enjoy "ideal worker" status.[135] In *Unbending Gender*, Joan Williams called for a two-pronged strategy of reforming the legal environment of both the market and the family to be more care work friendly.[136] On the market side, she called for the deconstruction and rethinking of the "ideal worker" norm, while on the family side she called for recognition of homemakers' labor through more legal entitlements upon divorce.[137]

In her 1995 book, *The Neutered Mother*, Martha Fineman laid out a powerful critique of the ways in which women are penalized for their roles as caregivers through systematic legal regulation that recognizes only married heterosexual couples as the appropriate site of caretaking.[138] Her book put forth one of the most radical proposals of the last decade: she suggested that the mother-child relationship should serve as the prototypical family, and it should be these relationships that the state seeks to endorse and support as family units, regardless of the existence of a sexual bond

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[132] Jana Singer, for example, proposed post-divorce income-sharing between the ex-spouses for reasons that had more to do with equity than efficiency, since efficiency as a normative guide was tainted by ideological presuppositions. Jana Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2454-56 (1994). For a recent proposal on a partnership rather than an efficiency model of marriage, see Kelly, *supra* note 7.

[133] *See* Williams, *Deconstructing Gender*, *supra* note 128, at 3.

[134] Williams, *Is Coverture Dead?*, *supra* note 5, at 2255-58.

[135] Joan C. Williams, *Married Women And Property*, 1 VA. J. SOC. POL'Y & L. 383, 390 (1994).

[136] JOAN WILLIAMS, UNBENDING GENDER (2000).

[137] *Id.* at 64, 114.

[138] FINEMAN, THE NEUTERED MOTHER, *supra* note 8.

with a man in the house.[139] Since *The Neutered Mother*, feminist discourse has acknowledged Fineman as one of the most important feminist legal thinkers on the subject of care work.[140]

Another landmark work in the legal debate regarding care work was Katharine Silbaugh's 1996 article, *Turning Labor into Love: Housework and the Law*, in which she provided a detailed analysis of the multiple ways in which work in the household passes for love and therefore goes unrecognized and unrewarded.[141] Her contribution took a significant step toward a more specific articulation of some of Fineman's critiques in legal domains such as labor law, welfare, social security, contracts, and divorce law.[142] In welfare and social security, for example, Silbaugh noted that the legal system recognized an entitlement only to women with a marital bond to a breadwinning husband while the housework women had performed at home—presumably contributing to husbands' increased wages—did not count for anything.[143] Finally, Silbaugh purported to go beyond liberal legalism's insistence on the importance of wage labor as a reform strategy for ameliorating women's economic situation. Instead she opted for an approach that "takes women's labor as it now exists, divided between paid and unpaid labor" and "considers how the legal treatment of women's unpaid labor disadvantages women."[144] This approach, according to Silbaugh, avoids the presumption that paid labor market reform is the primary means of achieving gender equity, a presumption "that undervalues home labor."[145]

By 2001, therefore, a rich discussion had developed within legal feminism, centering on the reconceptualization of house work as production and the potential policy consequences.[146] The next stage of the discussion

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[139] *Id.* at 5.

[140] Even though Fineman's project bears affinities with the cultural feminist projects of difference, its disassociation with the defense of the heterosexual nuclear family distinguishes it quite significantly, in ways that seem to elude attention whenever Fineman is cited in the context of the care work debate that has been raging in the last decade. *See infra* Part II.B.5.

[141] Silbaugh, *supra* note 14.

[142] *See id.*

[143] *Id.* at 38, 67.

[144] *Id.* at 6.

[145] *Id.* at 5-6.

[146] *See* Silbaugh, *supra* note 127.

involved the formulation of strong critiques against various arguments in the care work literature, to which care work feminists themselves reacted. The next section examines these reactions and further analyzes the various threads of argument that have begun to emerge as a feminist consensus, relating them to cultural feminist ideas on care.

2. Some Reactions Against Care Work Proposals

The care work arguments met with several significant criticisms by other legal feminists. In 2000, Vicki Schultz argued that the care work ideas so far proposed stemmed from a misguided acceptance of traditional gender roles that encourage women to stay away from the market in a society where paid market work is also the source of important non-monetary rewards such as self-worth, community, and identity.[147] She pointed out that even though some feminist proponents of equal remuneration of family and market work condemned the gendered assumptions of neoclassical economics, they nonetheless assumed that women are and always will be performing housework for different reasons, in the same manner as Gary Becker himself (assumes, not does housework).[148]

A year later, Katherine Franke developed the argument that feminists who concentrate their efforts on remunerating mothers' work take a position that is not critical enough of the "repronormativity" of our culture,[149] that is of the maternalization of women and the acceptance of their reproductive activities as natural and unproblematic.[150] Similarly, Mary Anne Case's *How High the Apple Pie*,[151] explored the distributional consequences of such policies among different groups of men and

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[147] Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

[148] *Id.* at 1905.

[149] Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

[150] *Id.* at 185. Franke's article contained a number of very important questions not only about the policy proposals, but also about some of the assumptions that care work feminists make about women's desire and sexuality. Her article was premised on the idea that just like women's sexuality, women's reproductive capacities are embedded in a web of power relations, which feminists would do well to question more deeply rather than take for granted by seeking to reward mothering as it stands. *Id.* at 207.

[151] Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001).

women.[152] She argued that policies shifting some of the cost on the shoulders of the employer would ultimately profit men with wives and children to the detriment of childless women who may take on more of the work and face sustained discrimination.[153] She further suggested that those who are advocating either employer or public assistance for caregiving often ask for nothing less than for society to make it costless for parents to raise a child.[154]

Schultz's *Life's Work*[155] provoked intense reactions on the part of care work feminists.[156] Katherine Franke's work in *Theorizing Yes*[157] and Mary Anne Case's *How High the Apple Pie*[158] drew similarly strong reactions.[159] Underlying these reactions is a developing attitude within the care work debate that includes assumptions not only about women's care work but also about an appropriate *feminist* stance towards that work.[160] Of particular relevance to this Article is that even though feminists disagree with each other,[161] there appear to be points of convergence within the debate regarding both these issues. This consensus includes several claims linking issues of work, care, women, children, poverty, and feminism in principle-like formulas, which tend to repeat themselves and therefore are rarely acknowledged in the debate.

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[152] *Id.* at 1754.

[153] *Id.* at 1759.

[154] *Id.* at 1785 n.101.

[155] Schultz, *supra* note 147.

[156] Joan Williams, Deborah Rhode, and Martha Ertman all replied to Schultz's article in a special response section of the Columbia Law Review. *See* Williams, *supra* note 126; Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834 (2002); Martha M. Ertman, *Love and Work: A Response to Vicki Schultz's* Life's Work, 102 COLUM. L. REV. 848 (2002).

[157] Franke, *Theorizing Yes*, *supra* note 149.

[158] Case, *supra* note 151.

[159] Mary Becker, Commentary, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV 1495, 1521 (2001). *See also* Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 63-64 (2002).

[160] *See infra* Part II.B.

[161] *See, e.g.*, Becker, *Caring for Children and Caretakers*, *supra* note 159 (reacting to Williams' own critique of cultural and radical feminist ideas).

B. The Moralization of Women's and Feminists' Work in the Care Work Debate

The legal feminist discussions of care work rest on an understanding, whether implicit or explicit, of housework as a productive activity.[162] However, feminists differ greatly on the questions of what is being produced and who it is that consumes or benefits from the product, and answers to these questions have significant policy consequences. Yet these issues often remain in the background, eclipsed by an increasing moralizing influence in the debate. This section explores and analyzes the tendency in some care work feminism to appeal to economic notions of the productive character of care work, while in reality invoking a moral idea of the value of care work. It then relates the moralization of the value of care work to ideas coming from cultural feminism, which focus on the undervaluation of women's care work. Finally, this section analyzes the ways in which care is championed by various care work feminists, not only as a value that should be rewarded by society in general, but also as a value that feminists should embrace.

1. Value as a Moral, Not Economic, Concept

The care work debate presupposes the idea that care work is productive. Some feminists draw on Becker's concept of the family as a small firm where members combine labor with market goods to produce things like meals and made beds.[163] Others emphasize the idea that the household produces human capital in the form of investments in children.[164] In yet another version, the production of children generates a "public good," either for the marital unit[165] or for society as a whole.[166] For example, at various points Joan Williams' work implies that what the family produces

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[162] Evidence of this is the widespread use of the term care *work* itself. *See, e.g.*, 76 CHI.-KENT L. REV. (2001).

[163] *See* Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1620 (1996).

[164] *See* Ann Hubbard, *The Myth of Independence and the Major Life Activity of Caring*, 8 J. GENDER RACE & JUST. 327, 345 (2004) (citing Becker's work on human capital).

[165] *See* Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 536 (1995).

[166] *See* Folbre, *Children as Public Goods*, *supra* note 30, at 96-90; England & Folbre, *Who Should Pay for the Kids?*, *supra* note 30, at 194; Becker, *Caring for Children and Caretakers*, *supra* note 159, at 1531.

includes the wage earner's increased earning capacity. The care work version of the value of work, however, ultimately does not rest on economics, but on a moral understanding that largely draws from cultural feminism.

The economic explanation for the notion that women's work is undervalued entails a market failure analysis: either a bias against women in general translates into a pay scale below the efficient level,[167] or the generation of positive externalities, such as children, by the performance of care work leads to underpayment for such services and eventually to their undersupply.[168] Care work feminists have employed the idea that women's work is undervalued,[169] as well as the idea that children are "public goods,"[170] but instead of these market analyses, they ultimately appeal to a moral idea of valuation and undervaluation. These feminists suggest that women's work is undervalued because women's experiences including caring are undervalued in a world that privileges male experiences. Based on that premise, some care work feminists argue that women's care work *should* be valued and remunerated more than it currently is and therefore endorse programs that remunerate unpaid household work. The moral nature of this analysis becomes evident due to its emphasis on the inherent value and essentially altruistic nature of what women do and the resistance to analyses of such programs' costs and benefits to different groups of men and women. The rest of this section explores the moral underpinnings of the idea of the value of care work in this debate and highlights the influence that cultural feminist ideas have had.

Cultural feminism recognizes care and altruism as essentially feminine traits and claims that a culture that undervalues community and care therefore undervalues women. In the words of Mary Becker:

> Relational feminism stresses the need to value community, relationships, and traditional feminine qualities because these

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[167] *See* Amy L. Wax, *Converted or Unconverted: To Whom Shall We Preach?*, 12 COLUM. J. GENDER & L. 546, 546 (2003).

[168] *See id.* at 550; Folbre, *Children as Public Goods*, *supra* note 30.

[169] *See* FINEMAN, THE NEUTERED MOTHER, *supra* note 8, at 166.

[170] *See* Becker, *Caring for Children and Caretakers*, *supra* note 159; Peggie R. Smith, *Caring for Paid Caregivers: Linking Quality Child Care with Improved Working Conditions*, 73 U. CIN. L. REV. 399, 411 (2004); ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 66-69 (2004).

> valuable qualities have been so under-valued in our overly individualistic and masculinist culture.[171]

According to this line of argument, this same masculinist culture leads many feminists to value wage work over care work as the appropriate path for women's emancipation. For example, under this line of reasoning, Vicki Schultz's proposals[172] are, in fact, masculinist and internalize the same culture that devalues women's labor. Challenges to the project of valuing women's feminine qualities are immediately suspect. Adherents to this position therefore are prone to dismissing *any* analysis that suggests women might be better off working in the market, assuming that it rests on the internalization of masculinist norms rather than on an analysis of potential distributional effects on women.

Another variation on this theme is evidenced when Fineman cautions that "[f]eminists should not trivialize women's voluntarily shouldering of material or social disadvantages as caretakers, labeling their doing so the product of false consciousness or resulting in individual or group pathology."[173] Fineman's formulation distances her from classic subordination feminism—in which women are coerced, through actual violence or the threat of violence diffusely present in a masculinist culture—to take on reproductive and homemaking activities. In her view, rather, women voluntarily take on these duties, and she argues that feminists should address this issue rather than lump it together with the masculine structures they seek to reform.

Despite its roots in cultural feminism, these arguments appear to have become a platform for a broader feminist argument. Articulating why "homemaking" is bad for women from a feminist position is difficult under this lens unless one argues that it is injurious to women simply because the legal system does not value or remunerate it. Instead, choice defines women's heavy investment in caretaking, and masculinist structures of thought work to devalue women's *choices*. There is a marked parallel between this argument and the economists' insistence that preferences are satisfied through expressed choices. Even though feminist theory has usually insisted on the coerced nature of women's choices and has urged economists to denaturalize their descriptions, choosing motherhood and

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[171] Becker, *Care and Feminists*, *supra* note 159, at 60.

[172] Schultz, *supra* note 147.

[173] FINEMAN, THE NEUTERED MOTHER, *supra* note 8, at 53.

caretaking in this context becomes women's authentic choice, despite men and masculinist women devaluing and abusing that choice.

For some feminists, the high number of women who engage in care work despite the financial penalization is a testament to the genuineness of their choices and can be measured by the amount of meaning they can find in the activity: "Women are either totally brainwashed by the pressure to be mothers, crazed, or find something of value in mothering given their decisions to mother in the face of such overwhelming disincentives."[174] For example, Mary Becker rejects the idea that women might have a whole range of other reasons to "mother," such as curiosity, greed, insecurity, jealousy, poverty, loneliness, and a legal and social system that penalizes them if they don't live up to the "mothering" expectations.[175] Alternatively, Silbaugh posits agnosticism toward the usefulness of the market or the housework as a preferable path for women's liberation. Instead, she "takes women's labor as it now exists, divided between paid and unpaid labor and considers how the legal treatment of women's unpaid labor disadvantages women" because "even when reform efforts aim to reduce the effects of home responsibilities on labor market prospects, they posit the paid labor market as the primary means of achieving gender equality. This orientation undervalues home labor."[176]

The central premise is that this is bad because it undervalues work that many women prefer or choose to do; "[t]he importance of focusing on the status of home labor is supported by the real differences among women and the variation in their preferences."[177] Deborah Rhode similarly declares that "[women's] contributions to their families and communities deserve recognition and respect *equal* to that of other labor."[178] Even feminists like Vicki Schultz, whose work decries the idea that women should be encouraged to do more housework, feels obliged to declare that "[n]o self-

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[174] Becker, *Care and Feminists*, *supra* note 159, at 70.

[175] For a thorough analysis of the social construction of motherhood that defines and divides mothers into "good" and "deviant" mothers see FINEMAN, THE NEUTERED MOTHER, *supra* note 8, at 101-25. For a description of the ways in which the legal system organizes support of different types of motherhood based on ideological distinctions between the public and the private, see *id.* at 177-93.

[176] Silbaugh, *supra* note 14, at 6.

[177] *Id.* at 14-15 (footnote omitted).

[178] Rhode, *supra* note 156, at 834 (emphasis added).

respecting feminist could be against 'valuing housework,' and I'm no exception."[179]

The result is that one must value housework to be a self-respecting feminist. But what valuation is sufficient for one to be accepted within this debate? Recognition of the fact that women produce in the household is not enough; otherwise Gary Becker himself would be included. In her critical response to Schultz, Martha Ertman posits that most people would agree with Schultz that no self-respecting feminist can be against valuing housework, but additionally that we must remunerate "labor done for love" in order to recognize it.[180] Valuing housework is a necessary but not a sufficient condition for being considered a self-respecting feminist in the context of the care work debate. Thus, valuation itself has become a moral imperative, notwithstanding the conflicts between proposals that participants in the debate put forth for actually implementing better valuation for women's work in the household.

2. R-e-s-p-e-c-t

Demanding respect for women's work in the household is another way in which the transformation of value into a moral concept manifests itself in these debates. Such respect for women's work in the household demands not only that society better remunerate the work, but also that feminists stop pressuring women to enter the market. Like the imperative to value women's work, the moral imperative to respect women's work is dismissive of proposals that emphasize market work because they lack respect for the work most women do. Put another way, respect for what women do becomes conflated with respect for who women are.

Joan Williams, for example, has cast her project in strong moral language moving from economic valuation to respect for what women do and then to respect for who women are. In doing so, she allows herself to conflate actions and identities, which she normally warns against.[181] One example of this is her assertion that "American feminists have little choice but to take traditionally feminine gender performances as a given"[182] for the simple reason that "[for tomboys] to be effective or to be *respectful*, they

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[179] Schultz, *supra* note 147, at 1900.

[180] Ertman, *supra* note 156, at 864.

[181] WILLIAMS, UNBENDING GENDER, *supra* note 136, 195-98.

[182] Williams, *It's Snowing Down South*, *supra* note 126, at 828.

need to meet feminine women on their own ground rather than insisting that women embrace the traditions of masculinity."[183] Another is her claim that penalizing women for bearing children is discrimination because motherhood is intimately connected to their identities. Women need to stop apologizing for *being* mothers, the way they stopped apologizing for *being* women. As identity enters the argument, respect emerges as a normative imperative. Action turns into subjectivity, and an economic argument about women's home labor going unremunerated turns into a moral argument about respect for women themselves.

The respect argument is a mirror image of the "false consciousness argument" that it was supposedly designed to rebuke.[184] If one is a feminist who does not value household—perhaps she thinks it's deadening, repetitive and tedious, and she wishes women did not have to do it—the terms of this debate dictate that her consciousness is male and therefore deeply flawed. She must view housework this way because she has internalized the values and hierarchical structures of men's consciousness. Her false consciousness reveals itself in her rejection of feminine values (instead of embracing them, as the original false consciousness argument goes). The effect of this rhetorical stance is to flip the question and present the goal of the debate, which is to discuss the value, usefulness, and modes of valuing housework for the purposes of feminist projects, as a given.

Valuation in the context of the care work debate thus takes on an ambiguous binary significance, sounding in both economics and cultural feminist morality. One can value housework in the economic sense and think that there is an economic value to it, but that does not qualify one as a feminist. A feminist must *respect* housework because it embodies women's caring selves, and *respecting* housework requires acknowledging some irreplaceable added value in the fact that women care about it. Therefore, the project of determining its value through standard economic methods misses the point of *respect* and must, in fact, devalue women's work. Obviously, Gary Becker cannot be such a feminist.

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[183] *Id.* (emphasis added).

[184] The idea that women have been oppressed for so long that their very sense of self has been co-opted by men was quite common in second-wave feminism. *See, e.g.*, MacKinnon, *Feminism, Marxism, Method, and the State*, *supra* note 3, at 520 (articulating the ways in which feminists, attempt through consciousness raising to recover from being "pampered and pacified into nonpersonhood"). A rebuke of the false consciousness argument can be found in Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1470 (2001).

3. The Moralization of Feminists' Work

Although care work feminists claim they want to remunerate objectively valuable labor that women perform regardless of their motivation, emotive incentives and actual performances get mixed up in a debate that hums an increasingly moralistic tune. Altruism is often conflated with women's "ethic of care," which implicitly becomes the operative reason that justifies remuneration. Furthermore, caring altruism becomes something that feminists look for in good feminist work. If a feminist appears insensitive or callous to suffering in general, not only women's suffering, then he or she is not a good feminist. Thus, care is not only something for which women should be remunerated, it is what we want out of good feminist scholarship.

For example, in Mary Becker's reply to Franke and Case, she tries to demonstrate that neither has adequately dealt with the children-as-public-goods[185] argument and, moreover, that both of them are insensitive to the suffering of others, particularly mothers and, above all, poor children. Franke, she claims, does not realize how privileged she is as a non-mother in her work environment:

> Working women, like Franke and myself who are not mothers, enjoy many privileges at work and at home relative to women who are mothers. One could describe what we enjoy as "non-mothering-working-woman privilege," similar to the white privilege enjoyed by whites in a racist society. In Franke's writing, she fails to notice her privilege, but that is not surprising.

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[185] The claim that children are public goods, in the sense that the benefits of a world with children is enjoyed by everyone but the cost only born by a few, the parents and especially the mother, has been proposed forcefully in the economic discipline by Nancy Folbre. *See* Folbre, *Children as Public Goods*, *supra* note 30. This claim is hotly debated within economics but has been taken up in the care work debate and is used as an argument for garnering momentum for more public support of child raising. For a concise overview of the feminist arguments employing the children as public goods idea, see Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 59-61 (2005). A major problem with this argument is that the gist of it does not depend on children as a positive externality in general. Rather children become public goods only through the mediation of the social security system in its current arrangement, which transfers money from the worker generation to the retiree generation. It is only through this mediation that the parents of current children can be shown to be providing a positive externality which will benefit third parties who have not contributed to the child's raising. *See* Folbre, *Children as Public Goods*, *supra* note 30, at 86.

> Part of the point of having a privilege is that it feels natural and is typically invisible to the privilege holder.[186]

This argument treats the question of how much caretaking should be accommodated in the workplace as a given. If she and Franke are privileged, there must be a natural line that defines what privilege is. The fact that Franke does not acknowledge it not only makes her look privileged, but insensitive to the suffering of those who are underprivileged. This is quite a long way from a positive economic argument about public goods.

Further on, Mary Becker uses an argument just like those employed against Gary Becker,[187] chastising Franke for a lack of empathy for poor children, ignoring Franke's disclaimer that the questions she raises must be asked with the context of a white, middle class paradigm where the focus is on the effects of some of the feminists' assumptions regarding women's sexuality,[188] "Does Franke have no empathy for the shocking number of poor children in the richest country the world has ever seen? . . . The needs of poor children in our rich nation are shocking, yet Franke never considers poor children."[189] Though technically true, such a critique ignores the purpose of Franke's project, and we should not read into it a lack of caring; but even if we did, that is not enough to make Franke a bad progressive feminist.

Similarly, Becker expresses condescension for Case's assertion that her research or personal needs should receive equal accommodation with the needs of children whose parents are working: "Government and employers should provide greater supports for working parents than for workers who would like to *dabble* in feminist history because children are people with needs."[190] Finally, she devotes a whole section of her article to

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[186] Becker, *Care and Feminists*, *supra* note 159, at 69.

[187] *See supra* Part I.B.3.

[188] Franke, *Theorizing Yes*, *supra* note 149, at 195.

[189] Becker, *Care and Feminists*, *supra* note 159, at 77.

[190] *Id.* at 83 (emphasis added). Interestingly, Fineman, whose work Mary Becker invokes, does not seem to be of the same mindset. Fineman ends her article, *Contract and Care*, by positing that the respect and accommodation for caretakers she is demanding could be expanded to include all activities that tend to regenerate the worker's energy and well being, such as "the artistic, nonmaterial, spiritual, or other inner-directed aspects of life" and therefore not just reproduction. Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1439 (2001).

prove that both Franke and Case are insensitive to poverty.[191] The bottom line of Becker's argument seems to be that mothers and children should be the primary concern of the feminist agenda, even though she might not readily admit that there is a conflict. For example, she claims that she would not "argue against easing pressures on women to have children when it is possible to do so *without harming women who do have children.*"[192] The overall effect of her rhetorical posture is to transform a debate about women that *do* care work into a debate about women who *are* caring amongst women *who care.*

But can one make a tenable distinction between easing social pressures on women to have children on the one hand, and providing disincentives for doing so on the other, since social pressure is a major "incentive" women have to mother? Acquiring the status of upper middle class mother and experiencing the allegedly unique feelings of connection to one's offspring are two of the key incentives provided by our culture to educated women for giving up their market labor. Notably, such incentives are in direct opposition to the status and experiences of single women and married women without children. The more upper middle class women opt for the status of non-market employed motherhood, the more likely such a gender identity will be identified as mainstream.

Picture a continuum with the disincentives for having children at one end and the social pressures to have children at the other. A woman who resists this social pressure, therefore, is moving towards the disincentives. The more acceptable a woman thinks it is to not experience motherhood, the less pressure she is going to feel to mother, and the less incentive she is going to have for mothering. If many women do the same, it reinforces the possibility of occupying alternative gender positions and eases the pressures on women to mother. Inversely, women who are mothers have the opposite incentive; they want as many women as possible to identify with their gender position. The more mothers around, the better for the ones already mothering. Thus, easing the social pressures on women to have children will always potentially harm the women who do have children, and vice versa, whether or not either group is conscious of it. In this light, Becker's desire to "eas[e] pressures on women to have children *when it is possible to do so without harming women who do have children*"[193] suggests that she perceives this conflict even though she

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[191] Becker, *Care and Feminists*, *supra* note 159, at 97-109.

[192] *Id.* at 70 (emphasis added).

[193] Becker, *Caring for Children and Caretakers*, *supra* note 159, at 1528-29 (emphasis added).

presents the rest of her argument in a moral tone rather than a pragmatic one.

4. Mothers = Children = Poverty

Lenore Weitzman's work on displaced homemakers set the tone for another thread of argument that has gained strength in the care work debate.[194] Women's position in the family regularly gets conflated with their children's, while the impoverishment precipitated by divorce is further identified with poverty *tout court*, with very little regard to actual differences in income levels.[195] This is one of the ways in which the argument for supporting divorced homemakers rides the coattails of a poverty-based sensibility. Now that it is established that there is a drop in income levels for divorced homemakers and most divorced women get custody of their minor children,[196] an implicit or explicit causal link between divorce and poverty seems to be drawn, at least discursively.[197] In reality, among custodial parents who live in poverty, young, black, and never-married custodial parents tend to have higher rates of poverty than other mothers in their respective demographic groups.[198] This challenges the link between divorce and reduction to poverty (as opposed to impoverishment generally) of the majority of custodial mothers.

The tactic of employing the specter of child poverty in the care work debate has already been noticed by Kerry Quinn.[199] In her 2002 Note,

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[194] *See* WEITZMAN, *supra* note 4.

[195] *See, e.g.*, KARIN STALLARD ET AL., POVERTY IN THE AMERICAN DREAM: WOMEN AND CHILDREN FIRST 9 (1983); Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 127 (1987); Loretta D. McDonald, *Child Support Guidelines: Formulas to Protect Our Children from Poverty and the Economic Hardships of Divorce*, 23 CREIGHTON L. REV. 835 (1990); Starnes, *Divorce and the Displaced Homemaker*, *supra* note 7, at 79; Singer, *Divorce Reform and Gender Justice*, *supra* note 7, at 1103.

[196] *See* sources cited *supra* note 195.

[197] The discursive link is apparent even in the titles of some of the sources above. *E.g.*, STALLARD ET AL., POVERTY IN THE AMERICAN DREAM: WOMEN AND CHILDREN FIRST, *supra* note 195; McDonald, *Child Support Guidelines: Formulas to Protect Our Children from Poverty and the Economic Hardships of Divorce*, *supra* note 195.

[198] *See* TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001, at 3 (2003), *available at* http://www.census.gov/prod/2003pubs/p60-225.pdf.

[199] Quinn, *supra* note 112, at 459.

she examines works by feminists as diverse as Williams, Ertman, McClain, Schultz, and Rhode[200] and notes that "feminists mobilize ideas about child protection as the justification for social reform,"[201] in part "[b]y invoking images of suffering children"[202] in a manner that appeals to social conservative impulses and at the cost of pursuing more transformative agendas. For example, though Joan Williams is usually quite careful to refer to the "*impoverishment* of women and children upon divorce" throughout her joint property article,[203] she also discusses "the current situation in which long-married homemakers are abruptly reduced to *poverty*."[204] In fact, she later acknowledges that her proposals almost exclusively benefit nonpoor women.[205]

The conflation of mothers, children, and poverty is similarly reproduced in Mary Becker's work. She notes that "it does not follow that we should keep many women (and children) in poverty in order to avoid skewing women's decisions to be mothers,"[206] conflating the lack of support for homemakers' claims against the state and employers and keeping women and children in poverty. Despite this, she completes the thought by observing that "for many poor women, the skewing towards motherhood is not caused by the wholly inadequate supports we give poor mothers in the United States today, but by the lack of other options, such as worthwhile education and meaningful jobs."[207] Apparently, poor women "choose" motherhood due to a lack of other options, throwing them into poverty, yet the corrective is support for mothering rather than providing them with those options. Franke's and Case's positions are entirely consistent with the demand for more options for poor women before they "choose" motherhood, yet they have not conceded to the discursive conflation of mothers, children, and poverty.

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[200] *Id.*

[201] *Id.* at 459.

[202] *Id.*

[203] Williams, *Is Coverture Dead?*, *supra* note 5, at 2249 (emphasis added).

[204] *Id.* at 2261 (emphasis added).

[205] *Id.* at 2289 ("Poor women will not be helped by post-divorce entitlements against their former husbands, but the large bulk of nonpoor women will.").

[206] Becker, *Care and Feminists*, *supra* note 159, at 91-92.

[207] *Id.* at 92.

The point is not that the huge percentage of poor children out there should be ignored, nor that divorcing homemakers have to suffer a reduction in lifestyle, while their ex-spouses don't. These observations, however, do not justify conflating support for mothers, support for children, and measures against poverty. The correlation between these issues does not require the moralization seen in the care work debates. On the contrary, this moralizing trend has actually helped political agendas that run counter to the ones pursued by care work feminists, because it reinforces the proposition that the solution to the poverty problem is to reinforce marriage itself.[208]

5. Thinking of the Good of All Women

Another rhetorical stance quite common in the care work debates is that *all* feminists should care for *all* women. This normative position often spills over into the movement's descriptive projects, obstructing the articulation of potential differences and even conflicts between different feminist ideas. For example, in *It's Snowing Down South*, Joan Williams describes a "coalition": "Feminism is a loose coalition of many women who are dissatisfied with traditional gender constraints for a variety of reasons. . . . If we insist on sanctifying the 'One True Way,' we will only deflect our energy away from achieving gender change . . . ."[209] She further insists that conflicts between feminists harm women themselves, while the ones who benefit from the current gender system—mainly men—sit back and enjoy the benefits.[210] She argues this in spite of her acknowledgement elsewhere that some men would prefer to spend more time with their families and

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[208] For an example of the way in which conservative think tanks and political groups link divorce and poverty see The Heritage Foundation, Map of the Family, http://www.heritage.org/Research/Family/Mapofthefamilycharts.cfm (last visited May 18, 2007). The Bush Administration has also espoused the idea that statistics on children and poverty necessarily lead to the conclusion that marriage itself can be a solution to poverty. *See* U.S. Department of Health and Human Services, The Healthy Marriage Initiative, http://www.acf.hhs.gov/healthymarriage/about/mission.html (stating that children in healthy marriages are less likely to be raised in poverty) (last visited May 18, 2007).

[209] Williams, *It's Snowing Down South*, *supra* note 126, at 816-17. This is just a snapshot of Williams' larger argument which she has developed extensively in her book. *See* WILLIAMS, UNBENDING GENDER, *supra* note 136, at 241.

[210] Williams, *It's Snowing Down South*, *supra* note 126, at 812-13 (emphasis added).

therefore should not be considered to profit from the current distribution of care work.[211]

In lieu of these harmful intra-gender wars Williams proposes a "listening tour":[212] "The only alternative to *respectful listening* is a series of gender wars . . . . To build a coalition capable of improving the economic position of *all* women, we need to meet women where they are and reflect their divergent truths—which are as flawed and situated as our own."[213] There is, however, quite a distance between recognizing that one is not omniscient and claiming that knowledge of our fallibility requires that we respect everything women or feminists do or want if we are going to improve the well-being of all women. This argument relies on logical slips, such as a conflation of truth and desire, the newly emergent argument from respect, and confusing critiques of women's choices with criticism of women themselves. An example of this last point is when one ignores the difference between pointing to the possibility of a connection between motherhood and current gender roles, on the one hand, and criticizing women for choosing motherhood, on the other.

In fact, there is a critical difference between describing a structure and its consequences and attributing responsibility to the agents whose actions reinforce the structure itself. If a feminist, for instance, was of the opinion that the eroticization of domination in pornography contributes to a system of continued domination of women by men[214] she would be unlikely to accept as a divergent truth a porn star's assertion that she is not dominated because she derives pleasure from her line of work. She would be more likely to agree that as long as women enjoy the eroticization of domination, or choose masochistic and passive sex performances, the system of eroticized domination from which women in general stand to lose will be reinforced. Yet in asserting this position she would not necessarily be condemning the particular women who perform these roles or who claim to derive pleasure from it.

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[211] WILLIAMS, UNBENDING GENDER, *supra* note 136, at 99.

[212] Williams, *It's Snowing Down South*, *supra* note 126, at 813.

[213] *Id.* at 831 (emphasis added).

[214] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 113 (1989) (describing the eroticization of women's submission and men's dominance as being at the center of gender as a system of social signification). Williams has expressed her own objections to the eroticization of domination. WILLIAMS, UNBENDING GENDER, *supra* note 136, at 276.

Inversely, a declaration of allegiance to the value of care is an insufficient basis for building political alliances, at least as long as some of these projects demand contradictory political approaches. A regime of enforceable splitting of post-divorce future income based on Joan Williams'[215] or on Martha Ertman's[216] work, for example, clashes at a fundamental level with Martha Fineman's radical reconceptualization of the family itself.[217] Williams' and Ertman's proposals move us away from Fineman's world where caregivers garner support for their performed work through widespread remuneration received for dependency work performed regardless of marriage relations rather than financial dependence on a husband.[218] Quite to the contrary, Williams' and Ertman's proposals both implicitly depend on a strong middle class of heterosexual couples. Therefore, despite their allegiance to the general project of remunerating care Fineman, Williams, and Ertman actually belong to quite different camps when it comes to how they actually imagine achieving that goal.

From a substantive point of view, Williams' call for coalition-building is related to the idea that all women stand to lose from the current gender system because we are all oppressed. Even though this idea has intuitive appeal for feminists, analysis of it reveals a number of holes, not the least of which is the tremendous number of possible configurations of gender, race, and class, each of which carries different levels of advantage and disadvantage. Furthermore, regarding divisions between women who have different lifestyles, such as Williams' "femmes" and "tomboys,"[219] it does not really seem to be true that a policy proposal that would benefit femmes is simply a different, rather than better or worse, policy proposal for addressing gender inequalities from a feminist perspective. For example, Mary Romero discusses in detail the ways in which paid childcare for the middle class may quickly turn into a model that reproduces class hierarchies among women.[220] Merely asserting that because a policy benefits some

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[215] *Id.* at 114.

[216] Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 22 (1998).

[217] *See* FINEMAN, THE NEUTERED MOTHER, *supra* note 8, at 226.

[218] *See id.* at 231.

[219] Williams, *From Difference to Dominance*, *supra* note 184, at 1452.

[220] Mary Romero, *Unraveling Privilege: Workers' Children and the Hidden Costs of Paid Childcare*, 76 CHI.-KENT L. REV 1651 (2001).

women it will ultimately benefit all does not make the claim plausible.[221] In fact, the feminist economic literature on the subject suggests the opposite.[222]

As Williams herself recognizes,[223] it is too early to conclude that any of these issues—how to build alliances, which interests to look out for, and which policy models should be put forth—are resolved. For that reason in particular, the arguments from respect and ethics seem untimely, punitively moralistic, and counterproductive. Otherwise, we have to condemn Franke and Case for not being feminist enough and accept a definition of feminism that takes as its baseline the idea that any "feminist" project must take into account all women, all children, all classes, and all poverty.

6. Argument Culture vs. Building Bridges

Care work feminists have called strongly for coalition building. In a discursive environment seeking to revalorize care, argumentation is accused of being petty and short-sighted. Such a position moralizes disagreements amongst feminists, holding them to be contrary to women's interests. As a result, potentially deep conflicts at the substantive and political levels are obscured.

In this vein, Joan Williams critiques "the tempting argument culture that beckons us to attack other feminists on the grounds that they reinscribe domesticity while we destabilize it,"[224] despite warning against the dangers of reinforcing the "ideology of intensive mothering."[225] She suggests that "[b]ridging that divide seems the better option, both for ethical reasons—it seems more respectful . . .—and because it is political suicide to write off a huge group of women when the goal is to build an effective coalition for social change."[226] Williams' posture sets up a dichotomy between bridging

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[221] For a thorough consideration of the ways in which some of the care work proposals rest on an implicit assumption of an elite, upper middle class woman, see Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7, 9 (2006).

[222] *See* discussion *infra* Part III.

[223] Williams, *From Difference to Dominance*, *supra* note 184, at 1492 ("we are in a brainstorming stage").

[224] *Id.* at 1491.

[225] *Id.* at 1449 (quoting sociologist Sharon Hays).

[226] *Id.* at 1492-93.

gaps on the one hand and playing zero sum games on the other. She resolves the dilemma by moralizing on the available choices: the common ethical reason for choosing to bridge the gap is respect for the constraints and difficulties of each group of women.

However, the issues in these debates involve much more than mere bickering among feminists. Rather, the discussion indicates fundamentally different normative visions of feminism and its political projects.[227] Until feminists have had a chance to thoroughly explore their differences and potential significance, neither the ethics of respect nor the appeal of coalition-building justify bridge-building for its own sake.

Similarly, Ertman rejects the argumentation within feminism, not for strategic or ethical reasons, but because of the philosophical understanding of one's own limitations[228] and the postmodern insight that "any particular institution has the potential to be both subordinating and liberating."[229] She argues that "what Schultz seems to see as a distressing trend in feminism can also be viewed as a healthy heterogeneity of strategies."[230] Therefore, like Williams, she believes that there is room for maternalists and non-maternalists alike in the feminist boat and we should adopt a "both/and" approach rather than an "either/or" one.[231] She concludes that since no strategy is perfect, we cannot and should not posit one place—either the family or the market—as ideal for the purposes of liberation and we should therefore refrain from choosing one strategy over the other,[232] despite acknowledging the possible contradictions between the various projects.[233]

Ertman's agnostic stance, based on the politics of coalition-building, also translates into a resistance to any articulation of the potential

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[227] For instance, a fundamentally different normative vision of women and of feminism seems to motivate Franke's objections to care work feminism. *See* Franke, *Theorizing Yes*, *supra* note 149, at 181.

[228] *See* Ertman, *Love and Work*, *supra* note 156.

[229] *Id.* at 860.

[230] *Id.* at 856.

[231] *Id.* at 850.

[232] *Id.*

[233] *Id.* at 862 ("Schultz is absolutely correct that income sharing proposals run the risk of reifying class, gender and racial differences. But focusing on paid labor runs its own risks.").

effects of specific policy proposals in terms that could be seen as divisive. In an important intervention in the care work debate, she proposed that couples should be obliged to sign Premarital Security Agreements (PSAs) under which the primary homemaker would be the primary wage-earner's creditor based on the provision of housework, and divorce would be the default trigger for collection.[234] Ertman claimed that her model would appeal to scholars with wildly varying approaches and therefore carried huge potential for transforming gender roles and the meaning of household labor.[235] Presumably, PSAs would appeal to those people who want women to stay at home, but she also claimed that they would appeal to those who want to transform existing traditional roles. Yet if PSAs have a real effect, it is impossible that both groups will be satisfied: either PSAs will predominantly encourage women to stay at home or encourage husbands to pressure their wives to the market in order to avoid a huge debt repayment upon divorce. If the latter results, it is not clear why feminists who think that women's choice to remain in the home should be respected—such as cultural feminists—would be happy with the proposal. Women who wanted to stay at home and do care work are instead pushed into the market because their husbands have an economic incentive. And cultural feminists should want this? Along with radical and liberal feminists and legal economists? Ertman's approach focuses on coalition-building at the cost of analyzing how her proposal would work within existing conditions and how it would affect distribution of resources among different groups of men and women.

From the position of the emerging care work consensus, disagreements over substantive issues are labeled as signs of a nocive and masculinist "argument culture," while coalition-building looks good merely because it calls for unity. However, the ability to weather disagreement is one of the truest signs of a strong movement. Feminists should not assume that argument is a bad thing in and of itself, especially if the alternative is blind support for proposals that might exacerbate a problematic gender system or other social evils that one cares about. In the current care work debate, the desire to build bridges does not justify the rejection of analyses that articulate the costs and benefits of policy proposals and point to potential winners and losers. After all, despite the seeming largesse of the idea that there is room for every feminist under the big feminist tent, Franke, Case, and Schultz were bitterly criticized by fellow feminists

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[234] Ertman, *Commercializing Marriage*, *supra* note 216, at 22.

[235] *Id.* at 29.

precisely because they articulated possible costs of the prevailing feminist strategies.[236] In fact, they were critiqued not only for their substantive objections, but also—even mainly—for their normative stance towards women's housework. The idea that good feminism is tolerant, respectful, heterogeneous, and inclusive is appealing but has thus far been belied even by the reactions of the very feminists who urge it.

III. BECKERIAN AND POST-BECKERIAN MODELS CAN HELP CONCEPTUALIZE HOUSEHOLD DYNAMICS

The preceding sections of this Article suggest that some of the recurring reactions of feminist thought to economics in general and Gary Becker's work in particular are ultimately rooted in cultural feminism. The care work debate is an apt example of the selective incorporation of economics in feminist debates. The debate incorporates insights from economics, but ultimately seems to reject economic analysis as a methodology appropriate for feminist purposes. Arguments recurring in the debate further showcase an intense moralization of the ideas of care work, women's work, and feminists' work. This section describes the problematic gaps in the debate that this tendency creates and the ways in which Becker's work, as well as economic work post-Becker, may help us fill them. More specifically, it suggests that the moralization of women's work results in marking all of women's activities in the household as productive, men's work as leisure, while also effacing women's agency in this system of gender relations. Becker's "altruist" model helps us conceptualize the system of carrots and sticks that can induce women as rational actors to remain inside a system of sexual division of labor. Consequent bargaining models of the family allow an articulation of the potential costs and benefits of legal reforms for different groups of men and women. The section ends with a preliminary description of the doctrinal domains in which these theoretical debates are playing out.

A. The Problems with the Current Consensus

Ideas from the emerging consensus on women's "ethic of care" pervade the feminist debates over the place of economic analysis in feminist legal theory.[237] First, women's work in the house has become identified

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[236] *See supra* note 156 and accompanying text; Becker, *Caring for Children and Caretakers*, *supra* note 159; Becker, *Care and Feminists*, *supra* note 159.

[237] *See* discussion *supra* Part I.B.1.

with selfless altruism that works mainly to the benefit of the husband.[238] Economics played a key role in identifying the household domain as a place of production, but feminist debates have transformed it into the idea that whatever activity women undertake should be termed production without further analysis. The move can be motivated by a laudable desire to "reverse the spiritualization of housework, and to recover its economic dimension,"[239] but it often ends up reinscribing the family domain as fully feminine, only now in terms of productivity. Breaking down housework into a variety of different components, such as "growth work" (pregnancy, birth, nurturing and even infertility treatment), "household management," "emotion work," and "status development work," and considering these as primarily done by women, despite its analytic promise, by another reading merely labels whatever women do in the household—especially white, upper-middle class women—as productive.[240] The wife produces for the husband and her children but does not appear anywhere as a consumer of those services, despite her alleged preference for this type of care work according to some feminists.[241]

For example, Ertman's response to Schultz casts doubt on whether more wage work for women will restructure the distribution of housework among husband and wife. Ertman observes that "[i]f women engage in more wage labor and men in less, it seems likely that this pattern would continue, and many men would use the freed up time to play more rather than to vacuum or write Christmas cards."[242] Even though the inequities of a two-wage-earner household where only the woman does the drudgeries of housework seem self-evident, the same is not necessarily true of the situation in which both do wage work outside the home and when at home one plays while the other writes Christmas cards. Presumably, Ertman is

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[238] The reason often cited for that is that the husband primary wage earner is gaining market experience and enhanced earning capacity while the homemaker is losing both. The emphasis of legal feminists on post-divorce entitlements partly accounts for this emphasis, which fails to take into consideration spousal interactions and exchanges during the marriage. *See* Ertman, *Commercializing Marriage*, *supra* note 216.

[239] Williams, *From Difference to Dominance*, *supra* note 184, at 1462.

[240] *Id.* at 1458-67.

[241] Deborah Rhode, for example, asserts that "[f]or many women, unpaid labor in the home, *even on routine tasks*, is more satisfying than their paid jobs; it offers greater autonomy, control, and opportunities for personal intimacy and connection." Rhode, *supra* note 156, at 838 (emphasis added).

[242] Ertman, *Love and Work*, *supra* note 156, at 858.

suggesting that writing Christmas cards constitutes labor that increases the family's—and therefore each wage earner's—reputational value; writing Christmas cards is "status development work,"[243] while play is simply pleasure for the husband. However, whoever writes the cards may have a preference for it and thus derives pleasure from it. Card-writing is not the obvious equivalent of dish-washing or diaper-changing. Unlike the latter examples, there is no danger that unwritten cards will go bad and stink up the sink (or the kid) here, in which case making assumptions about preferences and tastes becomes much more problematic. Similarly, if the husband's play includes the children of the couple, or even buddies (or bosses) from work or a gardening hobby, his play might be comparable to the care work that some feminists claim should be remunerated. The assumed definition of labor rather than leisure seems to be that which is done by the housewife and not the husband, rather than what has productive value for the household.

This example also illustrates the tendency to posit the middle class, white couple of the 1950s as the paradigmatic marriage, with the wife's homemaking activities un- or under-rewarded by definition. This tendency is marked in the care work debates, despite warnings by feminists themselves that "it is as important for women not to erase men's work as it is for men not to erase women's."[244] What in the "home sweet home" ideology of the '50s would count as a valuable contribution of women for which we need not discuss remuneration because marriages lasted longer than they do now, now becomes "economically productive," at least to the extent women's work in the household requires remuneration upon divorce.[245]

Last but not least, economic rationality in the legal feminist debate fails to account for women as rational profit-maximizers in an exchange which they have their own moves to play, giving up one thing to gain another, or even as consumers of any value while stranded at home. It also stops short of articulating women's agency even within the confines of institutional, societal, and personal constraints,[246] unless this agency

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[243] Williams, *From Difference to Dominance*, *supra* note 184, at 1463.

[244] *Id.*

[245] This trait is present mostly in proposals that focus on divorcing homemakers. *See* Williams, *Married Women and Property*, *supra* note 135; Williams, *Is Coverture Dead?*, *supra* note 5.

[246] A notable exception to this trend can be found in Lucie White's quite self-conscious effort to capture poor women's subjective experiences and accounts of agency—or lack thereof—in regards to the social policies theoretically designed to empower them. Lucie

encompasses only altruism.[247] This lack of interest is significant because it prevents feminists from forming a complete picture, not only of the sticks that keep women inside this gendered system, but also of the carrots, the positive payoffs of the current gender regime, which may keep women coming back for more.

The rest of this Article focuses on a description of some of the more specific elements in economic thought that would enrich the care work debate in this direction.[248] In addition, it suggests some of the doctrinal domains in which feminist arguments may begin to make a difference.[249]

B. Economic Models Can Help Us Refocus on Household Relations

1. Becker's Altruist Model Illuminates the Potential Effects of the Breadwinner's Contributions on the Persistence of the Sexual Division of Labor

Feminists have pointed out that the Beckerian altruist is not an altruist but a "Present-Giving Male Dictator."[250] While true, this criticism doesn't address the fact that the model captures something in the behavior of traditional breadwinner/housewife couples with the breadwinner in control of a market wage. More specifically, it models the idea that the wage earner's contributions to the homemaker will not depend on the "value" of the services rendered on the basis of productivity, but instead on factors such as the homemaker's position in the marriage market. Furthermore, it captures the way in which monetary contributions by the wage earner can influence decisions about whether one remains specialized

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E. White, Commentary, *Raced Histories, Mother Friendships, and the Power of Care: Conversations with Women in Project Head Start*, 76 CHI.-KENT L. REV. 1569 (2001).

[247] This point is related to, but different from, Katharine Silbaugh's critiques of feminist resistance to economic thought. *Cf.* Silbaugh, *supra* note 113. Silbaugh notices that "[f]eminists rank high among those who are skeptical of economists." *Id.* at 90. She adds that "[t]his skepticism proceeds on . . . a negative reaction to economics as a way to describe home activities, and an affirmatively positive response to love and affections as a descriptively accurate way of understanding and explaining productivity in the home." *Id.* She argues that this feminist resistance should be overcome by feminist scholars. *See generally id.*

[248] *See* discussion *infra* Part III.B.

[249] *See* discussion *infra* Part III.C.

[250] Bergmann, *Preposterous Conclusions*, *supra* note 44, at 146.

in household work when faced with the prospect of wage-earning market work.

This is illustrated by Becker's altruist model. Becker explicitly states that the altruist contributes some of his own income to his "beneficiary" not as a reward or remuneration for her household labor, but rather as a reflection of his own preferences, which include her utility to a varying degree. If the resource-controlling head of the household deems the beneficiary "too wealthy," he is going to stop contributing his own income to her. There are reservation points below which the beneficiary *w* is not going to stay in the marriage, but in the Becker model these are determined by competitive forces in the marriage market rather than by direct negotiations between the spouses.[251] If the marriage market is not favorable to the wife, she may accept very low contributions from the "altruist" *h*, while at the same time contributing the labor that it takes to maximize household output despite not getting enough in return. At the same time, *h*'s contribution may increase *w*'s total income, but this comes at the price of *w*'s internalization of some of *h*'s desires. Becker illustrates this with the example in which *w* is better off internalizing the cost of *h*'s annoying habit of reading in bed because his contribution to her will make them both better off.

Consider the more useful example of a homemaker's decision to remain specialized in the household and the role that the altruist breadwinner's contributions may play in pushing her in that direction. A simple way that a selfish *w* can increase her own income with the expectation that doing so will lower *h*'s income is by working longer hours in the market, causing an increase in her own income while decreasing how many household commodities she produces. A decrease in the production of household commodities might induce *h* to work fewer hours in the market in order to produce more of the household commodities himself or spend part of his income on outside help, such as nursery school. Given Becker's analysis of the sexual division of labor, a housewife's hour of market work will have less value than a breadwinner's and a breadwinner's hour of "housework" is less efficient than the housewife's. Therefore, the new arrangement would result in a fall in family income, presumably of greater magnitude than the increase in her personal income. The fall in family income would induce *h* to lower his contribution to *w* by more than this difference, leaving *w* worse off than before her decision to work longer market hours. Becker's conclusion is that even a selfish *w* will therefore

[251] BECKER, TREATISE, *supra* note 19, at 62.

refrain from actions that harm *h*, because she takes into account his altruistic behavior.

In other words, if a housewife knows that her husband cares about her utility, she is going to be more inclined to do what is more "efficient" for her to do in the first place. That is, she will specialize in housework.[252] But it is only the highly-paid altruist married to a low-wage-earning wife that has this influence.[253] Margaret Brinig suggested that Becker's model makes sense only with a type of "old marriage," in which spouses completely specialize in separate spheres.[254] However, if it is true that the new "dual earner" households are often neo-traditional families, in which there is still marked gender specialization and the man still gets the larger paycheck,[255] then Becker's model still has relevance.

2. Assuming a Female Altruist Helps Conceptualize the Homemaker's Bargaining Power

Although Becker's model has not proven to be as widely applicable as he expected,[256] his description contains elements that remain important to any analysis of family economics, and especially so to any analysis with feminist aspirations. His analysis has more to offer than the simple, yet powerful observation that work performed in the household is not unproductive simply because it is performed in the household, and his altruist provides an important element that is currently missing from the contemporary legal debates on care work despite the qualifications that critics have correctly noted.

Becker assumes that monetary income is not the only value generated in the household and that there are family specific goods that are

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[252] *See id.* at 295 ("altruism encourages the division of labor and an efficient allocation of resources").

[253] This is a critique that has been forwarded by mainstream and feminist economists alike. *See* Pollak, *supra* note 22, at 127; Nancy R. Folbre, *Market Opportunities, Genetic Endowments, and Intrafamily Resource Distribution: Comment*, 74 AM. ECON. REV. 518, 519 (1984).

[254] Brinig, *Comment on Jana Singer's* Alimony and Efficiency, *supra* note 14, at 2465.

[255] *See* HOCHSCHILD, *supra* note 116; Penny Edgell Becker & Phyllis Moen, *Scaling Back: Dual-Earner Couples' Work-Family Strategies*, 61 J. MARRIAGE & FAM. 995 (1999).

[256] Pollak, *supra* note 22, at 138.

produced and consumed at home, such as family time together, children, recreation, and vacations. In this scheme, women emerge not only as producers of economic value through their labor—as they are represented in most remuneration proposals—but also as consumers of this value. This is especially true if we assume, as many care work feminists do, that women consciously choose household work because they find more meaning there. Women also emerge as actors in a game of quid pro quos in which they affect their husband's behavior through their actions and choices despite their lower incomes. A husband who loves his children is a resource in the bargaining game with a wife who has more influence with the children, even within the same household.

If we take the "altruist" model seriously under its restrictive assumptions, the resource-controlling husband will spend some of the income on his wife as long as she internalizes some of the costs of his own preferences. This is not in return or as consideration for the housework that she has already done, as is implicitly accepted by many care work proposals, but as consideration for her compliance with his preferences and her labor going *forward*. The inverse is also true; the less the wife cares about her husband's contribution, the less she will comply with his preferences because she has internalized the cost of her actions in the form of his lowered contribution. This scenario is possible if the wife has an independent income of her own that she can use to offset the potential drop in her husband's contribution. But even if she doesn't have a monetary income, she is probably going to use the resources that she already has: her housework and ability to produce household commodities of value to the husband, such as children, meals, family time, or even sex. And this dynamic, though not as easily quantified as Becker suggests, will play out at the level of the events of everyday life.

If one reverses the model and considers *w* to be the altruist and *h* her selfish beneficiary, as many feminists assume, one realizes that altruist *w*'s contributions to her selfish beneficiary may very well be her housework, even in the Becker model.[257] If the selfish *h* cares about how much housework income he receives from his altruist wife *w*, then he is also going to try and regulate his behavior as if he were an altruist himself, absorbing externalities that would otherwise decrease overall family income. This model suggests that specialization in household work actually

[257] For a modeling of homemaking as an activity that can be analogized to the wage earning spouse's market work, see Robert A. Pollak, *Bargaining Power in Marriage: Earnings, Wage Rates and Household Production* (Nat'l Bureau of Econ. Research, Working Paper No. W11239, 2005), *available at* http://ssrn.com/abstract=697164.

gives *w* power over *h* in cases where production of household commodities is of value to *h*. The high-earning *h* and a specialized *w* who works to produce highly valued household commodities, such as status development work, might have a household where the selfish breadwinner *h* behaves more altruistically towards *w*, internalizing some of the costs himself. Of course, this is very specific to a particular class model, but it does show that household production can give some power to the homemaker, at least to the extent that the commodities produced are of value to the selfish breadwinner. In fact, the higher the socioeconomic level, the more substantial this power might potentially be.

Suppose the selfish breadwinner *h* decides to move the family to a city that *w* hates. In this situation, *w*'s utility would be significantly reduced by the move and therefore she would decrease her contribution in housework to *h* accordingly. She has the power to do this through withholding housework and refraining from the activities of homemaking that contribute to *h*'s overall income, such as cooking, cleaning, sex, and even dinner parties.[258] Arguably, if the increase in *h*'s income from the move is big enough, these actions on the part of *w* will not be enough to induce the selfish *h* to refrain from the move because he can hire someone else for the cleaning, cooking, or even the sex. However, another possible outcome is that *w* decrease in her contributions to *h*—or even the mere threat of her doing so—the selfish *h* will be induced to internalize part of the cost to *w* and offer her some sort of recompense. As before, the higher the value of the homemaking activity to the selfish *h*, the more power the altruist *w* will have at her disposal.

Such an exercise is useful because it induces us to think about the available moves in a "game" of marriage cast under Becker's terms, which is not dissimilar to the terms cast by care work feminists, and analytically explore the gendered division of labor and the distribution of resources that go with it, in which both women and men have moves to play out. The difficulty in quantifying this system notwithstanding, this is a meaningful practice. Thinking in these terms does not mean that one will necessarily end up concluding that the moves available to women are satisfactory or desirable, but it does require that we attempt to capture a wider range of women's agency, including its selfish aspects. This mode of thinking also illuminates the structural advantages that potentially attract women to the

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[258] For the argument that a homemaker cannot realistically withhold her labor without withholding it from herself as well see Silbaugh, *Turning Labor into Love*, *supra* note 14, at 34; Wax, *Bargaining in the Shadow of the Market*, *supra* note 87, at 555 (citing Silbaugh but noting that the question of how much housework can be withheld is a matter of degree, just like how cash can be withheld).

breadwinner/housewife marriage beyond the formulaic assumption that women have a privileged relationship to care that will always lead them there no matter the financial penalties.

3. Becker and Post-Becker Models Help Inquire into the Potential Effects of Different Legal Regimes on Different Groups of Women

Care work feminists commonly concentrate on the problem of distribution of resources at the moment of divorce,[259] but Becker's model draws attention to the distribution of resources during the marriage and complicates the idea that the distribution of *h*'s income is going to take place on the basis of work already performed. This should make care work feminists reconsider their implicit endorsement of or agnosticism toward the breadwinner/housewife model. In Becker's model, the distribution of income in the household is determined by marriage markets and the altruist's preferences but not by a measure of consideration for the wife's home labor.[260] Finally, Becker's model distinguishes between altruistic motivations and observed behavior that can qualify as such in a manner that could bring greater clarity to the legal debates as well.[261] The fact that the Beckerian altruist spends some of his own income on his beneficiary can simply mean that he is using the income expenditure to get the beneficiary to act in a specific manner. This goes for the homemaker as well; care work performed need not stand for caring and need not be moralized as such.

The Beckerian model has been criticized for the assumption the couple is maximizing a single utility curve.[262] Some feminists have taken this to mean that Becker assumes there are no conflicts of interest that take place in the household, when in fact Becker only purports to explain how family members are *induced* to behave *as if* there were no conflicts.[263] Negotiation models that have developed since try to model household interaction where each spouse is assumed to maximize their own utility

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[259] *See, e.g.*, Ertman, *Commercializing Marriage*, *supra* note 216.

[260] BECKER, TREATISE, *supra* note 19, at 13-14.

[261] *See* discussion *supra* Part II.B.3.

[262] Shelly Lundberg & Robert A. Pollak, *Bargaining and Distribution in Marriage*, J. ECON. PERSP., Autumn 1996, at 139, 143.

[263] *See* discussion *supra* Part I.A.3.

curve and resources are not necessarily pooled.[264] These models articulate the different moves available to the spouses under different conditions, including different legal regimes.[265] They further focus attention on the importance of the homemaker's potential wage rate in the market, even when the assumption is of a generous compensation regime for "professional" homemakers.[266] Attempting to model women's negotiating positions under different legal regimes would seem to be an exercise particularly suited for valuable insights from legal feminists,[267] yet thus far they have only engaged with it with an a priori commitment to the remuneration for housewives upon divorce.[268] In contrast, feminist economists have already examined issues such as how much state responsibility for child costs is enough,[269] whether equality and paid

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[264] *See* Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 INT'L ECON. REV. 31 (1980); Marjorie B. McElroy & Mary Jean Horney, *Nash-Bargained Household Decisions: Toward a Generalization of the Theory of Demand*, 22 INT'L ECON. REV. 333; Lundberg & Pollak, *supra* note 262.

[265] *See, e.g.*, SHOSHANA GROSSBARD-SHECHTMAN ET AL., PROPERTY DIVISION AT DIVORCE AND DEMOGRAPHIC BEHAVIOR: AN ECONOMIC ANALYSIS AND INTERNATIONAL COMPARISON (2002), http://www.rohan.sdsu.edu/faculty/sgs/documents/aea01v4.pdf; Jeffrey S. Gray, *Divorce-Law Changes, Household Bargaining, and Married Women's Labor Supply*, 88 AM. ECON. REV. 628 (1998).

[266] *See* GROSSBARD-SHECHTMAN ET AL., *supra* note 265.

[267] One issue in which feminist legal scholars are particularly well placed to contribute is the correct characterization of legal regimes. Some economists characterize the shift that happened in the 1970s in divorce rules as a shift from mutual assent to unilateral divorce. This idea seems to imply a misunderstanding of the shift from fault to no-fault divorce. Under fault divorce, some divorces were collusive mutual consent divorces, but it is not at all clear that this phenomenon could accurately characterize the whole fault regime and the incentives it provided in practice. *See, e.g.*, Gray, *supra* note 265; Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q.J. OF ECON. 267 (2006).

[268] Joan Williams has argued that the housewife's position during the marriage is going to improve if she has a claim to half of the output produced by the household, but the examination of potential combinations of different legal rules is limited to a no fault regime with a joint property regime (of acquired assets). Joan Williams, *Do Wives Own Half? Winning for Wives After* Wendt, 32 CONN. L. REV. 249, 269 (1999). A similar argument is made by Martha Ertman in her PSA proposal. Ertman, *Commercializing Marriage*, *supra* note 216. For an exception to this trend, see Wax, *supra* note 87.

[269] Susan Himmelweit et al., *Lone Mothers: What Is to Be Done?*, FEMINIST ECON., June 2004, at 237, 238.

maternal leave are compatible,[270] and what types of women stand to lose and gain from various different legal regimes.[271]

Margaret Nelson's article on *Housework and Self-Provisioning*, for example, purported to describe and measure men's non-monetary contributions to the heterosexual household.[272] She observed that even though Hochshild's influential *Second Shift*[273] contributed greatly to our understanding of the sexual division of labor, she had utterly overlooked men's unpaid contributions to the household economies:

> Some significant activities, however, are utterly ignored. Are we to assume that no one in these couples . . . ever does significant home repair, mows the lawn, rotates the tires on the car, builds a bookshelf, grows vegetables in the backyard, or makes gifts to cut down on holiday expenses? That is, there is a tendency to focus on family survival as being a simple (or not so simple) matter of employment and women's "traditional" housework.[274]

She further noted that the cost of forgoing this sort of analysis has been an impoverished understanding of exactly what kinds of economic disadvantages women, especially rural and poor women who lose a male partner, have to face. She attributed the oversight to a possible middle class bias that overlooks not only rural households but also poor urban households.[275] She also observed that the invisibility of men's domestic labor in the relevant literature glosses over the difference between married women and single women, since it completely overlooks the fact that men's domestic labor likely benefits only spouses and not single women.[276]

Similarly, in a study of lone motherhood in post-Soviet Russia, Shireen Kanji concluded that the children of lone mothers experience higher poverty rates, "but also that child poverty rates vary widely between types

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[270] *Id.* at 244.

[271] GROSSBARD-SHECHTMAN ET AL., *supra* note 265.

[272] Margaret K. Nelson, *How Men Matter: Housework and Self-Provisioning Among Rural Single-Mother and Married-Couple Families in Vermont, US*, FEMINIST ECON., July 2004, at 9, 10.

[273] HOCHSCHILD, *supra* note 116.

[274] Nelson, *supra* note 272, at 10.

[275] *Id.* at 11.

[276] *Id.* at 26-29.

of lone-mother households and so depend on a family's specific history and circumstances."[277] She also partly attributed the overwhelming correlation of lone motherhood with poverty to a predominant ideology about two parent families as optimal rather than to actual poverty levels.[278]

These are only two examples illustrating a range of issues that remain off the table in the feminist legal discussions, because of the prevalence of assumptions about women's privileged relationship to care, caring, and altruism, a parallel underlying theme of women's oppression by men, and the emerging moralization of feminists' position vis-à-vis care.

4. Focusing Attention on Spousal Interactions During Marriage

Within the legal debates, proposals focusing on remuneration of homemaking activities upon divorce[279] also run into the problem of a contradictory portrayal of marriage. Proposals for remunerating household work upon divorce implicitly rely on the idea that during marriage a breadwinner's wages suffice as compensation for the wife's contributions to the household economy.[280] Most feminists who advocate joint property regimes or some other form of remuneration for household work, such as Ertman's Premarital Security Agreements,[281] examine their proposals in the context of the wife's work after the divorce. On the other hand, feminist legal depictions are often imprecise or even evasive in their account of how income is spent while the marriage lasts and through what mechanisms its distribution is controlled: "if the marriage remains intact, the primary homemaker/creditor gets a return on her loan by sharing in the primary wage earner's earnings."[282] In these depictions, while the marriage lasts, the wife's altruistic work seems to be rewarded simply by the fact that the husband remains in the marriage and contributes his wage to the common pool of resources, but if the marriage ends, the wife becomes financially

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[277] Shireen Kanji, *The Route Matters: Poverty and Inequality Among Lone-Mother Households in Russia*, FEMINIST ECON., July 2004, at 207, 209.

[278] *Id.* at 208.

[279] WILLIAMS, UNBENDING GENDER, *supra* note 136, at 114; Ertman, *Commercializing Marriage*, *supra* note 216, at 19-28.

[280] Williams, *Married Women and Property*, *supra* note 135, at 394; Williams, *Is Coverture Dead?*, *supra* note 5, at 2233-34.

[281] *See* Ertman, *Commercializing Marriage*, *supra* note 216.

[282] *Id.* at 24.

vulnerable, subordinated to the husband who has reaped the benefits of her housework. She becomes subordinated because society as a whole fails to value her housework, and men ultimately benefit as a group. The remedy is a liberal legal intervention that would repair the harm done by remunerating the wife upon divorce.[283] Notably, in sharp contrast to the discussion of care as something that women have and men want, the related question of sex work within marriage almost never comes up.

The half-rosy depiction of the heterosexual breadwinner/housewife model appears to derive from a view that the homemaker's activities are altruistic, productive, and mostly unremunerated. This view conflicts with descriptions in Beckerian and post-Beckerian models where marriage is not an idyllic place where mutual love and affection reign at least in intentions, but instead is an arena in which actors seek to make the best of their available resources to achieve their goals. Perhaps such analyses are the type that degrade "the altruism necessary to sustain family life"[284] by breaking it down to calculating moves aimed at extracting gain, monetized or otherwise. Such resistance is particularly poignant when it comes to characterizing women's actions within the family as calculated or in any way self-regarding. For some feminists, it seems that suggesting that women's behavior in the family might be anything but altruistic is per se false, and this may be part of the source of some of the reactions against this part of Becker's work. Care work analysis of women's work in the household supports the expression of their activities in economic terms only to the extent that it helps to reward them when marriage ends. For this reason, legal feminism can only borrow the economic insight of household production but not the assumption of a homemaker as a selfish actor.

The closest that care work positions within the legal feminist discourse have come to acknowledging insights from economic methodology is when proposed joint property schemes are supported by the argument that they reinforce the homemakers' bargaining power vis-à-vis her husband.[285] This is assumed to be the case because if the wife's position

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[283] Fineman's work, in this regard, is much more coherent and radical, since it doesn't try to salvage the ideal of the heterosexual housewife/breadwinner model, while at the same time locating it as the paradigm of women's economic destitution. She proposes that the legal category of marriage be abolished for purposes of recognizing or remunerating relationships of dependency such as mother-child. Instead, she calls for a widespread reconceptualization and support of these relationships on the basis of the work performed for the indispensable societal goal of taking care of the old, the young and the infirm. FINEMAN, THE NEUTERED MOTHER, *supra* note 8, at 226-36.

[284] Williams, *Is Coverture Dead?*, *supra* note 5, at 2279.

[285] Williams, *Do Wives Own Half?*, *supra* note 268.

at divorce includes a larger share of the property settlement, then she must be in a better position to negotiate the distribution of productive outcome within the marriage itself.[286] This may very well be true and is a real contribution to the economic literature from legal feminism because economics generally takes current distributions of legal entitlements as a given. Becker's model for one takes for granted the existence of a male breadwinner who earns a wage that then distributes among family members at will. But as Joan Williams has rightly observed, the "he who earns it, owns it" rule is not necessary to the idea of property rights nor one that could not be modified in the future.[287]

However, neither does a legal realist view of marital property rights, such as Joan Williams', lead us to necessarily support a joint property of future earnings regime as a default rule. Work in the economic literature that does explore such differences in legal regimes (and should be of interest to those in the care work debates) indicates that the effects of the property schemes are not as straightforward as suggested by the legal feminist literature. Shoshanna Grossbard-Shechtman inquired into community property and separate property regimes and concluded that there are several different equilibria that can be reached within a marriage under each property regime. These different equilibria entail different levels of the "provider's" voluntary contributions to the "homemaker" during the marriage. In fact, some of her predicted equilibria involve a lesser contribution from the husband to the wife in regimes more generously protecting her at divorce.[288]

Grossbard-Shechtman further provides some predictions about homemaker-friendly rules, which she supports with actual empirical evidence from countries with differing legal regimes. The predictions that seem to be at least initially supported by some empirical evidence include that "[t]he more homemaker-friendly the rules of division of property at divorce, the . . . more popular traditional homemaker/provider [model is] with women outside the labor force."[289] This may very well mean that a particular wife's situation is better in a joint property regime during her marriage *if she is a homemaker* and in regards to levels of consumption experienced (although these will also vary), but it seriously shakes the

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[286] *Id.*

[287] Williams, *Is Coverture Dead?*, *supra* note 5, at 2248-53.

[288] GROSSBARD-SHECHTMAN ET AL., *supra* note 265, at 13.

[289] *Id.* at 16.

argument proposed in the care work debates that a joint property regime could work to *either* encourage a sexual division of labor *or* discourage it by providing an incentive for the husband to send the wife to market work. Initial evidence suggests that it will most probably do the former.

Therefore, if we take these preliminary conclusions as a starting point, assuring remuneration for homemakers through a joint property regime does not seem a *sine qua non* part of a feminist agenda that seeks to transform gender roles. It would be an invaluable contribution of legal feminists to enter the enterprise of figuring out the potential effects of different legal rules, and perhaps correcting possible misunderstandings in the economic literature of the legal considerations and pointing to the ways in which law itself might be at the root of individuals' perceptions of their well-being and their alternatives. However, such contributions would require leaving behind assertions about benefits to all women, homemakers or not, or to all homemakers, rich or not, that may be comforting to feminist ears but are not borne out, at least in the preliminary analyses.

Recent work in the economic literature further suggests that the parties' bargaining power within the marriage depends on their potential wage rates outside the marriage and not on their actual earnings.[290] A housewife who works part-time making much less than her husband—or even a full-time homemaker who has no wages at all—will not have the same bargaining power as every other housewife working part-time or full-time homemaker. If she *could* get a wage rate equal or higher to the one her husband currently enjoys, her bargaining power is not diminished by her current wage. This insight focuses attention back to the importance of the homemaker's class and educational background for bargaining within the marriage, but it also underlines fundamental differences in the situation of different homemakers and the fallacy of assuming uniform improvement of all homemakers' situation regardless of the particularities of their situation, especially class. Finally, it further challenges the idea that feminist support for more financial remuneration of homemaking as it stands should be a *sine qua non* of self-respecting feminists since a homemaker's *potential* wage rate plays a role in determining her position within the marriage regardless of the *actual* remuneration she receives from her husband. Simply put, a pragmatic approach to gender transformation does not have to hinge upon equal remuneration of homemakers, but nor does a market-based approach need to reflect first wave feminism's bias against femininity.

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[290] *See* Pollak, *supra* note 257.

C. Property Division and Alimony: Where Theory Meets Doctrine?

This section provides a preliminary discussion of property division and alimony upon divorce as an example of the potential consequences of taking a moral stance toward household production. Much of the feminist work currently pushing for greater remuneration and financial security for divorcing homemakers is based in part on the idea that household work is productive.[291] The moral notion of the value of care work in the context of the alimony debates, however, prevents inquiry into the potential effects of fully securing homemakers against the risk of divorce up to the point of splitting the breadwinner's future earnings. Such inquiry has already been judged to come from a masculinist version of liberalism that is punitive towards women and the choices they have made and will continue to make.

In most states, sweeping statutory reforms during the 1970s imposed a switch from permanent alimony to temporary (otherwise known as rehabilitative) alimony on the limited basis of need, which in turn gave rise to a widespread feminist outcry against the destitution of homemakers.[292] This feminist criticism led to the revision of the Uniform Marriage and Divorce Act to include a series of equitable factors beyond need as a basis for alimony awards.[293] Current statutory law in most states is a long way away from the world of homemaker destitution, even though permanent alimony remains clearly out of the picture. As alimony's theoretical bases weakened, feminists shifted their focus to property distribution. The idea that homemaking is productive was used to justify seeking the expansion of the pool of marital property to include future earnings. In turn, expanding the marital pool to future earnings on the basis of economic contribution conveniently also justifies alimony.[294]

These ideas are already partly implemented at the doctrinal level. Intangible assets, such as professional goodwill and pensions, now routinely

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[291] WILLIAMS, UNBENDING GENDER, *supra* note 136, at 32-33; Ertman, *Commercializing Marriage*, *supra* note 216, at 18-19; Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1515-19 (2005).

[292] *See supra* note 7 and accompanying text.

[293] For a thorough review and critique of statutory factors taken into consideration by state statutes see Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 32-39 (2001).

[294] This is the case even though the question of why it is that the wage earning spouse's contributions typically do not constitute the basis for alimony remains unanswered. *See id.* at 38.

enter the "marital property" pool divided upon divorce.[295] This is one way to split future income that was earned during the marriage, just as some feminists suggest. One of the more problematic issues in splitting future income is that of professional degrees.[296] So far, only New York splits a degree as marital property acquired through joint if distinct efforts.[297] The latest American Law Institute's (ALI) *Principles of Family Dissolution* enshrine some of these developments as well, proposing a switch from alimony to compensatory payments based on the ideas of lost earning capacity, lowered living standards, and even the unfair loss of the return of one's investment in a spouse's earning capacity.[298] The ALI principles further embrace the idea that property distribution and compensatory payments together should constitute the basis for an equitable distribution of gains and losses upon divorce, thus doing away with the traditional split between property and alimony.[299]

Some of the feminist proposals discussed in this paper, such as Williams' or Ertman's,[300] go even further, proposing the creation of a presumptive property entitlement on the husband's or main wage earner's future earnings upon divorce. This is based on a variation of the Beckerian idea of household production in which the production is the wage earner's increased earning capacity by the homemaking spouse rather than household goods consumed at home.[301] They do not address the symmetrical idea that directly follows: the wage-earning spouse also contributes, not only to the marital wealth, but to the homemaker's increased household capital. The goal of these proposals and that of the ALI principles converge: to secure homemakers against the risk of abandonment so that they can be fairly rewarded for the efforts during the marriage.

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[295] LESLIE J. HARRIS ET AL., FAMILY LAW 458-500 (3d ed. 2005).

[296] *Id.* at 492-97.

[297] O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985).

[298] AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION §§ 5.04-05, §§ 5.11-12 (2000).

[299] *Id.* §§ 5.05-06. For a critical review of the principles see June Carbone, *The Futility of Coherence: The ALI's* Principles of the Law of Family Dissolution, *Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43 (2002).

[300] *See* Williams, *Married Women and Property*, *supra* note 135; Ertman, *Commercializing Marriage*, *supra* note 216.

[301] BECKER, TREATISE, *supra* note 19, at 22.

Economic theory agrees that the full securing of homemakers against financial risk is going to move the system in the direction of an efficient solution. In fact, Gary Becker's theory predicts that the more secure a homemaker is in her financial situation post-divorce, the more women will be able to choose to safely do what he thinks is more efficient, that is, they will stay at home.[302] Shoshana Grossbard-Shechtman's preliminary conclusions confirm this prediction. Regimes that generously protect the homemaker upon divorce are also regimes where a high incidence of a sexual division of labor is likely to occur.[303]

This point of economic analysis is lost in the current care work debate. The moralization of women's care work and the imperative that feminists have to respect and value what women do make it difficult to articulate objections to these normative projects, including those based on the economic insight that they are likely to intensify the sexual division of labor. For example, Joan Williams reads Vicki Schultz's objection to these projects as recycling the "sameness/difference" debates of the '80s and rearticulating a feminist position for which liberal feminist Herma Hill Kay was criticized.[304] And as we saw, Williams has forcefully maintained that sameness feminism comes out of a tradition of masculinity and does not fully respect women's real lives.[305] Therefore, critiques of the alimony projects on the basis that they may encourage women towards traditional gender roles are considered disrespectful of women.

In actuality, the statutory language of most states is already homemaker-friendly enough to allow for interpretations that could approximate some of these feminist proposals without more statutory

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[302] This is the logical implication of Becker's observation that the sexual division of labor has allowed men to walk away from marriages easily, and therefore marriage law and contract law around the world has had to protect women against such an event. *Id.* at 43-44. Similarly, he proposed a switch to mutual consent divorce, which would grant divorcing women more negotiating power and therefore guarantee their financial situation post-divorce. This would counter the influence of no-fault, which, according to Becker, is to "discourage married women from leaving the work force for several years to care for their young children, because they realize that they will need good jobs if their husbands ditch them." Becker, *Finding Fault With No-Fault Divorce*, *supra* note 131, at 22. The implication of this is that if women are well provided for after divorce they will choose to specialize in the household.

[303] GROSSBARD-SHECHTMAN ET AL., *supra* note 265, at 16.

[304] Williams, *It's Snowing Down South*, *supra* note 126, at 820.

[305] Williams, *From Difference to Dominance*, *supra* note 184.

reform[306] and would push in the direction of officially turning marriage into a commercial venture that women can safely bet their money on. This Article argues for a more open feminist engagement with women's household work, one that seriously takes into consideration both the gains and losses to women themselves. Additionally, we have not paid enough attention to the very difficult tensions between distributive justice and the expressive and incentive effects of the law for both women and men, at a moment in time when family law has been described as being "in disarray."[307]

IV. CONCLUSION

This Article has shown that there is an emerging consensus within feminist debates with roots in cultural feminism, and that this has produced feminist reactions against economics and economic rationality in analyzing women's behavior. This emerging consensus has costs of its own, including the contradictory position that women's agency is problematic because it results from exploitation, yet ultimately respect-worthy because of its moral value as altruism. It further obscures investigation into the ways in which women themselves contribute to the perpetuation of current gender systems, not through "false consciousness" but through actual calculation of their own interests. The entirely respectable desire to create alliances within feminism should not stand in the way of a more precise articulation of the stakes, the groups affected, and the cost of potential reforms. In the current debate, there are too few points which feminists are "allowed" to make, preventing a more meaningful examination of the stakes of care.

Substantively, the point is that one doesn't need to make a formulaic claim about the altruistic behavior of women in the family to say something about why the *financial* costs of a housewife/breadwinner model fall on women's shoulders, particularly in the case of divorce, and why this is undesirable. On the contrary, if we are to assess the costs and benefits of a system of gender roles that distribute resources and power along gender lines, we need to be able to talk about the payoffs to women and costs to men, as well as the inverse. The system is incomplete unless it articulates some resource and power payoffs for women. That doesn't necessarily

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[306] Collins, *supra* note 293, at 32-39.

[307] Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes,* 8 DUKE J. GENDER L. & POL'Y 119, 123 (2001) (quoting Geoffrey C. Hazard, Jr., ALI Principles of the Law of Family Dissolution: Analysis and Recommendations, Foreword (Proposed Final Draft Part I, 1997)).

mean that these payoffs are sufficient to justify the specific gender system, but we may discover what keeps it going, beyond a simplistic account of women as passive, innocent, and altruistic victims of evil, exploitative men, or simply the victims of a masculinist market system that doesn't value their altruism. We have to take seriously, but also question seriously, women's role in perpetuating societal structures that may eventually prove to our detriment.

Feminism often portrays women either as innocent victims of oppression from which they cannot escape or as idealized caregivers who put their husbands and children first no matter what. But victims fight, resist and adapt, and so have women. Women have shaped and influenced their contexts, often acting in what could be considered as against their own best interests, calculating quid pro quos with their husbands, submitting in one domain in order to gain in another, and playing along in a constant game of power and resources. Of course, they may end up getting the wrong end of the stick, but the instinct to idealize women as innocent victims or as intuitive altruists seems misguided if one cares about women's well-being.[308]

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[308] An excellent illustration is the example of agricultural production, which is usually considered a garden variety "patriarchal" system in feminist scholarship. Anthropological work has noted that when the husband retires from the work that has been the source of his income and status, his position in the family declines dramatically. At the same time, the wife, who has spent a lifetime building relationships with her offspring on top of working in the fields, starts gaining more respect and voice in the household. At retirement the husband is a shadow of his past self, while the wife reaches new peaks of self-fulfillment. Economically, this is a payoff of resources and power, though not financial, but resources and power nonetheless. *See, e.g.*, ERNESTINE FRIEDL, VASILIKA: A VILLAGE IN RURAL GREECE (1962). Another classic study is Margery Wolf's *Revolution Postponed* in which she describes the ways in which women within the traditional Chinese patriarchal context work "like termites" from within to create "uterine families" of their own, based on the affections owed to them by their sons in order to overcome male domination. Wolf still describes the context as male dominated but does not fail to see the significant power that elderly women can come to wield. MARGERY WOLF, REVOLUTION POSTPONED: WOMEN IN CONTEMPORARY CHINA 9-11 (1985). For an account of how women's symbolic and aesthetic roles in patriarchal societies provides them with opportunities for public performance and political action see Loring Danforth, *Power Through Submission in the Anastenaria*, 1 J. MODERN GREEK STUD. 203 (1983). Similarly, economic literature on old age in patriarchal systems notices how the traditional patriarchal contract is age based, that is women gain resources and power as they grow older. The problem of elderly women's destitution can therefore be located to the unavailability of the patriarchal contract for all women or the weakening of this contract itself. For example, in some Arab cultures, as more and more women find themselves without kin in old age, due to widowhood, divorce, and other factors, they are unable to reap the benefits of the patriarchal contract which would have otherwise protected them in their old age. Jennifer C. Olmsted, *Gender, Aging, and the Evolving Arab Patriarchal Contract*, FEMINIST ECON., July 2005, at 53, 54.

The question that emerges if we do away with these assumptions and instead assume that women have agency within a gender system, is: What is women's contribution to the current gender system? Which women stand to win and which to lose from its perpetuation? How does law help shape, entrench, or transform these outcomes? This Article has argued that the language in which feminist legal scholars have been calling for remuneration of women's household labor merely sounds in economics, but in fact relies on a cultural feminist consensus. The cost is the lack of a more precise articulation of gender as a system with costs and benefits for different groups on both sides, but perhaps more importantly, a failure to pursue more transformative gender agendas. It is precisely the ability to focus on costs and benefits, tradeoffs, and bargains between wives and husbands and among different groups of men and women that makes the Beckerian and post-Beckerian economic works appealing, and certainly more appealing than an approach that romanticizes either women or the family. It is the promise of being able to articulate what these tradeoffs and payoffs are for women—as well as men and children—that is missing from legal feminist accounts. Although Becker may not deliver on this promise either, at least economists, including feminist economists, have engaged with his work productively since. Such inquiry should be a necessary part of the legal feminist agenda as well.