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HOW TO PLOT LOVE ON AN INDIFFERENCE CURVE

Brian H. Bix*

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

INTRODUCTION

In *From Partners to Parents: The Second Revolution in Family Law*, June Carbone¹ offers nothing less than a whirlwind tour of the current doctrinal and policy debates of Family Law — an astounding feat in a book whose main text (excluding endnotes and appendices) does not reach 250 pages. There seem to be few controversies about which Carbone has not read widely and come to a conclusion, and usually a fair-minded one: from the effect of no-fault divorce reforms on the divorce rate,² to the long-term consequences of slavery for the African-American family (pp. 67-84), to whether the Aid to Families with Dependent Children (“AFDC”) program (prior to the recent reforms) influenced the number of nonmarital children (pp. 32-33, 96), just to name three. As it seems impossible to give a faithful overview in a few pages of a text which is already a remarkable work of concision, this Review will focus on three themes highlighted or implicated by the book: (1) the title theme — the way family law has changed its focus from the behavior of adults within a marital or nonmarital relationship (“partners”) to the behavior of adults towards their children (“parents”);³ (2) the problems for legal reform when our choices are so deeply affected, and perhaps determined, by history and social norms; and (3) how an attention to history and culture can be used

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

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

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

I. FROM PARTNERS TO PARENTS

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

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

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

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

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

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

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

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

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

pose and effect of “providing substantive legal equality for all children regardless of the marital status of their parents”⁹

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

9. *Id.* at 289.

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

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

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

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

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

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

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

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

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

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

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

II. THE IMPLICATIONS FOR REFORM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Carbone portrays domestic life as being produced by broad ideas regarding the family, combined with (related) ideas regarding gender roles and sexuality. The Victorian family contained the earlier-mentioned isolation from the larger community and the separation of public and private spheres, along with a strong sense of gendered roles, both within and outside marriage (p. 101). The structure of domestic life was also strongly influenced by the sexual mores, as already discussed²⁴ (for example, that it was understood that when premarital sex resulted in pregnancy, the couple married, and this understanding was reinforced by strong social norms and sanctions (p. 91)).

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

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

24. *Supra* text accompanying note 16.

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

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

Arkansas²⁷ were justified in part by the harm allegedly being done to children by divorce.²⁸

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

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

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

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

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

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

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

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

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

III. ENGAGEMENT WITH ECONOMICS

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

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

34. See *infra* note 53.

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

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

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

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

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

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

whether and whom to marry, how to structure marital life, whether to have children and how many, whether to divorce, etc., are all treated as explicable in terms of preferences, incentives, and disincentives.⁴⁰ (A core insight of law and economics, the Coase theorem, states that in cases of incompatible rights or activities, it is the individuals' preferences and valuations that determine what occurs; law, the effect of legal rules, is reduced to near irrelevance⁴¹ — though the application of this claim to family law has been, strangely, relatively muted.⁴²)

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

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

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

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

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

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

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

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

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

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

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

Regan's work⁴⁷ picks up one aspect of that claim, by arguing that married individuals are (and often should be) thinking basically in "we" terms rather than "I" terms. Regan argues that spouses move back and forth between an "external stance" towards their marriage — a critical and reflective stance that can be roughly equated with that of economic analysis and utility maximizing — and an "internal stance," within which the marriage is part of a universe of shared meaning, a starting place quite different from that of individual utility maximization.⁴⁸ Thus, Regan's response to a comment like "spouses will stick with a marriage only if it produces a marital surplus — in the form of potentially utility-enhancing gains for each party — and only if each spouse receives some share of the surplus,"⁴⁹ is that it misses the extent to which married people do⁵⁰ think in terms of the couple or the family as the agent whose interests are to be maximized, and not each person as an individual agent.⁵¹

The problem of bounded rationality offers another basis for resisting law and economics⁵² — in general, but especially in the area of domestic relations. There are certain kinds of choices most individuals do not make in a rational fashion, as "rational" is defined in economic analysis.⁵³ These types of choices would seem to include many of those

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

63. Three small corrections and amendments should be offered:

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

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

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

NOTICE

Are We Protecting the Wrong Rights?

Jennifer L. Saulino*

NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE. By *Elizabeth Bartholet*. Boston: Beacon Press. 1999. Pp. 304. Cloth, \$28.50; paper, \$17.50.

Sabrina Green was found dead on November 8, 1997, at the age of nine years old. She was dead from untreated burns, gangrene and blows to her head which had fractured her skull. Her body was covered with sores, and the gangrene had spread through her right arm and hand, which was missing a thumb. In her final weeks of life she had been tied at night by the arms and legs to her bed to prevent her from stealing food, according to the half-sister who had been made her guardian [p. 92]

As horrific as Sabrina's death sounds, her life was even worse. Sabrina was born to a cocaine-abusing mother who abandoned her at birth. When her mother was found two months later, Sabrina was sent home to her. Her mother continued abusing cocaine and died three years later (p. 93). For the next five years Sabrina lived with a family friend. When the friend died, Sabrina's half-sister petitioned the court to become her guardian (p. 93). But Sabrina's sister had ten children of her own and had already been investigated for failing to care adequately for them. The family court judge nevertheless approved the guardianship, because he only had limited information presented to him by the state agency. "Family members, neighbors, acquaintances, and school officials all realized later that Sabrina was in trouble. But no one intervened to prevent Sabrina's torture and death" (p. 93).

Elizabeth Bartholet,¹ in her book *Nobody's Children*, takes a strong step toward beginning a new kind of dialogue about abused and neglected children. She positions herself as a liberal who has come to terms with the fact that traditional liberal ideals are in conflict with the needs of abused and neglected children (p. 5). In doing so, she tries to convince her readers that, regardless of ideology, we all should have a

* The author would like to thank Professor Don Duquette for invaluable comments and encouragement and the child clients of the Michigan Child Advocacy Clinic for showing me why this particular windmill is worth tilting at.

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different focus in the area of child abuse and neglect law.² She uses Sabrina as one of several examples of how programs for abused and neglected children that focus on keeping families and communities together, while well-intentioned, sometimes sacrifice the child. Bartholet's book, in that sense, is groundbreaking.³

Bartholet's argument begins with the history and politics of child protection programs and presumptions in favor of parents. It moves to outlining the modern day problems and the impact of substance abuse on children. She continues by demonstrating the pervasiveness of the philosophies that drove the old programs. Her analysis and examples show that the shortcomings of old programs are also present in programs purportedly designed to reinvigorate the system. She criticizes what she calls the family preservation bias and uses examples and statistics to show that the bias is unwarranted and probably detrimental. Through this format, Bartholet challenges traditional ideologies by demonstrating that they have not worked. She then takes the bold step of introducing theories most are afraid to verbalize — like the idea that interracial adoption should be widely utilized and that the legal system should aggressively separate children from drug-abusing biological parents. But she could have gone further.

All of Bartholet's arguments and evidence support the thesis that children have a *constitutional right* to be raised in a nurturing and loving environment — an environment that is in their best interests. This right would be a fully formed right equal to that of the parent to control the child's upbringing and guide her education. Thus, the law in this area should be focused on the conflict of rights and not, as it currently is, on the propriety of state interference on the parental right. Bartholet does not make that argument. She hints at it, and supports it, but does not defend it. She articulates her ultimate conclusion in the book as a need for a change in attitude and presents solutions such as more aggressive adoption and more state responsibility. Bartholet's book may seem radical, but her arguments do not take the debate in a new direction. They ultimately fall into the same child

2. P.5. In discussing the case of Sabrina, Bartholet demonstrates the true conflicts of ideology faced by child advocates: "There has been an even greater reluctance to voice concerns about the potentially corrupting influence of [money given to foster parents] in this context than in the non-kin foster context. One risks being considered not simply antipoor, but antifamily as well, and hostile to the black family in particular, since kinship care providers are disproportionately African-American." P. 92.

3. See Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1717 (2000) (book review) ("*Nobody's Children* is an unprecedented and extremely radical critique of child welfare practice. The book takes issue with the first principle of child welfare — that children should, whenever possible, remain with their biological families.").

abuse mold that is focused on arguing about the successes or failures of programs and policies.⁴

This Notice advocates the redefinition of child law for which Bartholet lays the groundwork but ultimately never advocates herself. Part I presents the highlights of Bartholet's argument. Part II suggests that a thesis based on an articulation of child rights could provide the anchor that Bartholet's current proposals lack and points out weaknesses to both approaches. Part III demonstrates how a children's rights approach could provide a better platform for discussion of many problems facing this country's children. This Notice concludes that a constitutional rights approach to child law would provide sturdier support to Bartholet's policy proposals, and perhaps revitalize the entire field.

I. BARTHOLET'S ARGUMENT

Beginning early in the book with her historical overview and continuing throughout, Bartholet criticizes the "family preservation" mindset that has permeated child protection law for the last few decades. She argues that the "entire child-protection system was shaped by the family preservation priority" (p. 39). Enforcement of child-protection laws was left, in the first instance, to child protection workers charged with keeping families together. The basis in legal history for the assumption that children are property of their parents is long held.⁵ The family preservation movement came about because several writers in the 1970s and 1980s challenged the foster care system of that time by arguing that, while harm might come from emotional abuse or

4. Compare Guggenheim, *supra* note 3, at 1733 (arguing that Bartholet's statistics are faulty based on one other researcher's studies and claiming that, "[t]o the extent that she believes children at serious risk of harm are left at home because of a widespread bias against removing them, she provides little evidence to support this claim"), with Elizabeth Bartholet, *Reply: Whose Children? A Response to Professor Guggenheim*, 113 HARV. L. REV. 1999, 2002 (2000) ("Not only does Guggenheim ignore [the point that family preservation studies do not examine the children after families are 'preserved'], but his review exemplifies the problem I try to illuminate, as he too makes claims for the proven 'success' of family preservation programs in terms of their ability to prevent child removal."). The two authors resort to arguments over statistics rather than over the question of how actually to achieve some help for the children they both would protect. See Guggenheim, *supra* note 3, at 1750 ("Professor Bartholet and I may differ on exactly how the sentiments . . . ought to be manifested, [but] we are in full accord on the importance of recognizing the risks inherent 'in continuing to abdicate any community responsibility for our nation's children — in continuing to see the children suffering abuse and neglect as not belonging to all of us.") (quoting Bartholet, *supra*, at 243).

5. See, e.g., Guggenheim, *supra* note 3, at 1743 (citing numerous cases):

[T]he rights of Americans to choose their marital partner, to procreate, to keep custody of children, and to control the details of raising them are not accidentally or carelessly selected freedoms. . . . The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of a similar order and magnitude as the fundamental rights specifically protected.

severe neglect, “more harm would come to children in the end from incursions on family autonomy” (p. 39). In attacking the family preservation mindset, she emphasizes the need for reconceptualization of theory and attitude.⁶ She argues that we should focus on the state obligation to protect children from abusive parents, not individual social agendas having nothing to do with children. We can do that by recognizing that “parents who treat their children badly are themselves victims, and if we want to stop the vicious cycle, we need to create a society in which there is no miserable underclass, living in conditions which breed crime, violence, substance abuse, and child maltreatment” (p. 6).

Bartholet moves on to criticize “politics” for the staying power of the family preservation ideology. She criticizes the left because they use the removal of children from their homes as a proxy for racial or class injustice (p. 45). She criticizes the right because they do not want the government interfering in their own parenting rights (p. 45). She then makes a connection that few would notice: the politics of the left and the right combine with the recent movement to reduce welfare spending. The combination sends a stream of money to the poverty-stricken through the children. Thus, family preservation policies also provide a means of funding where welfare fails. Families that take more children get more money. Yvette Green, Sabrina’s half-sister, took in Sabrina saying, “that she wanted to keep her family together and that she would need the additional welfare and medical benefits that would come with legal custody.”⁷

Abused and neglected children are disproportionately children of poorer parents.⁸ Family preservation policies keep the search for foster parents first within the extended family (satisfying the right) and then in the immediate neighboring community (satisfying the left) (p. 47). Foster parents are paid a stipend. Bartholet demonstrates that as welfare funding has fallen in the last few years, arguments for *child*

6. P. 122:

Nor has there yet been any fundamental change in the mindset of most of those who make and implement child welfare policy — the judges who interpret and apply laws, the social workers who make decisions whether or not to remove children, the bureaucrats who run federal and state child welfare agencies, the private foundation administrators who have provided essential funding for family preservation programs, the not-for-profit agency people involved in child welfare issues, and the lawyers who represent the parties in court, including those assigned to represent children’s interest. These people have enormous power to determine whether new laws and policies intended to change the system actually have any significant impact.

7. P. 93 (quoting Joe Sexton & Rachel L. Swarns, *A Slide into Peril, with No One to Catch Her*, N.Y. TIMES, Nov. 15, 1997, at A17); see also *supra* note 2.

8. P. 234. Bartholet disputes those who argue that the data is skewed and that child protection agencies simply do not focus on more wealthy parents. She presents other data showing these children really are more at risk. She also points out the risk factors for becoming an abusive parent are more often found in poorer, younger, single parents.

welfare programs have gained support. Her worry is that these funds are really just going through the back door to replace the money the government took out the front, and they are not providing more support for children. Bartholet thus realizes that an increased focus on child welfare may not mean increased resources for the actual children.⁹ Yet, her conclusion to the chapter weakly suggests that liberals need to worry about children as much as the exploited groups they worry child protection policies harm, and that conservatives should see the cost-effectiveness of early intervention (p. 55). Here she demonstrates a recurring penchant for suggesting through her evidence that she is heading toward a more fundamental change in thinking but failing to follow through.

Bartholet demonstrates that recent attempts at creating new programs still promote traditional ideals (Chapter Six). She uses as an example the Family Group Decision Making ("FGDM") model (p. 142). This new program directs child care workers to facilitate a family meeting of the extended family of the maltreated child and devise a plan for resolution. She notes that, as with old programs, a big part of the problem is measuring success: "Claims for the success of FGDM have been based almost entirely on demonstrations that state authorities have deferred to the plans developed by adult family members, and that those plans have reduced the number of foster and institutional placements . . ." (p. 144). Like the old programs, the new program measures success by how many children get returned to their families, not by how those children are doing. In fact, as Bartholet points out, in a program such as FGDM, children are likely to go "*unrepresented* in the . . . process" (p. 145).

One of the great strengths of Bartholet's argument is its identification of problems others have not noticed. Many argue that there are not enough adoptive parents to go around. She combats that argument with the recognition that the states are at fault for not looking harder for adoptive parents (p. 181-83). States create so many hurdles against adoption that middle and upper class couples are willing to pay more to go overseas to adopt babies just to avoid the red tape (p. 182). Further, she recognizes that in today's world, the need for parenting does not stop at age eighteen (p. 29). A system designed to turn these children out at eighteen without emotional and monetary support is truly naïve. Even the sitcoms joke that children are returning to "the nest" in great numbers these days.¹⁰ Higher education takes longer and jobs

9. "No studies have attempted to assess the risks for children posed by a system that pays people to provide parenting, recruiting for the job from among those in dire need, and largely excluding from consideration those who can afford to parent children in need without significant state support." P. 88.

10. See, e.g., *Empty Nest* NBC 1988-1995 (a story about a widower doctor whose two grown daughters take up residence in his house).

with real longevity are harder to find without upper-level degrees or refined skills. Without aggressive adoption leading to parents who will care for these children even as adults, we set the system up for failure. These kinds of problems will be present in any system. By acknowledging them, Bartholet demonstrates herself capable of taking the difficult positions.

II. AN ALTERNATIVE TO BARTHOLET'S ARGUMENT

Bartholet has the opportunity in the book *Nobody's Children* to articulate the rights of children at the constitutional level. Yet, while her book provides ample support for such an argument, it fails to take the last step and actually make it. In the realm of criminal law, sometimes distance from the criminals and their crimes allows appellate courts a more objective view of the actual rights involved.¹¹ The opposite may be true in the realm of child abuse and neglect law. Without really looking at the kids involved — without really looking at what happens to them — it may be impossible for lawyers, judges, and law professors to understand the rights involved. Criminals gain rights from distance that they might not have without the appellate process. Children lose them — or, more appropriately, never got them in the first place.¹²

This Part first demonstrates how Bartholet's own arguments support the children's rights approach. This Part then follows with an explanation of why shifting the focus to an argument about rights is a better step to take. It finally points out the major shortcomings suffered by Bartholet's approach, acknowledging that these shortcomings may be insurmountable by any reform proposal.

A. A Constitutional Rights Analysis — What Bartholet Could Have Said

In the process of making her explicit argument for more active and earlier state intervention, Bartholet repeatedly makes a case for the recognition of fundamental constitutional rights for children. Sometimes she even expressly notes the concept. Yet at every step she concludes her sections and chapters weakly and suggests that states should do more. This Section demonstrates the stronger conclusion

11. See, e.g., *Brewer v. Williams*, 430 U.S. 387 (1977) (showing that even when the defendant's self-incrimination in a horrific murder of a child was accepted by state courts, federal appellate courts focused on the criminal procedure principle in finding coercion by the police).

12. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) ("Even when blood relationships are strained, *parents* retain a vital interest in preventing the irretrievable destruction of *their* family life. . . . When the State moves to destroy weakened family bonds, it must provide *the parents* with fundamentally fair procedures.") (emphasis added).

that Bartholet could have reached and argues why she should have gone that far.

Bartholet highlights the story of Joshua DeShaney, a four-year-old boy beaten to the point of severe brain damage by his father when social services should have known him to be in danger.¹³ The Court held that culpability for Joshua's harm lay solely with his father, and not the state. In fact, the Court noted that if the state had removed Joshua, it might have been unconstitutionally intruding into the parent-child relationship.¹⁴ Bartholet notes that even Justice Blackmun's impassioned dissent assumed the baseline that a state's ability to act would be subordinated to the ultimate parental right.¹⁵ Bartholet criticizes this viewpoint because it fails to hold the state responsible for protecting children from their parents. She says this "shows the family autonomy model at work" (p. 36), implying that the Court's mistake was the presumption that family autonomy is the baseline. But, while she admonishes the state for denying direct responsibility for its children, she gives no real roadmap for achieving that goal. She is essentially arguing here that the Supreme Court is just wrong.

Yet here, in the first pillar of her argument that the state should take more and earlier responsibility for its children, she also provides the support for a riskier argument. What if we were to pit the rights of Joshua to be loved and nurtured against the rights of his father to parent him? Bartholet argues for more state responsibility, but has no claim of right to force the necessary policies. If the courts recognized the child's constitutional right to be free from harm by his parents, or to be loved and nurtured by his parents, then the state responsibility that Bartholet advocates would not be a political question, but a constitutional one. The policy arguments would then be focused on how to fulfill that responsibility and not as they are now on whether the state has the right or responsibility to intervene at all. The argument made by the Court, that the state could be charged with violating a parent's right for removing a child, would lose force in the face of the balance with the child's right not to have an abusive parent. The problem with *DeShaney* was that the question was parent versus state, not parent versus child.

Bartholet says that the state should be liable for harm to such a child without resort to Justice Blackmun's argument that the state has

13. This case reached the Supreme Court as a case by Joshua and his mother against the State. See *De Shaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

14. *Id.* at 203.

15. *Id.* at 212 (Blackmun, J., dissenting) (arguing for state responsibility based on the state's assumption of responsibility by intervening through the child protection program and thus giving others the impression that Joshua would be protected, but then not ultimately keeping him from harm's way).

a responsibility if the state first intervenes (p. 36). But she does not give the Court a way to get there. If the child has rights equal to parents, then it is the state's responsibility to protect that right — the state does not simply have some nebulous duty to intervene, but a real duty to protect the rights of this part of its citizenry.¹⁶

Bartholet could have based her argument on the premise that it is time to stop seeing children as property of their parents. Actually, she does mention it, but she buries it. In this chapter, Bartholet says of the Supreme Court: “the rights of biological parents are the starting point for analysis, and usually the ending point also: these rights are so powerful that children's rights, or the rights of competing ‘social parents,’ don't count at all unless the biological parents are first demonstrated to be unfit” (p. 40).

Rather than bury this statement as an observation within a chapter discussing history and politics, Bartholet could have written a book centered on the conclusions this book buries. She could have used the same evidence to support the bolder thesis that it is time for a change in viewpoint and argued that what is needed is an exploration of the contours of the rights involved. The child's right might be a positive right to be nurtured and loved, allowing for positive development toward adulthood. Alternatively, it may be a negative right not to be stunted in development by abuse or neglect. But that dialogue, should it occur, will be long and contentious. So, right now, it would be impossible to articulate definite contours or boundaries to the child's rights.

While criticizing the United States Supreme Court for upholding the family preservation bias, Bartholet points to *Santosky v. Kramer*,¹⁷ which mandates a higher burden of proof before a state may terminate parental rights. Here, she comes very close to making the argument advocated in this Notice. She actually says, “[n]ot surprisingly, in light of *DeShaney* and *Santosky*, the Court has failed to accord children any constitutionally protected rights to be properly parented . . .” (p. 40). But she concludes the chapter, and indeed the rest of the book, without ever making this failure of the Court to recognize children's constitutional rights her central theme. She does not argue, as she could, that children would gain power with rights — if not through the political process, then through courts.

In Chapter Five, Bartholet discusses traditional programs, beginning, again, with the concept of family preservation. Again, she notes

16. Interestingly, children placed in state-regulated foster homes may in fact have a substantive due process right to personal safety there. See *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990).

17. 455 U.S. 745 (1982) (holding that before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence).

the dichotomy between parents' and children's rights: "Federal constitutional law requires that states prove maltreatment by 'clear and convincing evidence' Federal constitutional law gives adults fundamental rights to parent their children, while giving children no rights to *be parented* in a nurturing way" (p. 113). In this chapter, she outlines existing programs and the difficulty in changing them because of the family preservation mindset. Here she also criticizes race matching as a method of community preservation. Yet, again, she concludes weakly without actually providing arguments that children *should* have rights.

Bartholet devotes Chapter Six to arguing that new programs suffer the same problems as the old because they follow the same traditional ideas — providing herself the ideal opening to argue for a complete change in viewpoint. She concludes the chapter with a few weak and general sentences about her views on what child protective services should be doing,¹⁸ but not before emphasizing that, "when children have been subjected to severe forms of abuse and neglect, the state should not abdicate *its* responsibility" (p. 146). Bartholet presses for more active involvement by the state at every turn, but she has room in her argument for the question of *why* the state has the responsibility. Asking *whose right* is in question is a potentially more far reaching step than the basic articulation that the state has to do more. Her manner of describing FGDM suggests that she believes the lack of children's rights to be the major problem with this new proposal,¹⁹ yet she does not come out and advocate children's rights as the solution. She leaves unanchored her call for state responsibility.

B. *What Would Children's Rights Do That Bartholet's Solution Does Not?*

With the gaining of their own constitutional rights, children have the chance to be taken seriously by scholars of all walks of constitutional theory. Children do not benefit from the full scrutiny of legal academy. Their plight is seen as subordinate to the rights of their parents. Family rights are debated, parents' rights are debated, but children's rights are ignored (or just not conceptualized).

As a part of its clinical program, the University of Michigan Law School offers a course on child advocacy. On the first day of class, Professor Don Duquette says to participants, "I've worked in this field

18. P. 159 ("[I]t seems likely that children would do better if adoption was established as the presumptive placement for all children who could not live with their parents of origin, leaving child welfare workers and the courts to choose another form of permanency only on the basis of an individualized determination that it would better serve a child's interests.").

19. P. 146 (criticizing FGDM because "it is about giving *parents* accused of maltreatment, together with other *adult* family members, even greater power than they now have over the fate of children").

a long time, and there are a lot of really good people with really soft hearts who work in this field, but what these kids really need is people with soft hearts and hard heads, and that's what I hope you will be for them." Part of the problem with this field is that many of the power-houses of legal thought and advocacy think it a separate and distinct area of law that is guided more by family policy than by legal theory. There is nothing intellectually challenging in the abstract, because there is no abstract conflict of rights.²⁰

With the reconceptualization of children's rights might come arguments of equal protection,²¹ substantive due process ("fundamental rights"),²² and other such stimulating possibilities for legal scholars. Once the rights of children directly conflict with those of parents, the academy might take notice. Children's rights should be taken seriously by all scholars — in reality and in the abstract.²³

Bartholet does not completely miss (or bury) the point. She describes children as "hostages" in the political fight over family support services (p. 195). She notes "children who are surviving but not thriving

20. See, e.g., DONALD N. DUQUETTE, MICHIGAN CHILD WELFARE LAW: CHILD PROTECTION, FOSTER CARE, TERMINATION OF PARENTAL RIGHTS, prepared for Michigan Family Independence Agency, FIA Publication No. 374 (2000) (acknowledging as a precursor, the one-way flow of rights: "The state can intervene coercively in family life only after due process of law. Protective services has very limited authority to override parental wishes in conducting its investigation or suggesting services.").

21. Children would not qualify as a suspect class justifying strict scrutiny under the Fourteenth Amendment. But perhaps programs such as FGDM would not seem so automatically rational if the child's right to be raised to his full potential, or loved and nurtured was well established.

22. Parents have long been presumed by the court to have the "fundamental right" to control the education and upbringing of their children. "The liberty interest . . . of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 US 57, 65-66 (2000) (chronicling the history of the Court's decisions in the area of parents' rights to "establish a home and bring up children" and "to control the education of their own" and "the fundamental liberty interest of natural parents in the care, custody and management of their child") (citing numerous cases). Disputes over that right have taken the form of how far the state may encroach on that right — when a child is a child and how far the parent's right extends until it meets the public interest. The opposing interest in these cases is assumed to be the public interest, not the child's rights. If children had a fundamental right to be raised without maltreatment, however, then the state and the courts in upholding the constitution might have a duty beyond simply the public interest. See *Harris v. McRae*, 448 U.S. 297, 312 (1980) ("[Q]uite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.' ") (internal citation omitted).

23. Ironically, although Guggenheim's review and this Notice take polar opposite approaches to Bartholet's work, they do agree in similar fashion that her approach is too narrow. See Guggenheim, *supra* note 3, at 1738:

The abysmal conditions of poverty and despair into which millions of poor children are born and are not immutable facts of life. It is essential that we determine the extent to which these conditions are caused by factors for which we may hold the larger society accountable and, therefore, could improve or eliminate. Nobody's Children fails to consider the extent to which these conditions are a product of various social forces influencing American society and policy.

ing” (p. 204) and reminds the reader that any system based on crisis is no help for them. Bartholet uses these middle-ground children as her best support for “taking adoption seriously”²⁴ while taking a stand on adoption in the book that is in itself a radical proposal. She advocates early and aggressive efforts at getting children adopted, and not necessarily by other members of the family or community. Highlighting the reality that drug abuse is a disease that takes a long time from which to recover, she makes the controversial suggestion that such a long time frame may be too long for children to wait — even if the parents may eventually recover.²⁵ Finally, she notes that the society needs to get beyond conceptions of racism and classism when talking about issues of how to help these children (p. 209). Bartholet does, obviously, take some risks with her book, and she fleshes out issues previously unnoticed.

Yet all of these points necessitate a more radical reconceptualization of rights. Merely pushing for more child protection money or better programs will not address these problems. In order to overcome the presumptions already present in constitutional law, children’s rights would have to be recognized equally.

Because Bartholet does not take the riskier path, the solutions she offers fall somewhat flat. Over and over, she advocates universal home visits for mothers of infants (Chapter Seven). Although she mentions the political difficulty of this solution, she does not give it the import it will necessarily have. Even the casual political observer will recognize that Members of Congress are generally members of the upper-middle class. Getting them to vote for a measure that would send a visitor into their own homes means probably compromising to the point where the visitor would not be much help to a child in danger. Yet instituting visitors only for the lower socioeconomic groups demonstrates bald-faced discrimination even with the statistics to show those children more at risk. A reconceptualization of children’s rights, however, takes the focus off the intrusiveness into the parents’ realm and puts it on the rights of the children to have some outside assistance.

Bartholet also proposes universal screening and neonatal testing to identify prenatal exposure to illicit drugs or alcohol (p. 222). She envisions reporting and immediate involvement by child protective serv-

24. Pp. 203-04 (“Taking adoption seriously means being willing to remove children even if physical safety is *not* at issue. It means being willing to take action *immediately* upon removal to terminate parental rights and place children in adoptive homes. . . . We may be moving in this direction, but so far we have taken only the most modest first steps.”).

25. Bartholet also challenges the studies showing that crack babies can grow up normally. She rightly takes a bigger picture approach and notes that the babies that are hardest to care for — malnourished, addicted, premature, low-birth weight — can grow up normally, but only with parenting above and beyond the average effort. Yet these children are sent to the homes of addicts (or even recovering addicts) — likely people who are not on the upper end of the curve in patience, determination, and attentiveness with their newborns. P. 76.

ices. Then, drug-exposed infants might be removed from their parents at birth and placed on a fast-track for adoption (p. 223). She argues forcefully for quicker adoption and more aggressive efforts to find adoptive parents (pp. 180-83). If she had taken the position that children have a right to this kind of supervision, she may have been able to move the debate in a different direction — give it a new focus. Thus, the intrusiveness on the parent's right would be balanced with the child's right to be raised safely and securely. The political difficulties still exist, but the debate takes a different tone — and maybe opens some minds.

Bartholet acknowledges the risks inherent in arguing as she does, and tries to temper the resistance:

It does seem harsh to take from people who are typically the victims not only of their drugs but of difficult, and often tragic, life circumstance, the children who may be their only joy and hope. But it is also harsh to condemn children to lives ravaged by their parents' substance abuse during pregnancy, by maltreatment during their early months at home, and by the years spent on hold waiting for their parents to overcome their problems." [p. 227]

She demonstrates, through statements like this one, that she is willing to fight back against those who would immediately criticize (with great legitimacy) any argument that parents' rights should be balanced with those of children.

Yet if she is willing to go so far, why not take the final step of advocating the equal *rights* of children? The entire way of looking at children's problems could gain multifaceted depth if it were moved from a strongly political issue of parents' rights, discrimination of underclass or minority parents, and details of programs, to a question of the application of children's rights, how they are balanced, and whether they are respected equally with the rights of their parents.²⁶

C. *Some Shortcomings of Both Approaches*

Bartholet's proposed solution in the book is also missing some important elements. She fails to address the problem of who makes the decision of what is best for the child of a failing family and how we prepare them to do so; she fails to deal with the political realities of radical reform; and she fails to deal adequately with the children in the middle — the ones already in the system who will not be affected by

26. Bartholet does recognize that rights change attitudes:

Mandatory home visitation does seem like a radical step in today's world. But compulsory education laws and childhood labor laws were once seen as radical interventions in the family. So were the abuse and neglect laws that took from parents the right they previously had to physically brutalize and to sexually violate their children.

P. 171.

reforms that start at the prenatal. But the book is a start, and a much needed one at that.

The most important question in any aggressive child protection system will be, who makes the decisions? In both a system that pushes for more aggressive early intervention and adoption such as Bartholet proposes, and a system that takes a deeper approach based on the rights of children, someone will necessarily have to make the hard choices at the personal, individual level.

Currently, foster care and child protective workers enjoy a great deal of autonomy in making such choices, but family court judges oversee the process. In many states, attorneys are also involved as representatives of the children in some capacity.²⁷ Yet, in most cases, all of these parties lack the training, time, and resources to make really informed, quality judgements. Social workers are at least as underpaid as teachers, and the burnout rate is high.²⁸ And comparative judgements between parents and prospective caregivers are difficult, if not in some cases impossible, to make without biases entering the picture.²⁹

In fact, as Bartholet recognizes, without addressing both problems at once, more money may not necessarily help the situation. "Increasing the pay of child welfare workers, decreasing their caseloads, increasing funds for child protective service investigative or family preservation services, and other popular 'reform' proposals, won't necessarily improve child welfare at all if the system is sending its workers instructions that are systematically biased in a problematic direction" (p. 99). The instructions that the system sends the workers are also not necessarily coherent, thus leaving them room for interpretation based on their own values. Again, because the current system is

27. See, e.g., MICH. COMP. LAWS ANN. § 722.630 (WEST 2001); 2001 D.C. Stat. § 6-2101(4); 705 ILL. COMP. STAT. 405/2-17 (1999).

28. This Notice disagrees with Professor Guggenheim's criticism of Bartholet on this point. He discusses Bartholet's argument that "[t]he problem is that the state typically does not provide adequate and timely reunification services. Child welfare agencies are notoriously underfunded and overburdened. Appropriate services are often unavailable." Guggenheim, *supra* note 3, at 1722 (citing *Nobody's Children*, p. 195). He then observes, "[t]hese statements contradict Bartholet's earlier assumptions that society has tried everything possible to improve the conditions of poor children who become victims of a dysfunctional foster care system." *Id.* Guggenheim does not make room for the argument that the two are not necessarily internally contradictory. Bartholet practically recognizes that the infusion of resources that would be necessary to remedy the first observation actually leads to the second. There is no realistic probability that the political system could do it, so we have tried everything within our power.

29. Carolyn Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Custody Disputes*, 99 MICH L. REV. 216, 227-35 (2000) (arguing that biases inherent in the consideration of wealth in determining which parent would be a better placement for a child militate exclusion of its consideration from the process, and thus suggesting that some biases may be impossible to separate from the individual decisionmaker necessitating elimination of the factor altogether).

predicated on the state versus the parents' rights, many people's value systems automatically move them to the side of the parents. The reconceptualization of rights suggested in this Notice might change the value balance. But qualitative judgments at the ground level will always be a difficulty of an area of law where the individuals injured are not able to speak for themselves.

Bartholet advocates a radical approach for children of drug abusers and children who have been severely maltreated from birth. But she also acknowledges the difficulty with defining neglect (p. 27) — a problem that becomes more acute either with Bartholet's call for more aggressive action or the children's rights alternative presented here. The definitional distinctions will have to be made with great care and the discretion given only to those who are well equipped to make such weighty calls. The egregious cases are easy under such scenarios; cases of neglect are not. The neglect determination brings the question of who makes the decision at the ground level into sharper relief. If children have a right to be raised in a nurturing environment, where do we draw the line? And what will be the impact of cultural differences? These questions have arisen in this context before — for instance, whether spanking is appropriate as a punishment or teaching tool or whether it constitutes abuse. But if the more aggressive state intervention Bartholet advocates comes to pass, or if the conception of children's rights changes as the stakes get higher, these fine distinctions will need to be thoroughly debated.

Neither Bartholet's solution nor a reconceptualization of rights overcomes another series of roadblocks: children cannot lobby; they do not make political contributions; and they do not vote. In Chapter Six, Bartholet recounts the broad support the Multiethnic Placement Act of 1994 ("MEPA") and MEPA II enjoyed in Congress (p. 129-33). This legislation forbids states from considering race as a factor in child placement. She even acknowledges the role that Senator Metzenbaum played in the legislation. She admires his interest in the topic and sees the Congress's interest as significant (pp. 130-31). But she does not seem to recognize that with a Senator as well-respected as Metzenbaum was, many of the other Members probably supported the bill because it was important to him, not because the topic had finally been acknowledged. Without such a supporter, how will the topic gain notoriety? This is a problem that children's issues have faced for years. Bartholet herself acknowledges it elsewhere in the book: "People talk of a children's rights movement. But the brutal truth is that children are economically and politically powerless. They are dependent on adults, and adult political groups have generally not taken up their cause" (p. 50).

Finally, the children caught in the middle deserve a great deal of attention once any framework for discourse over children's rights is established. Even with perfect new programs that begin during preg-

nancy and catch falling children just as they begin to fall, there will always be children who entered the world, or the system, before the new program was established. No conscious advocate would be willing to write off these children, but they are, in many cases, the hardest with which to deal. Bartholet does not propose any real solutions to the children who are already too old for adoption, or who have been so damaged by continued efforts at reunification that parenting would take extraordinary effort.

III. THE BROADER IMPLICATIONS OF A CHILD RIGHTS FOCUS

Lack of interest, political drive, and intellectual curiosity are not unique to child abuse and neglect law. They are pervasive in all types of law dealing with children. In education law, for instance, one member of Congress, himself a former teacher, repeatedly reminds us in speeches about education and school choice proposals that "what we are proposing is a widespread experiment in the lives of real children."³⁰ His statement is always true when legislators, politicians, and judges divorce themselves from the reality that their decisions will impact the children already in the system as much or more than the children they are attempting to help by reforming prospectively. Again, distance does a disservice to children. Recognizing the rights of children would involve a change in conceptualization of more problems than just child abuse and neglect. All areas of law dealing with children could be seen from a new viewpoint.

The debate over education laws in this country could be dramatically changed in focus and scope if the government were forced to grapple with more than just the political pitfalls of poor education systems. Children gained the right to be educated equally in nonsegregated environments years ago.³¹ Yet children currently do not hold a constitutionally protected right to an *adequate* education.³² Radical reconceptualization of children's rights might change the tone of debate over public education, school choice, and major education programs. Rather than arguing over parents' rights to "send" children to certain schools, the debate could be refocused onto the child's right to be educated to a certain standard. Jonathan Kozol's work in the bringing of the plight of poor school districts to light would take on a new force.³³

30. See, e.g., 144 CONG. REC. H2654-55 (daily ed. April 30, 1998) (statement of Rep. Sawyer).

31. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

32. For instance, Jonathan Kozol observes that "the state, by requiring attendance but refusing to require equity, effectively requires inequality. Compulsory inequity, perpetuated by state law, too frequently condemns our children to unequal lives." JONATHAN KOZOL, *SAVAGE INEQUALITIES* 56 (1991).

33. *Id.*

Children would have the right not to be forced to attend schools where plumbing does not exist, or ceilings fall in.³⁴

The rights of children could force the school choice debate to acknowledge the problem of children who do not receive vouchers, or whose parents do not apply for them.³⁵ If their rights became the focus, would Members of Congress continue to quibble over the political question of vouchers? Or would they begin to look for much larger, more radical approaches to reform of the whole system? Would they realize that even if vouchers cause gradual change in public education, children already in those schools cannot afford to wait for that change to occur?

The laws of evidence are a good example of a way even the legal establishment diminishes the rights of children. In a story of the horrors faced by a young boy during attempts to reunify him with his mother, Bartholet recounts that "he and his brother both accused their mother of abuse" (p. 107). This is not a new tale. Children make allegations of abuse. But the evidentiary system has grown up with the rights only of parents in mind, not of their children. Thus, it is inflexible to the special problems of children testifying. Yes, children are different. Questions arise as to their ability to testify in a truthful manner.³⁶ Children can be more susceptible to suggestion if interviewed without special care.³⁷ Testifying in court can, for them, be a traumatic experience in its own right.³⁸ Yet without their testimony, prosecutors are often at a disadvantage in proving what would be a cut and dry case of assault between two adults. The laws are beginning to change in some places.³⁹ But if children's rights were recognized as equal to their parents', courts would have to create methods that allow them to have their day in court. Interviewing techniques that are tailored to children could become standardized; *in camera* sessions with judges (rather than open-court testimony) could become standard practice;

34. *See id.* at 26, 106.

35. For instance, as Kozol observes, "[t]he poorest parents, often the products of inferior education, lack the information access and the skills of navigation in an often hostile and intimidating situation to channel their children to the better schools, obtain the applications, and . . . help them to get ready for the necessary tests and then persuade their elementary schools to recommend them." *Id.* at 60.

36. *See* RICHARD D. FRIEDMAN, *THE ELEMENTS OF EVIDENCE* 71 (2d ed. 1998) (reviewing the history of child testimony and the competency requirement and recognizing that recent trends have been toward weakening and eliminating competency requirements for child witnesses).

37. *See, e.g.,* *State v. Michaels*, 642 A.2d 1372, 1376-79 (N.J. 1994) (cataloguing interview errors in highly publicized child sexual abuse case).

38. *See* JOHN E.B. MYERS, 2 *EVIDENCE IN CHILD ABUSE AND NEGLECT CASES* § 6.2 (3d ed. 1997) (reviewing research on effects on children of testimony in child abuse cases).

39. *See* FRIEDMAN, *supra* note 36, at 71.

and judges and attorneys could be educated in recent research on the truthfulness of child testimony.⁴⁰

As the fledgling ideas in this Section demonstrate, a new debate about the inherent rights of children — positive or negative — has the potential to change the way we talk about a whole host of policies and programs dealing with children. Perhaps it is time to start looking at the field of children's rights as one coherent field rather than a policy problem common to many.

CONCLUSION

As Bartholet says in her Introduction:

This book is . . . about the culture that makes it possible to see children as *Nobody's*, or *Somebody Else's*, and certainly *Not Ours*. It tells the story of how our child welfare policies came to place such a high value on keeping children in their families and communities of origin without regard to whether this works for children. [p. 2]

This book recognizes what most people find too difficult to face: some of this country's children need radical intervention — their parents are not fit and, without extraordinary measures, will not be made so. The problem with Bartholet's approach, however, is that she has articulated no anchor in constitutional rights for the reforms she proposes. Without one, the easy counterargument to all of her proposals is that parents' rights should be respected, and she is just a radical who wants the state to control family life. This Notice has sought to demonstrate that Bartholet does not have to subject herself to that kind of minimization.

On an even more fundamental level, shifting the focus to the rights of children might force this debate out into the light. The children for whom Bartholet and her colleagues advocate are not the type whose rights are normally a topic of open debate. No one wants to break up loving families because of differences of opinion over proper methods in raising children. But because of that risk, many people are too afraid even to broach the issue. A recent presidential debate demonstrates the problem:

MEMBER OF AUDIENCE: I've heard a lot about education and the need to hold teachers and schools accountable. . . . But . . . I have seen a lot of instances where the parents are unresponsive to the teachers or flat out uninvolved in their child's education. How do you intend to not only hold the teachers and schools accountable but also hold parents responsible?

40. See MYERS, *supra* note 38, at 12 ("When the witness is a child, the assumption that traditional courtroom procedures elicit the most complete and reliable testimony is open to question. This is not to say, however, that traditional procedures should be abandoned. With relatively minor adjustments, most children can testify. Making room for children does not necessitate reinventing the legal wheel. Just add training wheels.").

BUSH: Well, you know, it's hard to make people love one another. I wish I knew the law because I would darn sure sign it. . . . I happened to believe strong accountability encourages parental involvement, though. I think when you measure and post results on the Internet or in the town newspapers, most parents say wait a minute. . . .

GORE: . . . I'd like to start by telling you what my vision is. I see a day in the United States of America where all of our public schools are considered excellent, world class. Where there are no failing schools, where the classrooms are small enough in size. . . . Governor Bush is for vouchers, and in his plan he proposes to drain more money, more taxpayer money out of the public schools for private school vouchers. . . .⁴¹

“How do you intend to . . . hold parents responsible?” was the question. This question was, at least in part, about the children Bartholet champions — the ones who have no chance of turning back time and regaining their lost prenatal care, nurturing in infancy and active teaching in early childhood. And both candidates quickly moved into realms of child advocacy for which they had ready answers. But these kids will not be helped by the programs that win presidential campaigns, and they should never be used as a springboard for a canned political message. These are the kids no one talks about. Maybe it's because there are no good answers for them. Maybe it's because they aren't an intellectually challenging topic. Or maybe it's because no one really knows how to help them. However difficult it may be to talk about a distressing problem for which there are no politically or intellectually sound solutions, it is time to start.

41. Debate Transcripts: 2000 Debates, at <http://www.debates.org/pages/trans2000c.html> (Oct. 17, 2000).