Journal of Gender, Social Policy & the Law

Volume 7 | Issue 3 Article 1

1999

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CAUGHT BETWEEN SCYLLA AND CHARYBDIS: LAW & ECONOMICS AS A USEFUL TOOL FOR FEMINIST LEGAL THEORISTS

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> Feminists who are not libertarians may not like the vocabulary, methods, and assumptions of economics, but if they refuse to consider the economic consequences of policies affecting women they may end up hurting rather than helping women.[1]
>
> [While] conservative feminism takes a more cautious stance on issues of concern to women than radical or liberal feminism . . . I believe that it has much to offer women—if only a warning to consider carefully the indirect effects of policies ostensibly favoring women—and that it deserves greater voice in the feminist chorus.[2]

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1. Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL. F. 191, 194.
2. *Id*. at 217.

I. INTRODUCTION

The school of thought known as Economic Analysis of Law (Law & Economics) uses economic principles to determine whether a legal outcome is efficient for society as a whole.[3] The increasing popularity of this movement stems from its logical neatness and its broad applicability to general legal issues.[4]

Judge Richard Posner, one of the founders of the Law & Economics movement, believes that feminist legal theorists can benefit from using the Law & Economics model.[5] According to Posner, the model would focus feminist attention on the long-term impact of the social policies they advocate.[6] When feminists advocate policies without scrutinizing the long-term impact, the result may place women in a worse position than if the policies had not been carried out.[7] Posner assumes, however, that Law & Economics and its classical liberal prescriptions, by focusing feminist attention on relevant market indicia, will lead feminists to conclusions with which they would agree.[8] Additionally, Posner assumes that using the tools of economic analysis will lead feminists to policies that will benefit women in general.[9]

This article examines whether Law & Economics can provide a starting point for feminists seeking policy guidance. Specifically, it

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3. *See* ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 1 (1979) (noting that Law & Economics "may be able to tell us why people make contracts and how contract law can facilitate the operation of markets"). Economic analysis, however, is not limited to contracts. *See, e.g.*, THE ECONOMIC FOUNDATIONS OF PROPERTY LAW vii-xi (Bruce Ackerman ed., 1975) (advocating a change in the structure of property law courses to recognize the importance of economics); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (describing the underlying economic rationale of various tort concepts); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (advocating the use of economic principles to determine the efficient combination of resources and punishment to deter crime); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 19 (4th ed. 1992) [hereinafter ECONOMIC ANALYSIS OF LAW] (applying an economic analysis to property, tort, antitrust, constitutional, common law, and criminal law issues).

4. Economics is able to explain and predict the behavioral changes of individuals as a result of changes in the law: "Like the rabbit in Australia, economics found a vacant niche in the 'intellectual ecology' of the law and rapidly filled it." ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 3 (2d ed. 1997).

5. *See* RICHARD A. POSNER, OVERCOMING LAW 329 (1995) (discussing the connection between biology and economics and refuting radical feminists' criticisms of his theories about that connection).

6. *Id*. at 336-37.

7. *Id*. at 329-34

8. For Posner, "[i]t is difficult to see why there should be any conflict" between liberalism and feminism. *Id.* at 329.

9. *Id*. at 329 (discussing how economic progress has powered the emancipation of women).

focuses on unconscionability[10] in contracts. It does so for three reasons. First, while feminists may favor the doctrine of unconscionability because it protects disempowered individuals from the throes of the market, its long term effects may render these individuals worse off than they would be without the doctrine.[11] Second, feminists have not addressed unconscionability or contracts to any great degree,[12] except in the analysis of surrogate motherhood,[13] marriage,[14] and employment.[15] Third, Law & Economics is strongest on those issues most closely related to exchange, and unconscionability applies to exchange transactions.[16]

Part I presents a broad overview of Law & Economics,[17] discussing

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10. "Unconscionability" is a nebulous legal term. For possible definitions, *see infra* Part II.B.

11. *See infra* Part III.

12. *But see* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000-02 (1985) (exploring an inconsistency/indeterminacy distinction in contract law through deconstruction of public/private, objective/subjective, and form/substance dualisms); Beverly Horsburgh, *Decent and Indecent Proposals in the Law: Reflections on Opening the Contracts Discourse to Include Outsiders*, 1 WM. & MARY J. WOMEN & L. 57, 61 (1994) (calling for a sweeping reform of law school curriculum to incorporate diversity); Marjorie Maguire Schultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 56-61 (1991) (discussing the gendered nature of law school curriculum and contract doctrine); Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 90 (1994) (discussing how *Williams* reinforces stereotypes regarding women and people of color); Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219, 221 (1995) (arguing for inclusion of contract law in postmodern feminist thought).

13. *See* Lori Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 LAW MED. & HEALTH CARE 72, 73 (1988) (discussing the rationale behind banning surrogacy); Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI-KENT L. REV. 303, 304 (1993) (advocating the scrutiny of systemic conditions that give men power relative to women, including political power and economic resources).

14. *See generally* Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 19-21 (1995) (discussing how the law creates and incorporates stigma in the structure of divorce); Milton C. Regan, *Symposium: Divorce and Feminist Legal Theory*, 82 GEO. L.J. 2119, 2120-26 (1994) (including perspectives on the modernization of marital status law, divorce and property rhetoric, alimony and efficiency, and alimony and race).

15. *See, e.g.*, CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 103 (1987) (describing the advent of sexual harassment law); Martha Chamallas, *Writing About Sexual Harassment; A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 37-39 (1993) (discussing the major trends in the emerging legal doctrine of sexual harassment); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1757 (1990) (contending that judges have the power to change the sexual composition of job classifications and to help women fight against their marginalization and segregation into low status and low paying jobs).

16. "Since buying and selling . . . are quintessentially economic activities, it would seem that economics should have something useful to say to students of contract law." KRONMAN & POSNER, *supra* note 3, at 1.

17. This article will not criticize the Law & Economics theory *per se*, although others have effectively done so. *See, e.g.*, Ronald Dworkin, *Is Wealth A Value?*, 9 J. LEGAL STUD. 191, 194-95 (1980) (disagreeing with efficiency as an ethical first principle); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 392-93 (1981) (condemning the indeterminateness of efficiency); Arthur Leff: *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 451-53 (1974) (criticizing the circular reasoning of Law &

contracts in general and unconscionability in particular. Part II uses Law & Economics to examine particularly (in)famous unconscionability cases to determine the socially efficient outcome. Part III questions whether these efficient outcomes would be acceptable to feminist legal theorists. Part IV provides insight as to why these outcomes would or would not be acceptable to feminists.

II. THE LAW & ECONOMICS THEORY OF CONTRACT

A. An Overview of The Economic Theory of Contracts

Law & Economics looks at the world through the lens of efficiency.[18] Any rule is efficient when the "winner" can potentially compensate the "loser" and remain better off.[19] Social wealth is maximized through the application of this principle. Resources are in the hands of those who value them the most, as determined by that person's willingness and ability to pay for them.[20] This principle may be applied to the courts to determine efficient outcomes. In a setting where transactions are costless, any assignment a court makes as to liability is efficient.[21] In realistic settings where transaction costs exist, a court must place the entitlement in the hands of the user who values it most.[22]

Economics); Frank I. Michelman, *Reflections on Professional Education, Legal Scholarship, and the Law-and-Economics Movement*, 33 J. LEGAL EDUC. 197, 201 (1983) (criticizing the movement's narrow focus).

18. "The existence of a market—a locus of opportunities for mutually advantageous exchanges—facilitates the allocation of the good or service in question to the use in which it is most valuable, thereby maximizing the wealth to society." KRONMAN & POSNER, *supra* note 3, at 2.

19. The goal of the principle is to insure that the "pie" of wealth increases, regardless of the distribution. In other words, the benefits of the transaction must exceed the costs. Posner's example illustrates this principle:

> [I]f A values the wood carving at $5 and B at $12, so that at a sale price of $10 (indeed at any price between $5 and $12), the transaction creates a total benefit of $7 (at a price of $10, for example, A considers himself $5 better off and B considers himself $2 better off), then it is an efficient transaction, provided that the harm (if any) done to third parties (minus any benefit to them) does not exceed $7.

ECONOMIC ANALYSIS OF LAW, *supra* note 3, at 12. Under the theory, A and B need not *actually* compensate any third parties as long as the benefits of the exchange exceed the costs. *Id*. *See also* John R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696, 698 (1939) (synthesizing the basic theories behind "welfare economics"); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939) (discussing the relevance of the status of interpersonal comparisons of utility to "welfare economics").

20. KRONMAN & POSNER, *supra* note 3, at 2.

21. *See* Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 12-13 (1960) (stating that where transaction costs equal zero, bargaining will result in resources flowing to their most valued use, regardless of initial distribution).

22. "[T]he wealth-maximization principle requires the initial vesting of rights in those who are likely to value them most." Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J.