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An Invitation to Feminist Law and Economics
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Gillian K. Hadfield

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FEMINISM, FAIRNESS, AND WELFARE: An Invitation to Feminist Law and Economics

Gillian K. Hadfield

University of Southern California Law School, Los Angeles, California 90089;
email: ghadfield@law.usc.edu

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■ **Abstract** In recent years there has been a renewed effort to ground conventional law and economics methodology, with its exclusive focus on efficiency and income redistribution through the tax system, in modern welfare economics (Kaplow & Shavell 1994, 2001). This effort raises a challenge to the possibility of a feminist law and economics: Is it possible to be a good (welfare) economist and still maintain the ethical and political commitments necessary to address feminist concerns with, for example, rights, inequality, and caring labor? In this review, I argue that modern welfare economics, rather than supporting the ethical minimalism of conventional methodology advocated by Kaplow and Shavell, ratifies the need for an ethically and politically informed economic analysis. Feminists can, and should, use the tools of both positive and normative economics to analyze feminist issues in law.

INTRODUCTION

Law and economics scholarship has conventionally adopted a methodological strategy of focusing exclusively on the efficiency implications of legal rules. As Sanchirico (2000, 2001) has observed, for a long time this method was taken for granted, but in recent years there has been a resurgence of efforts to ground this methodology more formally in welfare economics. These efforts are largely attributable to Louis Kaplow and Steven Shavell who, in a series of papers and later a book, have defended two basic methodological claims for law and economics. The first is the familiar claim that efficiency and equity (distribution) considerations should be isolated, meaning that legal rules should be chosen exclusively on the basis of efficiency and that distributive goals should be addressed through the tax system (Shavell 1981, Kaplow & Shavell 1994). The second is a more dramatic claim that “fairness” considerations should play no independent role in the choice of legal rules (or any other policies, including tax policies); by “fairness” Kaplow and Shavell mean any considerations that are not based on welfare effects. Put together, the Kaplow and Shavell work amounts to the following three-step defense of standard law and economics methodology: (a) Welfare is the only relevant criterion for the evaluation of legal rules, (b) welfare consists of efficiency and

distribution, and (c) efficiency is the only proper criterion for the evaluation of legal rules because distributive goals are more efficiently pursued through the tax system than through the legal system.

This conventional methodology poses a problem for feminists in law who want to use economics as a tool for analyzing legal rules and policies. Efficiency is too narrow a normative criterion and income redistribution too limited [and, perhaps, politically dangerous (McCluskey 2003)] a response to the problem of inequality and other feminist ethical commitments. This may explain why feminist law and economics is still largely an aspirational field of study, rather than a body of work that an *Annual Review* can survey and critique. Although there are some efforts to analyze, for example, tax and welfare policies (Alstott 1996, McCaffery 1997, Staudt 1996, McCluskey 2003), family law (Carbone 1990, Carbone & Brinig 1991, Brinig & Crafton 1994, Singer 1994, Estin 1995, Brinig 2000), employment law (Hadfield 1993, 1995a), contract law (Trebilcock 1993; Hadfield 1995b, 1998a; Brinig 1995), and corporate law (Sarra 2002) from a feminist economics perspective, by and large there has been little development in this field since Hadfield (1998b) attempted to define its scope. [For a recent book-length treatment of the issues at the intersection of feminism and economics, both critical and hopeful, see Fineman & Dougherty (2005).] Feminist analysis in law has, in general, not flourished in the last decade. Rosenbury (2003) found, for example, that the number of articles on women or gender published in leading law reviews fell by approximately one half over the last decade, and most of the work was done by established (tenured) scholars and not those newly entering legal academics.

And yet, in theory, economics possesses many attractive features for feminists: It provides careful tools for systematically analyzing the effects of legal rules and evaluating the impact of those effects on those we care about. It draws attention to the need for explicit assumptions about how people behave, what resources they have available, what constraints they face, what information they have. It emphasizes the dynamic interaction, both strategic and nonstrategic, between people and institutions. It is organized around the concept of equilibrium, drawing focus to the forces that stabilize the outcomes we want and that possibly resist change to the outcomes we do not want. And, we hope, it gives us a basis for careful assessments about which rules and policies will improve well-being. But if adopting law and economics methodology means restricting one's work to efficiency analysis and income redistribution, then the value of economics is substantially limited. I have argued elsewhere (Hadfield 1998b) that feminists can continue to use the positive (descriptive and predictive) tools of economics while conducting normative analysis informed by nonefficiency criteria. This response to the expanding claims for law and economics methodology, articulated most forcefully by Kaplow and Shavell, however, is inadequate, for they claim that welfare economics requires the law and economics analyst to eschew fairness claims and that the only proper economic criterion for assessing legal rules is efficiency. These are challenges to the possibility of a coherent feminist law and economics, and I take up those

challenges here. I argue that neither of the claims Kaplow and Shavell put forward about coherent law and economics methodology excludes the type of welfare economics that feminists should embrace: a welfare economics that is politically and ethically engaged and that is capable of addressing feminist commitments. Indeed, I argue, the only coherent welfare economics available is one that integrates the type of normative commitments that a field of study such as feminist law and economics requires.

FAIRNESS, WELFARE, AND THE GOAL OF ETHICAL MINIMALISM

Among the social sciences used in legal analysis, economics is clearly the most influential. Whereas other social science methods have substantial sway in particular areas—psychology where law makes judgments about competence or analyzes decision making, for example; history where the genesis of legal doctrines or practices is relevant; political science when the workings of political institutions are under scrutiny—economics managed in the 1970s to break free from disciplinary boundaries that limited the use of economics to areas where the law was regulating market conduct, notably antitrust law. Economists and economically minded legal scholars began to draw on economic models of behavior and social choice to analyze essentially all of law: torts, property, family law, corporate law, environmental law, poverty law, constitutional law, and so on.

Economics gained this ascendancy in legal scholarship, I believe, because of two seemingly opposed attributes of economic methodology. First, unlike many social sciences, economics makes both positive and normative claims, whereas much of social science is exclusively positive. Thus, economics helps lawyers, jurists, and legal scholars to predict not only what will happen if a particular rule is adopted or how to decide whether particular factual predicates of a rule are met; it also provides guidance about which rules to adopt. Economics thus speaks to the essential normativity of law and legal decision making. Paradoxically, however, it is a second claim, to ethical minimalism, that makes economics especially attractive and also explains why economics in its normative dimension is also more influential than many overtly normative legal theories, such as critical legal studies, critical race theory, libertarianism, or, indeed, feminist legal theory. The normativity of conventional law and economics is based on the concept of efficiency and the purportedly noncontroversial claim that a legal rule or policy that makes everyone better off and no one worse off (the Pareto criterion) or, slightly more controversial, that generates sufficient benefits for winners to potentially compensate losers (the Kaldor-Hicks criterion) should be adopted. Economics, therefore, offers legal decision makers relief from otherwise seemingly intractable ethical and political debates about fairness or justice.

Economics manages this apparently paradoxical state—normative power with minimal normative content—through various separability claims. Kaplow

& Shavell (1994) have emphasized one particularly powerful separability claim, namely that whatever our distributional goals or equity concerns, we will do better as a society (in the uncontroversial Pareto sense) if we look only to the efficiency criterion in selecting legal rules, leaving distributional considerations to the tax and welfare system. This is a variant on the more fundamental claim of the second welfare theorem, and in the next section I discuss that claim from a feminist perspective.

Kaplow & Shavell's (2001) work on "fairness versus welfare" delves into the justification for using welfare economics to evaluate legal rules in the first place. As good economists, they purport to be making a minimally normative claim: Legal rules and policies should be assessed in terms of their impact on the well-being of individuals; any slavish application of fairness principles (defined to be principles that look to factors other than the well-being of individuals) will, logically, lead in some circumstances to social choices that make everyone worse off. That, say Kaplow and Shavell, would violate the minimalist Pareto criterion, and we should all agree that such results should be rejected.

Feminists may have a harder time criticizing Kaplow and Shavell's fairness versus welfare claim than their separability claim. After all, most feminists ground their normative commitments in concerns about well-being, particularly women's well-being; few feminists are interested in pursuing abstract justice principles for the sake of principle. These are the lessons, for example, of Gilligan (1982), Noddings (1984), and Tronto (1993) on the feminist ethic of care, an ethic of particularistic attention to the needs of others in concrete circumstances. These commitments would seem to make feminists largely agreeable to the idea that legal rules should be evaluated exclusively in terms of well-being.

Kaplow and Shavell's approach, however, is not one that feminists working in law and economics should accept as a methodological framework. Many of the attributes of fairness and justice that feminists are particularly concerned with generally cannot be represented in the sorts of social welfare functions that Kaplow and Shavell have in mind. Hidden in their apparently capacious appeal to well-being as opposed to abstract principle are many much more restrictive, strongly normative conditions. The welfare economics Kaplow and Shavell are advocating is the narrowest form of welfare economics and precisely the one that seems to lead inexorably to the crabbed focus on efficiency, reducing fairness or justice concerns to problems of income distribution. And indeed this is their overall project: to justify conventional law and economics methodology. Feminists, who should welcome welfare economics on the whole as a systematic method of paying attention to the particular needs and well-being of individuals, should look to modern welfare economics for how it struggles to integrate into social welfare functions considerations such as concern with rights, interpersonal comparisons of well-being, objective criteria of well-being, the unique attributes of goods such as care that create the capacity for well-being or primary goods such as dignity, the inadequacy or unacceptability of some preferences, and the importance of processes and not merely outcomes. That is, feminists should with confidence reject

the ethical minimalism of conventional law and economics' exclusive focus on efficiency, taking up the more overt engagement with fairness and justice concerns that, in fact, animate modern welfare economics. I take up this argument in the section below on Fairness and Social Welfare Functions.

SEPARABILITY AND THE SECOND WELFARE THEOREM

Welfare economics is powerful because of its methodological implications. The first theorem of welfare economics says that perfect markets—ones with full information, complete divisibility and tradeability of goods, no externalities, no increasing returns to scale in production, and well-behaved preferences¹—will result in an allocation of goods (resources) that is Pareto efficient, meaning no member of society could be made better off under an alternative distribution without making some other member of society worse off. This result grounds the focus by neoclassical economists (including those working in law and economics) on creating market mechanisms and identifying market failures and missing markets.

The first welfare theorem can support final allocations of goods and resources, however, that violate our considered judgments about what is fair or just. An allocation that is Pareto efficient may allocate all goods to one person or one class of people; this is because the test for Pareto efficiency has to consider whether any member of society would prefer the initial allocation of goods to the one that would result from market trades. Thus, those that are well-off in the initial allocation must be at least as well-off in the final allocation.

The second welfare theorem allows those using welfare economics to implement (particular) views about fairness and justice. The second theorem says that any feasible Pareto-optimal final allocation (for example, one with an equal distribution of goods or income) can be reached through (perfect) markets through a manipulation of the initial allocation of goods or income. The methodological implication is what I have referred to as the separability claim: If markets are perfect, then they can be relied upon to achieve efficiency in production and allocation, whereas distributive concerns stemming from considerations of fairness or justice can be addressed through changes in the initial distribution of goods.

These two theorems account for the tremendous power of economic analysis and its persuasive attractiveness to applied policy making: They give a carefully reasoned justification for a focus on efficiency (the creation and correction of markets) in legal and policy design that does not require the abandonment of (or agreement on) the fair or just allocation of goods or resources.

The requirements of the first and second welfare theorems are very strong. Few if any markets are perfect. Moreover, the types of reallocations required by the

¹Preferences are said to be well behaved when they are monotonic and convex: Utility increases with any increase in the quantity of a good consumed (nonsatiation) at a diminishing marginal rate.

second welfare theorem—initial lump sum reallocation as opposed to distortionary taxes on income—are practically impossible. Yet the generality and elegance of these theorems are such that in making practical judgments about how to proceed with policymaking, the norms of economists tend to reflect a determination that the imperfections in markets and taxation methods are generally not sufficient reason to abandon the power of the separability claim.

Shavell (1981) and Kaplow & Shavell (1994) demonstrate the implications of such practical judgments for law and economics methodology. They specifically address the problem of distortionary taxes and conclude that the essential separability result continues to justify an exclusive focus in the design of legal rules on efficiency. Their reasoning is that any labor supply distortions created by the tax system will be replicated in the legal system if legal rules are used not only to achieve efficiency but also to redistribute income. Thus, legal rules chosen to achieve both efficiency and equity goals will contain a “double distortion” relative to a regime in which legal rules are chosen exclusively on the basis of efficiency and taxes are used for redistribution.

Sanchirico (2001) has highlighted at least one problem with this conclusion based on the “theory of the second-best” (Lipsey & Lancaster 1956). That theory tells us that, as a mathematical matter, adding up distortions is invalid: If one market fails to meet the assumptions of the first welfare theorem (is “distorted”), then we cannot conclude that eliminating a distortion in another market will increase efficiency. Kaplow and Shavell’s separability claim, however, has to be seen as an exercise not just in mathematical reasoning but also in practical methodological judgment. It reflects a common judgment made by economists in practice to ignore the implications of the theory of the second-best: Partial equilibrium efficiency analysis is standard fare in the economics literature. Although Kaplow and Shavell have not responded directly to Sanchirico’s “second-best” critique (they have responded to other criticisms he offers²), their implicit judgment appears to be that it is more likely than not that in practice the efficiency distortions that will be introduced if legal rules are used to redistribute income will not offset the labor market distortions that such rules will create. Because the labor market distortion (Kaplow and Shavell claim) will be the same whether redistribution is accomplished through a legal rule or a tax, the efficiency distortion will indeed be additive. [The claim that people will respond equivalently to redistribution through the tax system and the legal system has been criticized by Jolls (1998), Sanchirico (2000, 2001), and Avraham et al. (2004).]

Whatever the merits of the “second-best” judgments Kaplow and Shavell have employed, however, for feminists, there are deeper concerns about the exercise of practical judgment that underlies the application of the separability claim in law

²Sanchirico (2001) argues that Kaplow and Shavell have not adequately responded to what he calls the “efficiency as non-sequitur” critique. This critique emphasizes that not all redistributive legal rules are conditioned on income, and hence redistribution through legal rules cannot be replicated by an equivalent tax.

and economics. Even in a world in which perfect nondistorting income or resource redistributions are available, or a world in which Kaplow and Shavell are correct about the relative distortions afforded by redistribution through the tax and legal systems, the separability claim should be rejected in many cases by feminists.

Recall that the second welfare theorem assumes a world in which all goods (sources of utility or well-being) are tradeable and divisible and there are no externalities that cannot be made tradeable. These are assumptions that fail for values that feminists specifically emphasize. I explore the failure of these assumptions with respect to two subjects of concern to feminists: rights (such as rights with respect to autonomy and with respect to freedom from discriminatory or harassing treatment) and caring labor.

Rights

Rights—such as the right to make one’s own choices (about abortion, for example, but also about whether to enter into a contract or to work for a given employer) or to be free of discrimination or harassment in the workplace—can be analyzed instrumentally in terms of how they promote women’s ability to generate income and opportunities to secure their well-being. Rights, however, are also important sources of well-being in and of themselves. This is an important point because whereas the things that rights may afford women—a discrimination-free workplace, employment, contracts, the deferral of childbearing—may be tradeable goods that can be obtained through markets, rights themselves are not tradeable goods.

Consider for example a right to be free of discrimination in the form of harassment in the workplace. A harassment-free workplace is a potentially tradeable good. Employers can compete for employees by offering such a workplace, and they can compete in the goods and services market through their choice of workplace environment and hence the cost to them of obtaining labor. [Becker (1971) employs a standard model of labor markets to argue that discrimination—understood as employer animus-based preferences for discrimination—will be competed away as a result of its inefficient use of resources.] To the extent that our social welfare function seeks to allocate the benefits of a harassment-free workplace to employees generally or to women in particular, income transfers could conceivably enable such employees to demand such a workplace, that is, to avoid harassing workplaces (or to obtain other goods that give them an equivalent level of utility). Similarly, to the extent that workplace harassment lowers women’s wages and employment opportunities (by increasing the cost to them of different occupations, for example, or decreasing either their incentives to invest in human capital or their capacity to signal their abilities), the market allocation of income that results in a world of harassment can be corrected through redistribution. In these ways, harassment reduces women’s well-being because it denies women the things that produce well-being such as wages or workplace opportunities or pleasant working environments. Harassment itself can be a “bad” that women would like to have less of in a final allocation; they can purchase that allocation if they

have sufficient wealth (perhaps as a result of subsidies in the tax system) to avoid harassing workplaces.

A right to be free of harassment can be a source of value to women because it alters their opportunities to purchase the goods that a harassment-free workplace generates and it changes the price of these goods. This is the classic Coasian understanding of legal rights: Rights play an instrumental role in achieving the efficient allocation of goods or resources. Seen in this framework, the separability thesis seems natural: focus on the efficient allocation of the underlying goods or resources (with a market-determined price for harassing environments, for example); if the resulting distribution of goods or resources differs from what we judge to be just or fair (if harassment-free environments are too expensive and hence too many women cannot afford them), then redistribute income (possibly through the allocation of a right that allows a woman to demand compensation for harassment) to achieve the preferred outcome.

A right, however, may also be a source of value in and of itself. It may not be perceived merely as an instrument to obtain other goods. A right to be free of workplace harassment may be valued differently than a harassment-free workplace. The right expresses a social, political, and moral status. It is a manifestation of dignified and equal relations. The adjudication of a right to be free of harassment entails a public avowal of how a person must be treated by employers, by men, by those with power. The holding of a right entitles a person to trigger the state's exercise of public power: to obtain an accounting of wrongdoing and to declare, at least, when a wrongdoing has occurred.

Rights are not divisible goods capable of being produced and traded in markets. An individual can buy more or less harassment in the workplace, she can conceivably purchase more or less of a contract right to be free of harassment, but she cannot buy more or less of a public right to be free of harassment. There is no way to adjust our distribution of income so as to enable her to purchase this public right. We may be able to increase her income and thereby increase her capacity to influence collective choice processes (such as majority voting) that produce the right, but that is a different story.

The methodological point for feminist law and economics is clear: It is insufficient to focus exclusively on the efficiency characteristics of discrimination laws, not because the efficiency, or even economic well-being, criterion is inapposite in this area but because the economic theory that justifies the focus on efficiency fails on its own terms. This is not to say that feminists should not be concerned about the efficiency losses—understood as distortions in the allocation of resources and efforts—that may arise in the labor market as a consequence of discrimination laws that interfere with employer discretion. [For examples of this type of analysis, see Posner (1989) and Donohue (1986, 1989).] Being a feminist economist must mean, at a minimum, an appreciation of the fact that laws that on their face are intended to improve the lot of women may in fact make them worse off, as could happen if discrimination laws left women increasingly unemployed. Rather, the point is that feminists venturing into the law and economics analysis of discrimination

laws, arguing as economists, are entitled to reject an exclusive focus on efficiency precisely because an important source of value (the value of rights qua rights) is not subject to the claims of the separability thesis: We cannot correct any market distortion in the final production and allocation of this right through redistribution policies. Money cannot buy everything. Even if it can buy what rights can buy, it cannot buy the rights themselves.

Caring Labor

Feminist economics has, to the dismay of its small but dedicated band of practitioners, not made large strides over the past decade in putting issues on the agenda of mainstream economics (Ferber & Nelson 2003). But one area in which feminist economics has registered some success, and which Power (2004) identifies as a first principle for feminist economic method, is the analysis of care and caring labor. England & Folbre (2003) and Folbre (2003), for example, relate the analysis of caring labor—labor that is directed to producing capabilities in others, is (sometimes) supplied through intrinsic motivation and possesses unique attributes when supplied by individuals with nonmonetary motivations (such as parents), and is often supplied to beneficiaries who are not capable of judging quality or contracting for services (children, for example)—to the analysis of new institutional economics in general and incomplete contracting in particular. Taylor (1998) presents an economic model of caring that relates optimal care decisions to the costs of identifying those in need in small (family) versus large (organizational) populations and the relative cost of time for men and women.

The assumptions of the second welfare theorem fail profoundly with respect to the production, organization, and quality of caring labor. Caring labor has significant public good attributes, particularly if we emphasize the relationship between quality care of children and the production of social capital in the form of norms of honesty, trust, civic engagement, reciprocity, respect for law, and so on. There are also positive externalities associated with the production of capabilities that underlie the development of human capital, externalities that redound to the benefit not only of the person cared for but also to the benefit of society at large in the form of an educated workforce and polity, the resources for innovation, and so on.

The complex nature of caring labor means that conventional methods of addressing public goods and externalities problems are inadequate. To induce caring labor, we must generate an effective demand for caring labor. The demand could arise in the beneficiaries of care, in the providers of care, or in the public generally. Many of the direct beneficiaries of care, however, are unable to assess the value of care or transact for the provision of care (because they are children or because they are unwell, for example). Transferring resources to these beneficiaries, or their agents, is likely to increase the supply and quality of care provided in the market, but failures in the demand exercised by those in need of care mean that the result will not be optimal.

Alternatively, we could assume that those who supply caring labor through intrinsic motivation (such as parents or other family members) fully internalize the benefits to those for whom they care, in which case the supply of caring labor is a function of what is conventionally described as the labor/leisure choice. In this framework, the second welfare theorem would seem to be relevant: One may achieve the desired final allocation by redistributing income and thereby adjusting the price of leisure, leading to a final efficient determination of how much time is spent on care. This is one way in which feminists have framed the problems that women, in particular, face in spending as much time as they would like with their children and other family members.

There are (at least) two problems with this approach, even within conventional neoclassical frameworks. First, it is probably empirically inaccurate to assume that caregivers (mothers and fathers, for example) fully internalize the benefits of their caring labor as experienced by those for whom they care. It is not (just) that people are not perfectly altruistic and thus may fail to choose optimal levels of care for others, spending too much of their income and time on themselves and not enough on their dependants. It is, as Folbre (1994) has emphasized, that caregivers (particularly, in practice, women) incur various costs in providing care. They face trade-offs. When women care for others, they reduce their investments in human capital; they make themselves dependent on relationships that may circumscribe their autonomy, their mobility, their opportunities, or their well-being and that may end, such as in divorce, injury, or death.

Second, even if women receive substantial income transfers to compensate them for the costs of providing care to others, this compensation will not lead to an efficient allocation of women's time between paid labor and caring labor through market transactions. The structures of the workplace restrict the labor/leisure bundles that are available because, for example, production is often characterized by network externalities. Consider the scheduling of the work day. There are network externalities associated with common or at least overlapping work hours created by the need for collaboration, coordination, and communication with coworkers. The determination of work hours is thus potentially subject to conflicts of interest among workers and so must be determined through some collective mechanism—hierarchical authority (delegation to a manager) in the ordinary firm, or deliberation and possibly voting in a collaborative workplace. In such settings, the market does not produce efficient results. And, again, no amount of monetary redistribution can produce the allocation we may prefer as a society.

Can we solve the problems by conceptualizing caring labor as a public good, demanded by the state rather than individuals and produced by or purchased in the market by the state? Clearly we can generate substantial quantities of caring labor through this mechanism; this is what publicly funded childcare, education, hospitals, institutions, etc., provide. The fact that care provided by non-market providers—those who are intrinsically motivated to care, with whom the beneficiary has a long-term relationship—is fundamentally different from the care provided by market providers (England & Folbre 2003), however, means

that the state cannot achieve the optimal outcome through public production or purchase.

The lesson for feminists in law and economics is that the separability result has to be squarely rejected when particular legal rules under study have an impact on the provision of caring labor in the economy. The sweep of this implication is broad. All of modern corporate law and economics, for example, focuses on the efficiency of corporate governance, understood as maximization of returns to shareholders. Corporate governance, however, has implications for the organization of the workplace, which has implications—profound implications—for the provision of caring labor. The unique attributes of caring labor, however, as we have just seen, imply that we cannot simply maximize the wealth of shareholders—the profits of firms—and then redistribute income to achieve the socially preferred level of caring labor. Similarly, workplace regulations—hours legislation, parental leave policies, minimum wages, and so on—have to be evaluated not merely in light of efficiency concerns but also in light of ultimate social preferences for the production and quality of caring labor. Indeed, rejecting the separability thesis in this area would help feminist law and economics scholars to emphasize the social value of caring labor, indeed, the efficiency of caring labor, in light of its role in producing valuable social and human capital. The separability thesis suggests that the only interest we have in manipulating a market allocation through redistribution is in adjusting the relative wealth and consumption of individuals. A more careful economic analysis of caring labor sees not merely what is fair or just about maternity leave policies or workplace regulation but also what is, fundamentally, socially valuable.

Separability and Practical Judgment

The adoption of the separability claim in law and economics is ultimately a matter of practical judgment: When is it reasonable in practice, in light of real-world failures of the assumptions of perfect markets, to continue to rely on the second welfare theorem to justify a focus on the efficiency of legal rules? There are undoubtedly many settings in which this is an appropriate methodological move. Feminists in law and economics should be attentive to the normative quality of those practical judgments and the way, in fact, they reflect substantive views about what is valuable, what is important, and why. In making those judgments, the normative minimalism of the separability claim may be abandoned. This is what happens when law and economics scholars adopt the separability claim in the analysis of discrimination law or corporate governance: In treating normative concerns about equality or care as equity or distributional concerns—to be efficiently addressed through income transfers rather than through legal rule design—they implicitly assume that rights have only instrumental value or that the supply of caring labor is a leisure/labor choice that caregivers (such as parents) make. It is appropriate at that point for feminists to make these implicit normative claims apparent and to insist that law and economics analysis adopting these claims defend not only their economic reasoning but also their normative judgments.

FAIRNESS AND SOCIAL WELFARE FUNCTIONS

Feminists in law and economics who reject the use of separability in the analysis of legal rules and policies—who insist that equity considerations cannot be cabined off to allow an exclusive focus on efficiency—may nonetheless continue to work squarely within the neoclassical framework. Rejecting separability within that framework means working directly with a social welfare function to determine the desirability of a legal rule. Methodologically, the question for feminists is then whether working within that framework in law and economics is inconsistent with feminists' particular normative commitments, such as to the importance of rights and the impact of corporate governance and workplace regulation on the organization, quantity, and quality of caring labor. As framed by Kaplow & Shavell (2001), do feminists have to give up fairness in order to work with the concept of welfare?

Kaplow and Shavell make the basic claim that the only defensible normative criteria are those that evaluate legal rules and policies in terms of their impact on the welfare of individuals. They distinguish these welfare criteria from fairness criteria by adopting an idiosyncratic (Waldron 2003) definition of fairness: They use the term fairness exclusively to mean normative considerations that do not ultimately rest on the impact of a rule or policy on individuals' welfare. So, for example, they rule out decision criteria such as that "surrogacy contracts should be enforced because they promote women's autonomy," or that "surrogacy contracts should not be enforced because they degrade women," or that "women have a right to choose how they use their bodies, and this encompasses the right to decide to be a surrogate." They advocate instead that all of our discussions should be of the form, "Are the people we include in our social welfare function (surrogates, childless couples, unborn children, existing children, etc.) made better or worse off by a policy of enforcing surrogacy contracts?" Having defined fairness to be principles that ignore the welfare implications of a rule or policy, the basis for their claim is then a simple application of the economist's conventional, minimalist, Pareto criterion: Rules and policies should be rejected if they make someone worse off and no one better off. If there are circumstances in which enforcing surrogacy contracts to promote women's autonomy makes everyone worse off or makes someone worse off and no one better off, then, Kaplow and Shavell ask, what is the point in doing that? What sense can it make to say that autonomy for women is a good thing if it does not make at least someone better off? And if the application of this principle always makes at least someone better off (such as the woman exercising her autonomy), then we are doing welfare analysis.

The claim is, frankly, a fairly powerful one, for the same reasons that conventional neoclassical economics has been so powerful as a normative social science: It has minimal normative content. Although many in law and economics have criticized the opposition of welfare and fairness in Kaplow and Shavell's work (Chang 2000, Dorff 2002, Craswell 2003, Farber 2003, Kornhauser 2003, McDonnell 2003), it is hard to argue with the minimalist claim that ultimately all laws and

policies should be evaluated on the basis of whether they improve the well-being of actual people. Feminists, in particular, will not find anything objectionable in the idea that social choice should be governed by concrete attention to people's well-being in fact. Commitment to a principle that, systematically at least, made everyone worse off in any way we considered relevant would seem to reflect a foolish, abstract adherence to principle. And yet there is something quite jarring about the Kaplow and Shavell claim, something that seems to be much more dramatic as a normative claim, even for feminists who seek to do law and economics.

The objectionable part of Kaplow and Shavell's claim, from a feminist perspective, is the narrow form of welfare economics that they advocate, one that leads naturally to the narrow focus on efficiency in legal rules and that limits fairness concerns to income distribution. They are, indeed, engaged in the project of justifying conventional law and economics methodology. But feminists in law and economics should pay careful attention to the fact that their argument seems to suggest that by conceding the congenial claim that well-being should be the criterion of social choice we must also logically accept that nothing matters except efficiency in legal rules and income redistribution. In fact, this does not follow. Feminists can agree that welfare is the appropriate criterion, and even that welfare economics is a valuable methodological framework, without ending up at conventional law and economics and the narrow focus on efficiency and income distribution.

Kaplow and Shavell are advocating not merely that legal rules should be evaluated exclusively in terms of individual well-being; they are advocating that well-being, for the purposes of guiding social choice, be evaluated exclusively in radically subjective terms³ and that only subjective utility information be used to construct a social welfare function.⁴ But it is well known in modern welfare economics that such a social welfare function is a highly problematic, perhaps incoherent, concept. Feminists can, and should, join mainstream welfare economists in rejecting the restriction to subjective utility information in constructing social welfare functions.

Impossibility and Interpersonal Comparisons of Utility

The roots of modern welfare economics rest in a set of results deeply pessimistic about the possibility of systematic social choice. Traditional welfare economics dates back to Bentham (1996 [1789]) and the proposal that social choice be governed by a strictly utilitarian calculus, maximizing the total subjectively evaluated utility of a community, without regard to the distribution of utility within the community. This approach to social choice dominated economics until the 1930s

³"The only limit on what is included in well-being is to be found in the minds of individuals themselves, not in the minds of analysts" (Kaplow & Shavell 2001, p. 980).

⁴"Social welfare is postulated to be an increasing function of individuals' well-being and to depend on no other factors" (Kaplow & Shavell 2001, p. 985).

when, as described by Amartya Sen, who received the Nobel Prize for his work in welfare economics in 1998, “utilitarian welfare economics came under severe fire[E]conomists came to be persuaded by arguments presented by Lionel Robbins and others (deeply influenced by ‘logical positivist’ philosophy) that interpersonal comparisons of utility had no scientific basis” (Sen 1999, p. 352). Interpersonal comparisons of utility are necessary to construct a utilitarian social welfare function because all utility has to be reduced to a common metric. This is the basis for the minimalist move in neoclassical economics, the retreat to the Pareto criterion and to the first and second welfare theorems. Under this approach, the problem of interpersonal comparisons of utility and the construction of a social welfare function in fact are put aside in favor of the demonstration that, assuming that the construction of such a social welfare function might be possible, perfect markets will achieve Pareto optimal outcomes, and redistribution of endowments can select any outcome that maximizes social welfare.

Then, in 1951, Kenneth Arrow proved a rather distressing result with wide-reaching consequences: In the absence of interpersonal comparisons of utility, no social welfare function that is based exclusively on individual subjective preferences—which takes into account no other information to select optimal social outcomes—exists (Arrow 1951). Formally, Arrow showed that a social ordering over possible allocations that satisfies minimal conditions—it does not track the preferences of any single member of the society (nondictatorship), it chooses between alternative allocations exclusively on the basis of the preferences of individuals between those allocations (independence of irrelevant alternatives), and it places no restrictions on the preferences individuals might hold (unrestricted domain)—fails to establish a complete, transitive ordering over outcomes, the definition of rational choice.

Kaplow and Shavell avoid the impossibility result (although they do not discuss it) by assuming that interpersonal comparisons of utility are possible and, indeed, are possible to the extent that the social welfare function can be based not only on total welfare but also on the distribution of welfare among individuals. But they do not explain how such interpersonal comparisons are to be made and thus do not explain how they resolve the very problem that led welfare economists in the 1930s to abandon the concept of an aggregate social welfare function based exclusively on subjective utilities, the problem that led to the minimalist Pareto criterion and ultimately to the impossibility result. Indeed, Kaplow and Shavell do not explain how the analyst who is encouraged to endorse welfare economics as the framework for all legal rule and policy evaluation (and recall, their claim is the strong one that any other framework fails to be logically consistent and conflicts with the Pareto criterion) is to engage in interpersonal comparisons without taking into account information other than individual subjective utility assessments.

In fact, the lesson of modern welfare economics is that it is not possible to construct a social welfare function without taking into account information other than individual subjective utility. That is, the welfare economics Kaplow and Shavell are advocating does not exist, and one can follow their recommendation to eschew

any efforts to judge what is good or bad for individuals, what is fair or just in aggregating individual well-being to arrive at social choices, only by ignoring the demonstrated inconsistencies in such an approach. Arrow (1977) shows this clearly. In this work, and in response largely to the efforts of other welfare economists such as Hammond (1976) to reconcile welfare economics with Rawls (1971), Arrow takes on the challenge to construct a social welfare function that includes interpersonal comparisons of utility, seeking the most minimal version of such comparisons that overcomes the problem of impossibility. The metric he arrives at (a utility function defined over goods—such as wine—and the attributes that lead to the derivation of utility from the consumption of goods—such as the capacity to enjoy wine) accomplishes what a method of interpersonal comparisons requires, namely the reduction of all utility to a single comparable metric. But it does so at a price that Arrow himself finds troubling:

[R]educing an individual to a specified list of qualities is denying his individuality in a deep sense. In a way that I cannot articulate well and am none too sure about defending, the autonomy of individuals, an element of mutual incommensurability among people, seems denied by the possibility of interpersonal comparisons. No doubt it is some such feeling as this that has made me so reluctant to shift from pure ordinalism, despite my desire to seek a basis for a theory of justice (Arrow 1977, p. 225).

Kaplow and Shavell also reject this solution when they insist that the only criterion of well-being has to be the individual's subjective assessment of well-being and not that of the analyst's: As Arrow's own view of his solution makes clear, reducing individual well-being to a single metric requires that individuals all be in some fundamental sense the same, and the designation of any such metric would require an outside analyst to determine what it is that produces utility, in the same way, for anyone.

As Sen (1985) has explained, the fundamental source of the impossibility result is the neutrality that is implied by the type of social welfare function Kaplow and Shavell have in mind. If the only measure of utility we admit is the individual's subjective valuation, and if the only aggregation we allow is that which takes into account only these subjective preferences, then it follows that our social choices must be indifferent to the sources of individual utility, to the particular goods that individuals obtain in alternative allocations. Social choices cannot weight preferences according to any information about the particular things individuals value; in this framework, social choice is committed to neutrality as between promoting one person's utility by, for example, affording them opportunities to degrade others and promoting another person's utility by affording them greater dignity or autonomy. This is the sense in which the type of social welfare function Kaplow and Shavell have in mind rules out a wide array of ethical frameworks and judgments, and in particular rules out the kinds of normative commitments that feminists hold.

In this framework, social choices also cannot be determined by the nature of particular states of the world, by comparing the content of particular allocations.

The Rawlsian approach to justice, for example, is incompatible with the Kaplow and Shavell version of welfare economics. Rawls's conception of justice requires attention not merely to the utility of individuals but also to their access to what he calls primary goods: basic rights and liberties (such as freedom of thought), freedom of movement, and free choice of occupation, the social bases of self-respect, powers and prerogatives of positions of authority, and income and wealth (Rawls 2001, p. 58). Primary goods are the things individuals need to realize well-being as "free and equal persons living a complete life" (Rawls 2001, p. 58). Rawls's theory of justice addresses the just distribution of primary goods: The first principle of justice requires that "each person has the same inalienable claim to a fully adequate scheme of equal basic liberties" (Rawls 2001, p. 42), and the second principle requires that any social and economic inequalities must be attached to positions available to all under conditions of fair equality of opportunity and be to the greatest benefit of the least advantaged. Rawls's approach is affirmatively about promoting individual well-being; it is a considered assessment of what produces well-being.

As Kaplow and Shavell acknowledge (Kaplow & Shavell 2001, fn. 54), Rawlsian justice is incompatible with the welfare economics they advocate because it takes into account more than subjective utility assessments; it also takes into account the particular attributes of underlying goods and objective indicia of well-being such as the capacity to exercise choice and to access sources of power and income. But, as we have seen, any coherent social welfare function must take into account information beyond the subjective utility assessments of individuals. Otherwise we are back at Arrow's impossibility result. The dilemma for Kaplow and Shavell is then essentially this: They insist that individuals can be the only judge of what they individually value in any aggregation of preferences into a social welfare function, and yet any coherent social welfare function must take into account information other than these subjective preferences.

Thus, Kaplow and Shavell's claim is not really that the only coherent approach to legal analysis is to use welfare economics because their specific approach to welfare economics does not allow for the construction of a social welfare function. Their claim reduces to a much more idiosyncratic and contestable one, namely that legal rules and policies should be chosen in light of what promotes each individual's own conception of their utility, rather than some analyst's conception of their well-being. They reject fairness principles because they are not, by definition, equivalent to individual subjective preference rankings. They insist that the only valid social choices are those that choose in the way individuals would choose. But this does not resolve the fundamental problem of social choice: How do we choose when our choices affect not just one but many? How do we resolve conflicts, such as the conflict between someone who derives pleasure from domination and the one who suffers under that domination? How do we allocate common resources? How do we organize activities that produce goods, and how do we distribute the fruits of those efforts? How do we respond to poverty and oppression?

Kaplow and Shavell's framework responds in a narrow way, the only way that is consistent with their fundamental commitment to individual subjective utility. They

respond, as they set out to do, with conventional law and economics: efficiency and income redistribution. Efficiency is acceptable because it does not require interpersonal comparisons of utility and is not social choice; rather, it takes as a given an existing distribution of endowments and capabilities and institutions and preferences and simply asks, could we make everyone better off by changing our rules? All the questions of social choice, where conflicts and trade-offs between individuals are at stake, are relegated to a single acceptable instrument: income redistribution. Income redistribution is acceptable to their framework because it allows for interpersonal comparisons in a common metric, the only good that Kaplow and Shavell will allow the analyst to assume is universally valued by individuals: money. They refer to this sometimes as the distribution of well-being, but given their refusal to allow information about the allocation of specific goods into the equation (hence ruling out redistribution of goods, rather than income), they are in fact only referring to income, the fungible resource that individuals can then use to choose which among the goods available to them they should purchase.

Feminists can confidently reject this effort to collapse all of our fairness, justice, and equity concerns to income distribution. And they can do so on the very grounds that Kaplow and Shavell want to use to justify their narrow framework. As feminists emphasize, there are values that human beings receive from nontradeable goods such as the right to be free of harassment, the entitlement to dignity and equality in social processes, or the care that is embedded in particular non-market relationships such as the family. As I have already argued with respect to the rejection of the separability claim, these are goods that cannot be secured through income redistribution and markets. If we are committed in fact to the capaciousness of respecting the diversity of values individuals hold, then clearly we cannot rule out, as Kaplow and Shavell implicitly do, these nonmarket goods. The import of feminism here is to emphasize the importance of these goods, to say that these are not marginal considerations or empirically unlikely preferences that can be brushed aside in the practical judgments about methodology that law and economics analysts, like all analysts, must make. Kaplow and Shavell cannot reconcile any a priori limitation on the importance of nonmarket goods with their premise that “the notion of well-being used in welfare economics is comprehensive in nature. . . . incorporat[ing] everything that an individual might value” (Kaplow & Shavell 2001, p. 979).

Nor can Kaplow and Shavell reconcile with their commitment to a comprehensive welfare economics their view that well-being is not merely subjective but is idiosyncratic and inscrutable as to each individual, accessible only through empirical methods and not through philosophical or other theoretical inquiry into the nature of human well-being. Feminist claims, like most ethical claims, about what is fair are, in fact, claims about what produces well-being for any human being. The claim that autonomy is a good thing, for example, appeals to a universal human nature that values the capacity for self-direction in life. Those who do not value this, we often judge, are operating under a false understanding of what promotes their own, subjective sense of well-being. It is a contestable claim, to be sure. But

Kaplow and Shavell provide no reason to rule out, *a priori*, the possibility that claims about universal sources of well-being are correct.

Indeed, Kaplow and Shavell's own defense of conventional law and economics methodology requires that a set of claims about the universal value of some goods be true. Although they do not articulate a theory of income distribution, any articulation of their position would require recognition of a fundamental point made by Rawls and Sen, namely, that in order for income to produce utility, individuals must have liberty. Specifically, Kaplow and Shavell's emphasis on income distribution as an instrument for adjusting the distribution of well-being assumes that every person has the liberty to participate in exchange. The relationship between income distribution and well-being also rests on the implicit assumption that all people possess the human and social capital necessary to evaluate trades and carry them through. In an extended economy with noninstantaneous exchange, this implies the capacity to contract and to access formal and informal mechanisms for enforcing trades. It is thus straightforward to derive fairness principles strictly from universal claims about the subjective well-being of individuals: All are entitled to equal access to markets and to trade on the same terms.

In a similar vein, feminists' principled claims such as "women should have a right to be free of harassment" can clearly play a role in defining what it means to be better off or worse off, and in any given policy or legal rule choice, the claim that the choice should be governed by the principle can clearly be a claim that, in this setting, our social welfare function is characterized by a reduced form rule: Harassment is wrong, reducing the well-being of all under all states of the world. There is no reason why a social welfare function cannot take the form, "We are all better off in a world free of gender inequality." A social welfare function taking this form simply adopts a view of preferences that reflects the position taken by many welfare economists when struggling with what to do with malevolent preferences, such as a preference for the domination of others; these are not "well-informed" preferences; these are preferences that it would be "welfare-maximizing to change;" or these are "unethical" preferences [for discussions about the nature of preferences, see Brock (1973), Nunan (1981), Hammond (1989)]. And if the social welfare function takes that form, then it is perfectly appropriate—indeed, mathematically elegant, to adopt a core value of neoclassical economics—to evaluate choices not by reference to a full-blown social welfare function but rather by reference to this derived principle. Indeed, this is precisely the strategy of traditional welfare economics and the first welfare theorem: We can proceed without specifying the social welfare function because by this proof we show that maximization of the value of any social welfare function can be obtained merely by following the principle of promoting free and voluntary exchange in markets.

In practice, economists routinely appeal to reduced-form principles of this type, despite the lessons of the second-best theorem that tell them that maximization requires specification of a social welfare function. They routinely judge that those lessons can be ignored and simpler principles used to determine what is social welfare maximizing: reduce transaction costs, create tradeable goods (such as

pollution rights), enforce agreements on the terms set by the parties, protect property rights in ideas and inventions, eliminate obstacles to the entry of competitors into a market, etc. This is the stuff of law and economics: the application of reduced-form principles. There is simply no basis for the judgment, no basis that feminist law and economics scholars should accept, for not similarly expecting that the difficult problem of deciding what it means to say people are better or worse off, even within the framework of welfare economics, will also have simple implications for particular legal and policy choices: promote women's autonomy, support investments in caring labor, eliminate gender discrimination in the workplace. A good economist will of course think through whether or not the application of such a principle in a given case will, in fact, lead to worse outcomes; whether poverty, for example, will result from a particular application of a principle that "women's autonomy should be promoted." Indeed, this is precisely the dilemma many feminists struggle with when it comes to determining what the right result might be, for example, in extending the principle of freedom of contract to surrogacy (Hadfield 1995b, 1998a).

But a dilemma feminists do not have to struggle with is the choice between fairness and welfare: Modern welfare economics recognizes that any social choice must be informed by more than purely subjective utility information; it must take into account the underlying qualities of what creates human well-being. As Sen has framed this with respect to feminist concerns in particular:

There have been many recent investigations of gender inequality and women's deprivation in terms of undernutrition, clinically diagnosed morbidity, observed illiteracy, and even unexpectedly high mortality Such interpersonal comparisons can easily be a significant basis of studies of poverty and of inequality between the sexes. They can be accommodated within a broad framework of welfare economics and social choice (enhanced by the removal of informational constraints that would rule out the use of these types of data) (Sen 1999, p. 363).

CONCLUSION

The vast majority of legal debates are among people who take seriously the importance of well-being and who share diverse and rich views about what promotes well-being, in the long- and short-run. It is misguided, and misrepresents modern welfare economics, to suggest that there is a conflict between a commitment to fairness and to well-being, or that a law and economics methodology must be limited to a focus on efficiency and income redistribution. Clearly, conceptions of well-being that encompass claims about the distribution of specific rights and specific goods fall within the domain of economic analysis. The great virtue of doing law and economics is that it emphasizes the need to articulate the effects of legal rules, in the long- and short-run, and to be systematic about exploring the more

subtle consequences of legal rules and policies. Economics can help us identify cases when, indeed, we can safely focus on efficiency and material consequences or employ the separability thesis to parcel out our various goals to different legal instruments. Feminists analyzing the desirability of different legal rules should be looking to economic analysis for careful modeling, explicit attention to assumptions, and carefully specified behavioral models. They should be using economic tools to focus on the implications of strategic behavior, information dynamics, and equilibrium forces. They should be doing careful empirical work to describe the phenomena they study and to test the hypotheses they formulate. And they should embrace welfare economics and its explicit attention to the components of a social welfare function. But they should reject the claim that doing welfare economics means doing conventional law and economics, focusing on efficiency and limiting fairness concerns to income distribution, and they should reject the separability thesis when the conditions that make that thesis relevant do not hold, as they do not for many issues of importance in feminist analysis.

Sandra Harding wrote in 1995 that feminist economists should be seeking not to undermine objectivity in economics but rather to promote a stronger form of objectivity (Harding 1995). Doing feminist law and economics should similarly be an exercise not in cutting back on the grounding of our methodology in welfare economics, but rather in embracing the overtly normative nature of that exercise, one that requires, not relinquishes, ethics and politics. As Sen (1999) has observed, as modern welfare economics has evolved, it has drawn closer to moral philosophy, to the effort to say substantively what it means for individuals to enjoy well-being. This is a project feminists in law and economics should also take up as their own.

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