

# LAW AND ECONOMICS: A FEMINIST ECONOMIST'S CRITIQUE

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From a feminist standpoint, law and economics suffers from the same biases as neo-classical economics. It relies on a market approach which prioritizes efficiency over equity. Furthermore, the analysis is not sensitive to the gender impact of policy measures. This paper outlines the efficiency (Pareto optimal) conditions of a market approach and the implications of such an approach for women. It then offers some specific suggestions for a feminist critique of law and economics.

## I. The Conditions for Pareto Optimality

The area of law and economics is the application of neo-classical micro-economic theory to the area of law. I specify "neo-classical" because there is not just one school of economics. Neo-classical economics is basically market economics, that is, the approach which extols the virtues of a free market. Within neo-classical economics, there are conservative and liberal variants. This is pertinent because some of the law and economics literature cites economists such as Milton Friedman and F. A. Hayek who are of the extreme conservative persuasion.

The argument put forward by neo-classical economists for the free reign of the market rests on claims of the efficiency of the market over other allocative mechanisms. However, the case for this efficiency is at a theoretical level. The theoretical models of the discipline are based on numerous assumptions of questionable validity in the real world. Neo-classical economists outline these assumptions and the problems associated with them but then proceed with the analysis regardless.

How is economic efficiency defined? Efficiency is defined as a Pareto optimal state, a position from which no one can be made better off without making someone else worse off. The attainment of Pareto optimality requires the satisfaction of an array of marginal conditions in the goods and services markets, in the factor markets, and in production. These conditions are usually defined for a two-consumer, two-commodity, and two-firm world but must be extended to the whole of the economy for Pareto optimality to exist.<sup>1</sup> Pareto optimality has no meaning in a partial equilibrium sense.

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<sup>1</sup>R. A. Bilas, *Microeconomic Theory*, 2d ed. (New York: McGraw-Hill, 1971) at 305.

Not only do these marginal conditions have to be satisfied, but also the analysis must be based on numerous assumptions, few of which would be possible to satisfy in the real world.<sup>2</sup> Pareto optimality is not just one position for the economy. It is a whole array of outcomes each having a different income distribution.<sup>3</sup> Most economists find it difficult to go beyond this array of Pareto optimal positions, because to do so would necessarily require value judgments. The definition of efficiency used in economics thus has a very specific meaning, and this has many implications. It is not just your commonplace "efficiency" which seems reasonable to most people.

How is "equity" defined in this model? "Equity" is achieved when marginal conditions in the factor markets for land, labour and capital are satisfied. Under marginal productivity theory, equilibrium is achieved where each factor receives the value of its marginal product, supposedly its contribution to production.<sup>4</sup> This analysis completely ignores the actual structure of factor markets by assuming that all markets are perfectly competitive. It also fails to include all those who are not involved in any factor market as either owner or paid worker. As well, the model takes as given the initial endowment of factors.<sup>5</sup> On the one hand, those using the approach do not like to make value judgments. They consider their approach scientific and non-ideological. On the other hand, they accept the status quo as a meaningful starting point, which in itself embodies an ideological position.

To summarize, the main problem with the direction of law and economics is its rapture with the concept of efficiency, as used by neo-classical economists. Economic theory idealizes efficiency but ignores goals of equity. Neo-classical economists avoid equity issues because those might involve value judgements. Thus, for anyone who would place equity before efficiency, neo-classical economics would have, at best, a limited usefulness.

The law is not the only area that is trying to incorporate neo-classical economic thought. For example, there has been an invasion of neo-classical economic theory in the area of social policy reform.<sup>6</sup> The government is not listening to social policy analysts anymore. It is listening to neo-classical

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<sup>2</sup>J. de V. Graff, *Theoretical Welfare Economics* (London: Cambridge University Press, 1957) at 142.

<sup>3</sup>Bilas, *supra* note 1 at 313.

<sup>4</sup>S.F. Feiner & B. B. Roberts, "Hidden by the Invisible Hand: Neoclassical Economic Theory and the Textbook Treatment of Race and Gender" *Gender & Society* (2 June 1990) 159 at 164.

<sup>5</sup>S. Himmelweit, "The Individual as Basic Unit of Analysis" in F. Green & P. Nore, eds., *Economics: An Anti-Text*, (London: Macmillan, 1977) 21 at 25.

<sup>6</sup>J. McFarland, "Combining Economic and Social Policy through Work and Welfare: The Impact on Women" *Papers on Economic Equality* (Ottawa: Status of Women Canada, 1994) 147 at 147-164.

economists. In fact, the spread of neo-classical economics into other areas has been noted by others and has even been given a name: economic imperialism.<sup>7</sup>

## II. Implications of an Efficiency Approach for Women

Females have never been prominent within the economics discipline. There are few famous women economists. There are few female economists in academia. A female presence is lacking in economics articles and texts. A few years ago, I did a survey of economics journals in the Harriet Irving Library, of the University of New Brunswick. Of the seventy-one issues of thirty-one journals from the neo-classical paradigm that I examined, only nine articles dealt with what could be broadly described as women's issues.<sup>8</sup> Only one was written by a woman. In a 1986 survey done by the Social Sciences Federation of Canada, the Canadian Economics Association reported "zero" articles "specifically on women's issues" among the ninety-six articles published in their journal in the period between 1982-84.<sup>9</sup>

A 1990 American article examined the treatment of women in twenty-one introductory economics texts. Looking for "topics of special salience to women", it found on average 10.38 pages in texts of an average length of 810 pages. In percentage terms, this was 1.36% of the content. A comparison of first editions of texts with revised editions showed an insignificant increase from 1.26% to 1.40%.<sup>10</sup> It is apparent that women have not been the subject of economics or participated to any significant extent in the discipline. Perhaps it is not surprising that the discipline has not seen the world from female eyes.

Neo-classical economics starts from the supposedly generic notion of "economic man". The first step in achieving Pareto optimality is to define the preferences of this "economic man" who is assumed to have insatiable wants. Hence, scarcity is inherent in the system. Given the opportunity, "he" will always choose more over less. In other words "economic man" is motivated by greed. Such a narrow view of human nature is a questionable starting point of analysis. One new left critic maintains:

Economists have postulated a rotten world and have set about to see under what circumstances it might be good, subject to the unchallenged constraining postulate

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<sup>7</sup>J. Hirshleifer, "The Expanding Domain of Economics", (1985) 75 *American Economic Review* 53 at 53.

<sup>8</sup>K. Driscoll & J. McFarland, "The Impact of a Feminist Perspective on Research Methodologies: Social Sciences" in W. Tomm, ed., *The Effects of Feminist Approaches on Research Methodologies* (Waterloo: Wilfrid Laurier University Press, 1989) 185 at 194.

<sup>9</sup>*Ibid.* at 199.

<sup>10</sup>*Supra* note 4 at 161.

(that wants are insatiable) which makes it rotten to begin with. Welfare economists are living contradictions, all by themselves.<sup>11</sup>

Another major conceptual critique is that neo-classical economists, by focusing on the market, ignore the private sphere in favour of the public sphere. Indeed, neo-classical economics has traditionally neglected the household sphere. Recently, however, certain neo-classical economists have entered the household sphere using market tools of analysis. Yet their analysis “simply tak[es] us around the vicious circle that we want to have explained.”<sup>12</sup> There have also been recent writings from the field of law and economics in areas such as surrogate motherhood which are critiqued for similar reasons.<sup>13</sup>

Neo-classical economists consider economics to be a science, such as physics or chemistry, which is thus objective and value-free. Accordingly, economists have formalized their theoretical and empirical analyses with mathematical and econometric models. This methodological approach is in stark contrast to feminist methodology. Feminist methodology values qualitative research, is explicit in its value judgments, starts from experience rather than unrealistic assumptions, and is highly sensitive to the relationship between the researcher and the “researched”.<sup>14</sup>

Recent feminist critique of economics has also stressed the non gender-neutral impact of economic policy.<sup>15</sup> Policies are designed by economists and governments without regard for their impact in terms of gender. A number of examples from the current social policy review illustrate the outcomes of this approach. The recent proposed unemployment insurance changes were initiated at the urging of neo-classical economists as a way of making the program more efficient. These proposed changes will have an impact on the lives of many Canadians – specifically those who lose their jobs and most severely on those who do not have steady jobs, those whom the government labels “frequent users”. What is not explicit and perhaps has not even been considered at the policy making level is that the majority of “frequent users” are women.<sup>16</sup> Women comprise the majority of those who are in part-time and/or short-term jobs. They

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<sup>11</sup>M. Zweig, “A New Left Critique of Economics” in D. Mermelstein, ed., *Economics: Mainstream Readings and Radical Critiques* (New York: Random House, 1970) 25 at 27.

<sup>12</sup>M. MacDonald, “Economics and Feminism: The Dismal Science” (1984) 15 *Studies in Political Economy* 151 at 172.

<sup>13</sup>W. A. Wieggers, “Economic Analysis of Law and ‘Private Ordering’: A Feminist Critique” (1992) 42 *UTLJ* 170.

<sup>14</sup>K. Driscoll & J. McFarland, *supra* note 8 at 186.

<sup>15</sup>See I. Bakker, “Through a Feminist Lens: Macroeconomic Restructuring in Canada” in *Papers on Economic Equality* (Ottawa: Status of Women Canada, 1994) 1.

<sup>16</sup>“Proposed UI Reforms Condemned”, *The [Toronto] Globe and Mail* (6 December 1994) A7.

also constitute a significant portion of seasonal workers such as fishplant workers and workers in the tourism industry.

There are numerous other examples of the non gender-neutral impact of policies. The job-creation impact of infrastructure projects is often to provide jobs for males and not for females. Further, social security "reform" will result in an increase in the unpaid labour of women as women compensate for the reduction in services to the household. For example, the de-institutionalization of health care, in practical terms, is a cut in women's paid work in favour of increased unpaid caretaker work for women at home. This social security "reform" will create a greater polarization among different groups of women and will also have a negative impact on equity policies for women and other traditionally marginalized groups. Such examples underscore the unconscious, although possibly deliberate, gender blindness with which policy makers and analysts, many of whom are neo-classical economists, formulate such options.

### III. Some Suggestions for a Feminist Critique of Law and Economics

The feminist critiques of economics outlined thus far are applicable to the area of law and economics. Although mathematical model building and econometric testing have not been developed within the discipline of law and economics, its conceptualization and its policies are nonetheless equally unlikely to have a gender-neutral impact. I would like to end my remarks by suggesting a few areas where the impact of such policies would be anything but gender neutral.

I am certain that issues of equity are of primary concern to feminists in law. Such issues include equality of opportunity, equality of employment, a just distribution of income and wealth, and the recognition of unpaid work. How can these issues be addressed given a theory which takes as a starting point given endowments or, in other words, a given distribution of wealth? If these issues are not addressed and efficiency remains the predominant goal of the law and economics discipline while issues of equity are ignored, then women will be seriously harmed.

Equal pay for work of equal value is a good example. Equal pay policies have been proposed and implemented because of historic, systemic inequities in pay for men and women. Women in Canada are still earning only 69 cents for every \$1 earned by men.<sup>17</sup> However, any effort to compensate women for past inequities and raise their pay up to the level earned by men doing the same work and holding the same qualifications necessitates market intervention. Market-oriented economists reject such policies for just this reason. Those working in the area of

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<sup>17</sup>This is based on full time average earnings from the 1991 census as reported in A. Freeman, "Wage Gaps Between the Sexes Shrinking" *The [Toronto] Globe and Mail* (15 January 1993) A1.



economics and law who adopt such a market-oriented approach, may tend to reject such policies as well. On the other hand, advocates of equal pay for equal work policies point out that efficiency is not attained by free labour markets anyway because real labour markets do not satisfy the conditions required by Pareto optimality.<sup>18</sup> The issue of equal pay for equal work remains a classic example of the debate regarding the appropriate prioritization of efficiency and equity.

A basic application of neo-classical economic analysis provides the rationale for the commodification of all goods and services as well as the enhancement of private property rights.<sup>19</sup> The argument made is that privatization maximizes efficiency by minimizing social costs and maximizing social benefits. However, when I think of property as it may concern women, I am reminded of the 1985 Nairobi UN Decade of Women conference theme: "Women and girls are one half of the world's population; women do two-thirds of the world's work, receive one-tenth of the world's income, and own less than one hundredth of the world's property."<sup>20</sup> Hence I would fear the impact of enhanced property rights on the lives of women.

With reference to the commodification of all goods and services, perhaps feminists should encourage the extension of this principle to the household sphere so that everything that a woman does in the household could be given a price. This, according to property rights theory, would maximize social benefits and minimize social costs. Yet, one might wonder if it would do anything for relations in the family, which one might hope could be the last bastion of sharing and caring. This is an area of inquiry where neo-classical economics has little to contribute. Nonetheless, those working in the area of law and economics have indeed examined the area of sociological phenomena with respect to such issues as marriage, divorce, surrogacy and prostitution. This has introduced a market-oriented, efficiency approach to the study of these areas which may be as inappropriate and as dangerous to women as such a market-oriented approach has been when applied to the private sphere by neo-classical economists.

A final area which has a substantial bearing on law and economics, is the idea of freedom of contract, one of the cornerstones of a free market. A neo-classical economics postulate is that parties entering into an exchange do so voluntarily. Would this apply to the vast bulk of women workers? Do women "choose" their

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<sup>18</sup>See B. Bergmann, "The Economics of Women's Liberation" in D. Mermelstein, ed., *Economics: Mainstream Readings and Radical Critiques*, 3d ed. (New York: Random House, 1976) 458 and F.D. Blau & M.A. Ferber, *The Economics of Women, Men and Work* (Englewood Cliffs, N.J.: Prentice Hall, 1986).

<sup>19</sup>E. Mansfield, *Microeconomics* (New York: Norton, 1994) at 554-5.

<sup>20</sup>E. Hall, "Women and Development" (CUSO) at 1 [unpublished].

role in the labour force or do they accept it because of the lack of other choices? Marjorie Cohen, a feminist economist, suggests: "Women, for most of the history of industrialized countries, have been restricted from access to all but a handful of jobs, so freedom of contract cannot be seen as ever having applied to the condition of female labour."<sup>21</sup> I hope that others who care about these issues will consider these critiques and keep a cautious eye out for the effects of "economic imperialism" in this and other areas of law.

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<sup>21</sup>"The Problem of Studying Economic Man" in G. Finn & A. Miles, eds., *Feminism in Canada* (Montreal: Black Rose Books, 1982) 89 at 98.