ECONOMIC EFFICIENCY AND THE PARAMETERS OF FAIRNESS: A MARRIAGE OF MARKETPLACE MORALS AND THE ETHIC OF CARE

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> "Thus far [Law and Economics and Critical Legal Theories] have been either hostile or oblivious toward one another . . . The promise of a new, comprehensive approach to legal scholarship . . . lies in the possibility that these two movements could develop a unified scholarly discourse."[1]

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[1] Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1393-94 (1996).

INTRODUCTION

The great divide among scholars regarding business law matters and government undertakings is between those who advocate for using theories of welfare-maximization derived from the study of market forces and those who urge that fairness and other deontological concerns should predominate in private and public decision processes. The former group, largely comprising of law and economic scholars, seeks to ensure that decisions lead to efficiency so that society derives the maximum benefit from all available sources of welfare.[2] The latter group, consisting of varied perspectives and sometimes categorized collectively as deontologists, share a common concern that justice and more ideational values are being sacrificed at the altar of efficiency to the detriment of society's

[2] These include not only economic goods, such as goods and services, but more intangible sources of individual well-being.

overall well-being. As scholarship from these two perspectives evolve over time, the law and economics group endeavors to incorporate humanistic concerns raised by the deontologists but avoid compromising the primacy of efficiency; on the other hand, scholars from the deontological perspective undertake to master the technical aspects of efficiency analysis but primarily to demonstrate critically that efficiency analysis is morally defective. Regardless of the perspective taken, however, one conclusion held in common among these groups is that a trade-off between efficiency and fairness necessarily exists. Of course, the members of each group have a different view of which goal should be compromised.

This article will demonstrate that a trade-off between efficiency and fairness is not essential to reaching the goals each group seeks.[3] To the contrary, the two analytic perspectives must ally themselves to ascertain what states are optimal for society to choose, from both fairness *and* efficiency criteria. This does not imply that the inquiry should be about efficiency or fairness separately, and then struggle to determine which compromises between the two are best for society. What this article shows is that for any society, fairness and efficiency concerns yield a multiplicity of options that satisfy both of their respective criteria. One can either determine which of the possible states of the world are the most fair and then select the most efficient from among them or one can seek to determine which of the possible states are the most efficient and then select the most fair.[4]

As explained thus far, one might surmise that the choice is the same regardless of the approach taken.[5] There is, however, a conundrum that

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[3] It is not only the deontologists and the law and economic scholars that have held the view of an unavoidable trade-off between efficiency and fairness; economists have also held it as well. *See, e.g.*, ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975), discussed *infra* at note 124 and accompanying text. Economics has provided the theoretical underpinnings of both the law and economics movement and its critics in the legal arena.

[4] It is important to note, given the controversy generated by Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001), that the definition of fairness used here is the more generic, broad-based one and not the more specialized concept that Kaplow and Shavell use. *See infra* text accompanying notes 137-154. Harvard Law Review chose to publish the authors' book in its entirety in one issue of the journal. The citation of the book is LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (Cambridge: Harvard University Press, 2002). The page references herein are to the journal issue.

[5] It is not difficult to see that there will be fair choices that are efficient. Using the Pareto criteria, discussed at text associated with *infra* notes 90-97, assume you have a state of the world that is deemed fair. It is not efficient. By definition, if it is not efficient that means it is possible to rearrange the distribution of goods, rights and other concerns so that at least one person feels better off and no one else feels worse off. This takes into consideration all aspects of people's sense of well-being, both before and after the distribution. Since this latter state exists (because of the assumption that the initial fair distribution was not efficient) this redistribution would be preferred over the initial one. As explained at *infra* notes 90-97, such re-distribution can continue until reaching a state that is both fair and efficient.

prevents the existence of one, unique optimal choice. Though it has been recognized in a variety of contexts, either explicitly or implicitly, that a proper efficiency analysis will lead to a multiplicity of possible efficient choices, it has not been adequately recognized that fairness analysis also leads to a multiplicity of "fair" choices—the differences among them largely depending on the values of the particular decision-maker. This means that just as efficiency analysis leads to multiple options, so do fairness concerns. Using the twin criteria of efficiency and fairness will not yield necessarily a unique choice but more likely a subset of choices from the overlap of the set of efficient and the set of fair possibilities. The choice of which state actually to pursue from this smaller subset becomes a "political" choice because the "optimal" choice depends on the decision-maker's own subjective evaluation.

This article will discuss how to refine the set of choices that are both "fair" and "efficient" in order to limit the "political" aspect of the decision to remain within the boundaries of what is, by social consensus, fair. This article proposes a concept of "parameters of fairness" to bound the range of acceptable efficient choices to stay within the scope of fair choices. The concept and set of the parameters of fairness are drawn from notions of fairness that have evolved from our jurisprudence over time. Just as the set of efficient choices is bound by the parameters of fairness, however, viewing the process the other way, that is, selecting first the fair choices based on the parameters of fairness and then selecting the efficient ones from that set, bounds the fair choices to those that are also efficient. Heuristically, whichever approach is taken, the set of possible optimal choices for society should be the same and the extent of the political aspects would be the same as well. This article argues that this process represents the maximization of welfare from both efficient and fairness viewpoints. Though the process is still not determinative of a unique choice, it does yield a set of choices. The decision-maker's preferences determine which choice to pursue, and therefore, the decision is, in that sense, political.

In order to provide a specific example of how deontological and efficiency goals do not conflict but in fact support each other, this article examines a particular business law problem: the undue incidence of business harm inflicted on members of the community. Economic theory shows that businesses engage in cost-benefit reasoning to guide their decisions, a methodology of overt controversy both as a policy tool and a descriptor of private corporate behavior. Law and economic analysts strongly advocate cost-benefit's use because of its efficiency implica-

tions[6] while deontologists express consternation at the potential for unacceptable consequences.[7] Though the usual assessment by both sides is that any resolution to the disagreement must involve a trade-off between efficiency and fairness, this article shows otherwise. Applying the conjoined frameworks of fairness and efficiency criteria, this article demonstrates that the problem of undue business harm lies not with the cost-benefit approach but with the failure of the parameters of fairness to adequately consider the concerns of all members of the community. By turning toward deontological methodology, however, it is possible to expand the parameters of fairness to address the specific concerns raised by business harm and the use of cost-benefit reasoning without compromising the criteria of efficiency. The particular deontological methodology this article draws on is feminist jurisprudence's ethic of care. The focus is not on gender issues but rather on the methods to expand notions of fairness that feminism evolved. Employing feminist analytic techniques to redress the specific concerns of cost-benefit reasoning shows how an application of a deontological philosophy can extend the parameters of fairness to enhance social welfare overall. Moreover, expansions in the parameters of fairness further narrow the scope of the political aspects of decision-making without compromising efficiency.

Part I of this article presents the problem of harmful business conduct, noting how mainstream analyses have failed to resolve the concern satisfactorily. Suggesting that alternative approaches to legal problems may be of assistance, this section considers the literature collectively known as "outsider scholarship." Though generally developed to address the concerns of groups suffering discrimination, one field of outsider scholarship—feminist analysis—appears fruitful for adaptation to the problem of business harm. Part II gives an overview of the feminist method, in particular describing the concept of the excluded voice and the principle of the ethic of care for use later when proposing fair solutions regarding harm from business decisions that are also efficient.

Part III describes how the typical business structure lends itself to the possibility of undue business harm and when in the business decision-making process the potential for deleterious conduct arises. In particular, this section describes in some detail the business use of cost-benefit analysis to guide its profit-maximizing decisions and how decisions regarding risk of harm enter that process. Part III then continues with both the law and economics' arguments that the process reflects

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[6] *See, e.g.*, Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1037 (2000); Michael Abramowicz, *Toward a Jurisprudence of Cost-Benefit Analysis*, 100 MICH. L. REV. 1708 (2002).

[7] *See generally*, Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 971 (2000); Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEGAL STUD. 971 (2000).

society's choices on risk as well as the criticisms of those arguments. Part IV lays the foundation for the later application of the parameters of fairness. It describes the extent to which economic efficiency analysis contributes to enhancements of social well-being but also its limitations. Using Pareto efficiency criteria, this section explains why efficiency analysis necessarily leads to a multiplicity of efficient states, the most preferred selection from which Pareto analysis can offer no guidance. The indeterminacy inherent in Pareto criteria regarding which potential efficient state to pursue not only characterizes efficiency analysis's limitations but also delineates the scope for deontological choices in the decision process. This section also discusses efforts to reduce the indeterminacy through expansion of efficiency criteria and the reasons why such efforts nevertheless resort to some form of deontological choice to do so. There is a brief discussion with regard to recent efforts to improve the application of cost-benefit analysis specifically.

Part V more directly addresses the question of trade-offs between efficiency and fairness and argues that to the contrary, a decision regarding efficient states necessarily requires deontological decisions as well; those deontological decisions do not substitute for efficiency but compliment it. Part V also considers, in this context, the implications of the work of Kaplow and Shavell, which argues that fairness concerns should never enter as an independent factor when seeking to maximize social welfare. Part V shows that Kaplow and Shavell's conclusion rests on a narrow definition of fairness, one that has been stripped of all of its social-welfare enhancing properties. Though their definition of fairness does not comport with usual notions and purposes of fairness, their arguments nevertheless offer insights for defining the parameters of fairness. Part VI presents the concept of the "parameters of fairness" and discusses how they coalesce with efficiency criteria to enhance social welfare overall. In particular, the section discusses the parameters of fairness's role in social choices as well as in private decision-making. Part VII gives a specific example of expanding the parameters of fairness to address certain problems in cost-benefit criteria by considering a particular deontological approach, feminist jurisprudence. This part presents how feminist techniques can address particular social concerns for general consideration as well as demonstrate how feminist methods can address the particular concern of undue business harm. Throughout the analysis it is clear that efficiency goals have not been compromised but fairness goals have been advanced in a manner that enhances social welfare overall.[8] A conclusion follows Part VII.

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[8] Other scholars have proposed possible synergies between feminist and law and economic theory. *See, e.g.*, Douglas A. Kysar, *Feminism and Eutrophic Methodologies*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS (Martha A. Fineman & Terence Dougherty eds., 2005)

I. HARMFUL BUSINESS CONDUCT

A. MAINSTREAM ASSESSMENT

There is no question that legal and policy conundrums regarding business often defy happy resolution by traditional analyses. Many conundrums make their appearance in the course of conduct by corporations or other business entities that inflict harm on community members. Examples are victimization wreaked upon consumers,[9] neighbors to the production process,[10] employees,[11] or investors.[12] Sometimes the victim is society as a whole, as when the environment is harmed[13] or large numbers of employees lose their jobs or investors their savings.[14] Resolutions to avoid these harms or provide adequate compensation often seem elusive. Legal hurdles to prove legal causality and liability[15] and lack of business assets prevent injured plaintiffs from being compensated.[16] The nature and direction of economic growth is predominately dictated by

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(demonstrating how law and economics can be useful to feminist analysis); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. FOR SOC. JUST. 457 (2002) (combining feminist analysis and law and economics to address corporate issues).

[9] The drug Diethylstilbesterol (DES) was administered to pregnant women to prevent miscarriages, but it also caused cancer in many of the female children who were born to these mothers. Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

[10] Children and others allegedly died of leukemia and other illnesses after exposure to toxic solvents from nearby manufacturers that leaked into the municipal water wells. Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1222 (D. Mass. 1986), *aff'd sub nom*, Anderson v. Cryovac, ,Inc., 862 F.2d 910 (1st Cir. 1988); *see also In re* Union Carbide Corp. Gas Plant Disaster at Bhopal India, in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986) (prevailing winds blew a toxic gas leak from a plant into a densely populated area resulting in at least 2,100 deaths and over 200,000 injured).

[11] Employees were exposed to hazardous conditions caused by noxious chemicals at their place of employment. Blakenship v. Cincinnati Milacron Chem., Inc., 433 N.E.2d 572 (Ohio 1982), *cert. denied*, 49 U.S. 857 (1982).

[12] A $50 billion write-off by Worldcom in 2002 due to manipulation of reserves and overstated earnings during the previous three years caused Worldcom's shares to drop from $65/share to mere pennies causing investors to lose hundreds of millions of dollars. *See In re* WorldCom, Inc. Securities Litigation, 294 F. Supp.2d 392, 398, 401-02 (S.D.N.Y. 2003), *cert. denied*, Fed. Sec. L. Rep. P 92, 616 (S.D.N.Y. 2003).

[13] *See, e.g.*, Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U.L. REV. 115 (2004) (discussing why private industry fails to protect against environmental consequences such as destruction of wetlands, the ozone layer, and clean water).

[14] The collapse of Enron share value from $90 to $0.60 not only caused investors to lose $63 billion, but over 4000 employees lost their jobs and, as 60% of their retirement pensions were invested mandatorily in Enron stock, they lost most of their retirement funds as well. William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1276-77 (2002). *See also* Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394 (2004).

[15] Plaintiff could not identify which of the defendant DES manufacturers produced the drug plaintiff's mother took that caused plaintiff's cancer. *Sindell*, 607 P.2d at 926.

[16] For example, Johns-Manville Corporation filed for bankruptcy protection, despite the fact that it was solvent, to avoid paying damages arising from asbestos litigation. *See* Lee Ann Flyer, Comment, *Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of*

businesses through the workings of the marketplace unconcerned with social harms, raising the question to what extent the government should take control.[17] Should the role of government be anticipatory through regulation or compensatory in its consideration of such harms? What criteria should enter the assessment?[18]

One widely used technique to evaluate government policy and business decisions is cost-benefit analysis, which fashions measures of economic benefits and weighs them against some measure of costs. If the benefits as measured outweigh the costs, cost-benefit analysis approves a particular business endeavor or government program.[19] The negative dimensions of those decisions are realized when the costs are suffered, whether socially, environmentally, or by individuals. Though policymakers may decide that society is better off on balance—despite the costs—with a particular course of action, whether by business or government, others express unease with the drawbacks cost-benefit analysis seems to dictate: unredressed personal or financial harms, unemployment and permissible environmental damage, to name a few. The concern indicates a deep reservation as to the validity of the choices cost-benefit analysis makes.[20]

When business scholars, whether in law or economics, are confronted with questions regarding the consequences of de facto permitted harmful business conduct, the response is often not very satisfactory. When the traditional tools of analyses—whether legal, economic or "law and economic"—do not provide some ready resolution to the objections, it seems to many outside the discipline of business scholarship as if the business scholars retreat to a position of advocating the negative conditions as an inevitable cost of overall economic welfare and a necessity of a fair and objective legal system. One can observe some business schol-

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the Bankruptcy Act as a Shield Against Massive Tort Liability? 56 TEMP. L. Q. 539, 543-44 (1983).

17 *See, e.g.*, BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984) (discussing the shift in perspective from one that government should take only a "reactive" stance to complement private market activities to one that government take an "active" stance and regulate market activities). Enron spent millions of dollars and successfully lobbied officials throughout the country for energy industry exemptions from the Securities disclosure laws that allowed it to hide the growing liabilities that ultimately caused its collapse. *See* Bratton, *supra* note 14, at 1279-80.

18 *See* Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675, 679 (2003); Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 682 (1999) (noting a consensus that "incentive-based instruments such as taxes and tradeable allowances should generally be chosen over technology requirements and fixed emissions standards").

19 *See infra* notes 64-68 and accompanying text.

20 *See, e.g.*, Calvin Terbeek, *Love in the Time of Free Trade: NAFTA's Economic Effects Ten Years Later*, 12 TUL. J. INT'L & COMP. L. 487 (2004).

ars actually justifying or applauding negative consequences as a sign of healthy growth and a balanced system of justice.[21]

One might suspect that such repose or exaltation in the face of such dismal impacts may be the result of frustration with a framework of legal and economic analysis that offers no resolution for these problems. Certainly there has been a spate of renewed interest in examining the criteria by which policy-makers make their decisions regarding trade-offs between benefits and harms of any particular course of action.[22] Though many business scholars work diligently to discover some aspect or tool within the framework that will permit reducing harmful consequences, the forthcoming nature of such solutions is open to question. Though the current search for optimal, objective, decision criteria to maximize social well-being or to achieve an ideal of justice in the face of trade-offs is far from concluded, the current trend of insights is not unfolding propitiously. Though these inquiries seek to respond to objections raised against traditional law and economic evaluations of both public and private cost-benefit choices over the last few decades, nevertheless the current efforts leave an uneasy feeling of déjà vu—that once again the endpoint will be inconclusive as to what constitutes a satisfactory "objective" approach to social choice and just ends. This provokes the question of whether a different framework can offer perspectives for possible solutions that pursuits along more traditional lines have thus far not yielded.

B. "OUTSIDER SCHOLARSHIP"

One interesting set of candidates for alternative frameworks of analyses is the group of approaches known collectively as "outsider scholarship," as well as their predecessor, critical legal studies. The "outsider scholarship" consists primarily of feminist legal theory, critical race theory, and gay legal studies, all of which focus on particular groups who are viewed as outside the mainstream and whose concerns are not ad-

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21 "Under a common understanding of normative economic analysis, legal rules are assessed by reference to wealth maximization or efficiency, criteria that many construe as omitting important aspects of individuals' well-being and as ignoring distributive concerns." Kaplow & Shavell, *supra* note 4, at 968 (stating that their approach is more comprehensive). "Myron Magnet, a reporter for FORTUNE, typified the attitudes of many when he commented: "Yes, many jobs are disappearing, and workers who thought they were set are having their lives painfully disrupted and their earnings cut through no fault of their own. Yet it's worth remembering . . . that 'the process of job destruction is a very normal process of the economy.'" Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L. J. 1, 4 (1993). Such statements reveal resignation and obeisance to the workings of the "invisible hand" of the market."

22 *See, e.g.*, Kaplow & Shavell, *supra* note 4, at 968; *see also infra* notes 108-23.

dressed by the social norms.[23] Their candidacy seems potentially fruitful because their focus is on the disenfranchised and how to both recognize and address the disenfranchisement.

The complaints regarding decision-making criteria for business conduct focus on the inadequacy of protection or redress for victims of business harm. In effect, the concern is the disenfranchisement of those victims, though the victims do not necessarily belong to any discrete social group. To the contrary, victims of business harm can cross all social and economic boundaries. Though outsider scholarship tends to focus on some particular discrete social group, that does not mean their techniques cannot be usefully applied to other contexts of disenfranchisement.

These alternative fields of endeavor, however, have paid rather limited attention to business law issues directly. Critical legal studies' focus has been to criticize mainstream legal analysis, including "law and economic" analysis, for its efforts to find and define objective legal standards that guide judicial decisions. Critical legal studies' attention has been primarily on demonstrating that, despite the wishes of mainstream analysis, law is inherently indeterminate and therefore cannot be objective; to the contrary, law functions to disguise or empower the social elites' domination of those not in the elite group.[24] Thus they eschew any efforts to have determinate outcomes. This is in significant contrast to most law and economic analyses.

Contributors to outsider scholarship primarily focus on the particular disenfranchised group of their concern. Critical race theory, in addition to criticizing critical legal studies itself for not addressing or meeting the needs of ethnic minorities, examines ways in which the legal climate discriminates against minorities and how it undermines efforts to overcome that discrimination.[25] Gay legal studies seeks to define what legal imbalances face gay men and lesbians.[26] Only feminist theory, while similarly engaged in issues concerning the plight of women, has made more than a passing effort to expand its analytical frontiers to issues that

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[23] *See, e.g.*, Anne Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995); Francisco Valdes, *Afterward – Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999).

[24] MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3-4 (1987). Critical legal studies scholars were particularly vociferous with regard to the indeterminacy inherent in law and economics as law and economics analysis gained ascendancy in the legal community. *See, e.g., id.* at 141-50.

[25] *See generally*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARV. C.R.-C.L. L. REV. 301 (1987); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

[26] Kim Brooks & Debra Parkes, *Queering Legal Education: A Project of Theoretical Discovery*, 27 HARV. WOMEN'S L. J. 89 (2004).

do not focus on questions of gender discrimination. Indeed, there have been a number of articles over the past decade or so in which feminist and non-feminist scholars apply feminist principles to issues regarding business law.[27] For the most part, however, the extent to which any jurisprudence has had a significant influence on business law issues, it is the law and economics approach which has controlled that terrain.[28]

As is well noted, however, by both those within the feminist framework and those with a law and economics perspective, there has long been a distrust between the two groups of scholars, one (law and economics) perceiving the other (feminists) as lacking in serious rigor,[29] the other seeing the former as at best failing in human compassion.[30] More significantly, each group has historically been identified as having their political origins and motivations at opposite ends of the political spectrum, with the law and economics scholars traditionally considered politically conservative while the feminist scholars viewed as aligned with liberal, left and radical political perspectives.[31] Regardless of the conten-

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27 Examples of early notable efforts by feminists to apply feminist concepts to business law issues are Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1, 6 (1994) and Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1415 (1992). *See generally*, Ramona L. Paetzold, *Commentary: Feminism and Business Law: The Essential Interconnection*, 31 AM. BUS. L. J. 699 (1994); Leslie Bender, *Feminist (Re) Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L. J. 848 (1990). The earliest application known to this author is Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L. J. 543, 554 (1985).

28 "When [law and economics] ideas were produced . . . business oriented people found their voice . . . ." Douglas G. Baird, *The Future of Law and Economics: Looking Forward*, 64 U. CHI. L. REV. 1129, 1144 (2003) (Posner, J., Symposium).

29 See, for example, the defense by Judge Posner, one of the foremost proponents of law and economics movement, to the criticism that he is critical in his book, OVERCOMING LAW (1995), of leading feminist scholars because they are women. He asserts he is critical of them not because they are women but because they are not "analytical" philosophers or not "engaging the rational intellect" or whose work has an "uncertain relationship to fact" or he disagrees with their evaluation of scientific evidence. Richard A. Posner, *Response to Clark Freshman, Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1610 (1995).

30 For cogent feminist criticisms of the law and economics efficiency debate, see Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L. J. 783 (2003); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (A Particular Type Of) Economics*, 64 U. CHI. L. REV. 1197 (1997); Marianne A. Ferber, *The Study of Economics: A Feminist Critique*, 85 AM. ECON. REV. 357 (1995). For a fairly scathing attack on the use of law and economic reasoning, see Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1998).

31 *See* Gary Minda, *The Jurisprudential Movements of the 1980's*, 50 OHIO ST. L. J. 599 (1989). Similar sentiments have also been expressed by other outsider scholarship. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L. J. 1757 (2003).

tiousness between the two groups and the perceptions of those outside these groups, there is no question that both law and economics and feminist theory have fundamentally transformed the way American legal issues are addressed, albeit mostly in different areas of law.[32]

It is unfortunate that two such powerful analytic tools have been precluded from taking advantage of the insights the other has to offer.[33] It has been demonstrated in a variety of contexts that law and economic reasoning is not necessarily tied to a particular political perspective and, in fact, can serve other viewpoints equally well.[34] Similarly, the efforts by scholars to apply feminist principles to non-feminist concerns such as business law, demonstrate that feminist analysis is not inherently solely about women's issues.[35]

Thus one outcome of this article is to suggest how an "outsider" methodology, feminism, may assist law and economic reasoning on issues that law and economics seems unable to resolve on its own. Similarly, the hope here is to suggest that the tools law and economics scholarship has developed in the legal arena over the last 40 years can serve feminist values and goals as well.

II. INTRODUCTION TO THE FEMINIST METHOD

Anyone familiar with the advent of feminist thought knows that its focus is on the concerns of women. One might suspect, therefore, that

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32 Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV.129, 139-47 (2003); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1338 (2002); Richard A. Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 U. CHI. REV. 1167 (1997).

33 A number of scholars have noted the potential of combining law and economics with feminist analysis in a variety of contexts, often coupled with Critical Legal Studies and other outsider scholarship. *See generally*, Edward L. Rubin, *supra* note 1; Gary Minda, *supra* note 31; Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017 (1992). More recently, Barbara Ann White, *Feminist Foundations for the Law of Business: One Law and Economics Scholar's Survey and (Re)View*, 10 UCLA WOMEN'S L. J. 39 (1999) and Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for "Critical Legal Economics,"* 2003 UTAH L. REV. 1155 (2003) have raised the issue again.

34 For early demonstrations that value choices in law and economic analysis can traverse the political spectrum, see Robin Paul Malloy, *Equating Human Rights and Property Rights – the Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L. J. 163 (1986); Jeffrey L. Harrison, *Egoism, Altruism and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309 (1986); Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577 (1987) and subsequent works by those authors. Recently, there has been an increased interest by law and economics scholars in the role of value choices. *See* Claire A. Hill, *Law and Economics in the Personal Sphere*, 29 LAW & SOC. INQUIRY 219 (2003) and references therein; Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998).

35 *See* Sara Dillon, *A Farewell to "Linkage": International Trade Law and Global Sustainability Indicators*, 55 RUTGERS L. REV. 87, 146-49 (2002); *see also infra* note 59.

any contribution feminist thinking might offer business law would be on those aspects of business that affect women's lives. Not as well known, however, is that feminist thinking has developed and embraced techniques of analysis that are quite different from traditional legal approaches. This unfamiliarity with feminist analytic technique contrasts significantly with the broad-based familiarity among legal analysts with law and economic reasoning.[36] Admittedly, the feminist techniques evolved because mainstream analysis repeatedly failed to address satisfactorily the issues of women with which feminists were concerned. Nevertheless, the original motivation does not preclude the emergent analysis from serving useful purposes in other venues as well.

The stimulation for feminists to develop different techniques was the realization that mainstream analysis would always fail to illuminate dilemmas of gender because inherently it marginalized women. In the process of unveiling this marginalization, intellectual investigations gave rise to more revelatory analytic approaches. Though these techniques were designed to focus on gender concerns, their power of analysis is quite strong and, as is suggested here, can be extremely useful for non-gender issues.[37] What follows is an overview of certain feminist techniques[38] in order to demonstrate in later sections how feminist analysis can give a different insight into some of the difficult recurring problems in business law.

A. THE "EXCLUDED VOICE"

One of the most significant analytic contributions of feminist thought is its use of the "excluded voice."[39] This notion arose in response to feminists' recognition that mainstream analytic frameworks, which purport to be objective, are in fact biased in favor of the perspective of those in power. In particular, the concept of the "excluded voice" demonstrates how the legal system's administration of justice fails to consider the subjective experiences of those without power. The legal system seeks to achieve justice among and between the members of the power group according to the group's own sensibilities. The system, however, applies the same resulting standards to those outside the power

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36 Hanson & Yosifon, *supra* note 32, at 270-79; Epstein, *supra* note 32.

37 "In fact, feminist jurisprudence now provides analytic tools that can be applied to virtually any legal subject or approach." Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 3 (1995).

38 There are a number of excellent articles detailing the conceptual underpinnings of feminist jurisprudence. The discussion of the concepts here is drawn primarily from the following articles: Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

39 Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993).

group, the "other," whose characteristics are different and whose sensibilities do not fit the power group's legal mold. As a result, the legal system's notion of fairness and accountability proves to be subjective to the power group rather than objective as it claims, and justice is not achieved for everyone.

The effectiveness of "excluded voice" analysis is evident, for example, when critiquing traditional notions of non-statutory rape liability. A man offers as his defense for his act of rape that the woman was "asking" for it through her style of dress or provocative conduct. Historically, determinations of the man's guilt were based on whether it was reasonable for him to perceive consent.[40] The fact that from the woman's perspective, she was held down, perhaps beaten, and physically penetrated against her will, did not hold great weight in the evaluation of the guilt or innocence of the male defendant. If justification could be found for the man's professed perception, his conviction was highly unlikely. And, as history shows, the social as well as legal atmosphere skewed deliberations in favor of finding the man's perception as justified. ("Boys will be boys"; the wish not to ruin the male's career because of a moment's "indiscretion".). By basing the evidence and judicial determination on the validity of the man's seeming perspective, the woman's subjective experience of being raped was lost. Justice was meted out not based on what harm transpired against the woman, but instead on an analysis of the man's state of mind—with great deference paid to it as the "objective" truth.[41] Thus justice did not consider the woman's subjective harm in its equation, the woman became the "other" and her experience became an "excluded voice." This legal attitude, of course, had social implications as to the mode of care or indifference a man felt compelled to adopt when determining if the woman he was penetrating was in fact consenting to it.

Woman's excluded voice arises in a variety of arenas, aside from the obvious one of rape. Sexual harassment, domestic violence, financial equity in divorce, childcare, healthcare, and job opportunities all represent areas in which historically the woman's voice—her experience and perspective—has been excluded.[42] As a result, feminists have evolved a variety of means to include that voice.[43] One is to raise the

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40 *See* SUSAN ESTRICH, REAL RAPE 29-41 (1987).

41 This was accomplished under the rubric of mens rea. Subjective awareness is a prerequisite for criminal culpability, at least for serious crimes. Some women have suggested therefore that negligence is a better standard. *See generally* Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

42 *See generally* Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181 (1994).

43 Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989).

conscience of the decision-makers by having the woman tell her story in the decision-makers' forum—"consciousness-raising" through the use of "narrative."[44] A second is to recognize inequalities in the balance of power between those whose voice is dominant and those whose voice is "excluded" and to take steps to equalize that imbalance in the decision process.[45] An example is a health care policy that affords women pregnancy-related protections at their place of employment that leaves them in the same position as men with respect to career advantages.[46] A third approach is to engage in "context analysis," that is, to evaluate disputes in the full context in which they occur rather than on the basis of abstract notions of neutrality to determine "fair" action.[47] For example, the legal standard that permits an individual faced with the threat of violence to defend only with a physical force no greater than that threatened, ought to change in the context of a 110 pound female facing battery with fists by an abusive partner twice her size.[48]

Of course, the desire to include the excluded voice relies on the decision-maker's conscience to value equally the well-being of the woman with the rights of the man. It is quite possible, however, that the decision-maker him- or herself is biased in favor of the dominant voice; in the gender context, that would be a bias in favor of the man. The feminist ethic of care, another important contribution, addresses that concern.

B. THE "ETHIC OF CARE"

The "ethic of care" arose from feminists' consternation with the social tolerance for unacceptable levels of harm arising from gender bias. Frustrated by the mainstream attachment to notions of "neutral" treatment for all individuals despite the resulting real suffering by women,

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[44] Bartlett, *supra* note 38, at 863-67; *see also* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U.L. REV. 589 (1986).

[45] It is the recognition that the male "voice" (or perspective) dominates the mainstream legal framework that leads feminists to the analysis of patriarchy and hierarchical domination. "In order to become dominant, a discourse . . . must exert control over the concepts and ideas that are understood to be the foundation of the area. Language is the medium . . . ; the ideology and assumptions underlying it are bought or sold by those with the ability to validate one discourse over another." Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 736 (1988). *See also* Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1 (1994).

[46] *See, e.g.*, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989).

[47] *See generally* Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991).

[48] Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 377-78 (1996).

many feminists concluded that the willingness to tolerate harm to women was an outgrowth of the ethical values at the core of traditional standards of conduct. Feminists argue that mainstream thinking is obsessed with a "rights-based" sense of justice that abstracts unmercifully from the context within which real individuals operate.[49] ("The law denies equally the rich and the poor the right to sleep under the bridge."[50]).

The ethic of care is an alternative moral philosophy that is needs-based and guides community decisions according to differences among individuals.[51] For example, workplace health care policies that accommodate differences in gender are easily justified under notions of fairness guided by an ethic of care, though less so under a rights-based sense of justice. The ethic of care seeks equality of well-being suggesting health care should meet the medical needs of both women and men though their needs are different, whereas a rights-based ethic suggests that a fair health care policy is one that is the same for all employees. The practical difficulties of a rights-based approach became clear when women entered the workforce in greater numbers and at higher professional levels during the late 70's and 80's.[52] The policies in place reflected the needs of men, the dominant gender, with the needs of the other going unmet. At that time, the rights-based response to complaints by women, the "excluded voice," was that both genders had the same health care policy and the complaints were demands for "special" treatment.[53]

The rights-based perspective could not recognize that health care policies in place were already tailored to the needs of men, thus in effect giving them, the dominant gender, "special treatment."[54] Any tailoring for the non-dominant gender, women, was seen as violating the rights-based concept of *equal* treatment which, within its framework, is defined as the *same* treatment for all.[55] In contrast, since the ethic of care's no-

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49 *See, e.g.*, Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373 (1986).

50 "The law, in its majestic equality, forbids the rich as well as the poor to beg in the streets, steal bread, or sleep under a bridge." JOHN BARTLETT, FAMILIAR QUOTATIONS 802 (14th ed. 1968) (quoting Anatole France).

51 Scales, *supra* note 49.

52 Findley, *supra* note 46.

53 That is the implication of Justice Stewart's majority opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that a state insurance program excluding normal pregnancy from disability coverage did not violate the Equal Protection Clause because exclusion treated men and women equally).

54 *See id.* at 497 (Brennan, J., dissenting) (noting that the state insurance program covered, among other disabilities, ones that are voluntary, *e.g.*, *cosmetic*, and prostatectomies – a disability a woman will never experience).

55 *Id.* ("The appellee . . . contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she has encountered a risk that was outside the program's protection . . . [W]e hold that this . . . is not . . . valid . . . under the Equal Protection Clause . . .").

tion of equality is based on a sense of well-being rather than a doling out of rights, equality in health matters constitutes responding to each gender's specific needs by a policy that contains *equality of tailoring* in its design.[56]

The ethic of care is properly named because it relies on the decision-makers' compassion and empathy for "others" in recognizing and determining what is fair and just. Of course, there is no guarantee that the decision-makers will feel this sense of compassion. Hence, feminists suggest efforts to foster compassion to support an ethic of care, for example, education emphasizing recognition and acknowledgment of "others" thereby raising consciousness regarding differences among individuals as well as groups. Communities should cultivate a sense of "connectedness" with "others," so that all will experience individuals different from them as equally a part of their society and as deserving to have needs met.[57] Moreover, techniques mentioned earlier for including the "excluded voice" foster the ethic of care as well: consciousness-raising through the use of narrative, correcting imbalances of power, and understanding individuals in the full context of their experience all serve to raise levels of compassion and empathy for the "other." Diversity in the decision-making body and throughout the organization serves these ends as well.

Of course, in the bulk of the work done by feminists, the "other" is the female, the encouraged sense of "connectedness" is between the genders, the different needs to be met are the concerns of women and the balance of power to be equalized is between the sexes. Much of feminist philosophy, however, also seeks to extend this sensibility for all members of society and aspires to have the ethic of care at the center of the legal and socio-political system as a whole.[58] The feminist belief is that

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[56] *See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); *see also* Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. J. 375, 426-42 (1981).

[57] "*Connectedness* is increasingly recognized as an important principle within the ethical framework. . . . Stemming directly from . . . feminist . . . philosophical principles, the notion of *connectedness* is that decision-making and personal actions must take into consideration not only the decision-maker, but also other persons and events associated with the decision-maker. While making decisions in a detached manner may foster great objectivity and impartiality—the hallmarks of principle-based decision-making—it can also lead to decisions and actions that ignore the broader impact of those actions and decisions on loved ones, family, community, and even society at large." Greg Koski, *Risks, Benefits, and Conflicts of Interest in Human Research: Ethical Evolution in the Changing World of Science*, 28 J.L. MED. & ETHICS 330, 331 (2000).

[58] *See generally* Lahey & Salter, *supra* note 27. *See also* Cohen, *supra* note 27, at 6; Paetzold, *supra* note 27. More recently, the new Socio-Economics movement has adopted similar goals and some feminist writers in business law have joined forces there. Law and economics scholars with a more politically liberal approach than the traditional Chicago School perspective have also participated. *See generally* Symposium, *Teaching Law & Socioeconomics*, 41 SAN DIEGO L. REV. 1 (2004), with contributions by June Carbone, Robert

a society so constructed will provide a richer and more supportive environment in which all people can live more satisfactory lives.

III. ETHICS IN THE DECISION PROCESS OF BUSINESS

Given the hopes of many feminist writers—that the compassionate insight of the feminist perspective be included in the core of society's values—it is not surprising that some of those scholars have turned their attention to an essential dimension of our society: the business environment. One critical aspect which authors focus on is the harm that enterprise conduct inflicts. The feminist critiques of these harms ask why decision-makers make the choices they do and why the legal and political system permits and even often supports them doing so. Primary attention is given to the standpoint of the decision-makers themselves and what in the business environment induces these individuals to elect activities that produce such levels of harm. At the heart of feminist analyses is the belief that the willingness to undertake activities which can have dire consequences for some stems from the absence of the ethic of care in the foundation of business law and policy structure.[59] The question feminists then ask is: why is that true and what might remedy it?

A. DILUTION OF RESPONSIBILITY

The nucleus of the business enterprise consists of a decision process that is fragmented, in which the recipients of the benefits or the sufferers of the consequences of enterprise activity are distinct from those who set enterprise policy. As a result, management, whose efforts aim to maximize profits, do not themselves bear a personal relationship with the outcome.[60] The benefits of management's actions accrue to the owners, usually shareholders, who typically select the managers but who generally do not participate directly in enterprise decisions or know the origins of their benefits. The harmful consequences of enterprise conduct, however, fall by and large on entirely different individuals or groups who have little or no say regarding business decisions: consumers, employees, and neighbors to the physical location of the enterprise, all suffering

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Ashford, Lynne Dallas, Thomas Ulen, Edward Rubin, Jeffrey Stake, Kenneth Dau-Schmidt, Ellen Dannin, Timothy Canova, Claire More Dickerson, Katherine Stone, Margaret Brining, Richard Gershon, Charles Pouncy, Willima Black, and Jeffrey Harrison.

[59] For example, refer to the work by Kathleen A. Lahey , Sarah W. Salter, Ronnie Cohen, Ramona L. Paetzold, June Carbone, Lynne Dallas, Ellen Dannin, Claire More Dickerson, Katherine Stone, Margaret Brining, and Willima Black, *supra* note 58.

[60] It is important to make a distinction between corporate management decisions regarding the company for personal gain at the expense of others, such as the criminal activity of those indicted in the Enron scandal and decisions made for corporate gain. For an excellent description and analysis of the theoretical and legal implication of Enron's downfall, see Macey, *supra* note 14.

from the toxic effects of the production process. Even today, as holding one's life-time savings in stock is more feasible among a broader cross section of society, a demarcation has emerged between the few shareholders who are corporate insiders with ties close to management and the remaining "outsider" shareholders, where the former influence business decisions to their own benefit leaving the latter to suffer the fallout.

The resulting fragmentation in the decision process induces each of the decision-making groups to focus myopically on their own relatively narrow goals. The shareholders focus on their dividends and the growth of their shares' market value. The managers, whose compensation and continued position are determined by the company's performance, focus on maximizing profits to generate those large dividends and induce increased shareholder value. The recipients of the harmful fallout—the consumers, the employees, the enterprise's neighbors, and on occasion, the outsider shareholders—for the most part do not participate in the decision process.[61] Thus, nothing inherent in the decision structure insists on including a full awareness of the potential harmful effects on the "others." It is not difficult, therefore, for the shareholders and the managers, each concerned with their own narrow aspect of the business' functioning to shut their eyes to the larger, more global impact of enterprise undertakings.

Furthermore, the consumers, employees and neighbors are fairly powerless to affect these decisions that will ultimately affect them. Admittedly labor unions, environmental collectives and such have afforded some groups a measure of protection, but most members of society are at the mercy of the business decision process.[62] For the most part, people do not even know the course of actions chosen or the potential harm to which they are put at risk until after consequences have occurred.[63] Even then, the primary avenue of recourse open is to seek remedies after the fact through lawsuits, a recourse fraught with hurdles and barriers.

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61 For a general description of the functioning of a corporation, see ROBERT HAMILTON & JONATHAN MACEY, CORPORATIONS (8th ed. 2003). With regard to the conduct of corporate insider shareholders to the disadvantage of outsider shareholders, see *supra* note 60.

62 Some European countries require that unions and representatives of constituencies other than those of the shareholders be on the board of directors for these reasons. *See, e.g.*, Larry Fauver & Michael Fuerst, Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards (2004) (University of Miami) (on file with author) (empirical analysis demonstrating that presence of labor on Boards increases firm value and improves corporate governance).

63 This was most notably apparent in the Enron scandal, when employees aligned themselves with shareholder interests by investing in Enron shares, and yet still victimized by the corporate insider shareholders. *See supra* notes 14 and 60.

B. THE BUSINESS COST-BENEFIT PROCESS, THE MORALS OF THE MARKETPLACE, AND THE CRITICS

The impact of business decisions suggest an inherent inadequacy in the consideration of the harm to victims when evaluating the gains to the beneficiaries. A feminist approach would strive to integrate the harm's proper weight and see as essential to that end imbuing the decision environment with the ethic of care.[64] It is useful, however, to consider first the law and economics' assessment of the firm's decision-process and its capacity to yield outcomes that mirror society's values. Hopefully, the law and economics framework can facilitate the goals of a feminist approach.

As many law and economic scholars have long asserted, the most common and effective technique to evaluate decisions is cost-benefit analysis, which assesses the costs and the benefits of any particular undertaking from the perspective of the decision-maker. From the firm's point of view, in seeking to maximize its profits, this evaluation of any particular venture is based on what revenues the firm expects to receive (the benefits) and what expenses it anticipates incurring (the costs). By comparison, a cost-benefit analysis engaged in by a social policy-maker for the purpose of maximizing society's welfare may not appraise factors in the same way as the firm, even if using the same process to make the decision. In order to compare meaningfully the firm's optimal decision with regard to risk with that of society's, it is important to understand the components of the firm's cost-benefit evaluation.

Included in the firm's assessment of benefits and costs is a consideration of the risks and uncertainties in both factors: the variability in both the potential revenue and the potential expenses. The management's appraisal of the impact of uncertainty in these elements is based on the firm's experience and its assessment of future possible outcomes. As demonstrated in other contexts,[65] the most effective method of appraising the uncertainties in these factors is to weight each potential revenue or cost by its probability of occurring. In the simplest of cases this means to multiply each potential revenue stream by its probability of occurring and then sum those results and multiply each potential cost by its probability of occurring and sum those results. These calculations generate an "expected" revenue and an "expected" cost, though it is "expected" in a mathematical sense not in a literal sense.[66]

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[64] *See supra* note 59.

[65] *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877-87 (1998).

[66] Suppose, for a simple example, the reader joins a game of coin toss. The rules are: if the coin turns up heads the reader receives $5.00, if the coin shows up tails the reader receives nothing. Assuming a "fair" coin (one which comes up heads ½ the time and tails ½ of the

The decision process involves weighing the sum of the "expected" benefits against the sum of the "expected" costs or, from the firm's point of view, the expected revenues against the expected expenses.[67] If the expected revenues exceed the expected expenses then the venture is worth risking undertaking as it is more likely to prove profitable than not. If there is more than one potentially profitable venture under consideration, the firm will undertake the most likely profitable first and continue to select business ventures in the rank-order of their expected profitability, limited by the firm's available resources.[68] In this manner, the firm uses cost-benefit analysis to maximize its profits, given its resources.

One core law and economics assertion is that the firm's cost-benefit process to maximize its profits generates choices that are also maximally beneficial for society as well.[69] Underlying that conclusion, however, is an implicit assumption that the criteria the firm uses to evaluate its costs and benefits are effectively equivalent to those society would choose in the same situation.[70] That is debatable, particularly regarding what constitutes acceptable risks and allocations of harm.

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time), then on average, the reader can expect to receive $5.00 half the time and expect to receive nothing half the time. The literal use of expectation in the previous sentence is not what is meant by the mathematical sense of "expectation." The mathematical expectation is calculated by multiplying each possible revenue by its probability of occurring and then summing the results. So in this instance, the mathematical "expected revenue" is: $5.00 x ½ + $0 x ½ = $2.50 + $0 = $2.50. Thus the managers would evaluate this "revenue" situation as having an "expected revenue" of $2.50 even though $2.50 is in fact never paid out. The reader only can receive either $5.00 or $0 but, over time and repeated plays of the game, what the reader receives averages out to $2.50, the "expected revenue" (or "expected benefit" in more general terms).

The mathematical expectation is equivalent or equal to what the reader would receive on average per game over time if he or she played the game repeatedly. However, the mathematical expectation is an equally valid notion even if the reader plays the game just once (or the firm undertakes the venture just once). This is because the mathematical expectation is the "mean" or averaging of all the possible outcomes. Thus the "expected revenue" (or expected benefit) is the average of the possible outcome weighed by their probabilities of occurring.

67 Once again, as in *supra* note 66, the expected cost is calculated by multiplying each of the potential costs by their probability of *occurring* and summing the result.

68 For readers more sophisticated in this kind of analysis, it should be clear that I am assuming risk-neutrality for ease of exposition—an assumption that is quite customary in such discussions as well as one that is quite reasonable in general as well as here.

69 The origins of this argument come from the original "invisible hand" theory of Adam Smith. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Modern Library 1937) (1776); ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS (Robin Paul Malloy & Jerry Evensky eds., 1994).

70 In particular, the Chicago School has often argued that the value of the costs and benefits to the firm are dictated by market prices and market prices efficiently reflect the relative preferences in society as a whole. That market prices adequately and accurately reflect social preferences is an often-criticized conclusion and the economics literature is replete with articles demonstrating how and when market prices fail to do so. Though market prices are a good indicator of consumer choices under a narrow range of circumstances, they are very heavily influenced by society's income distribution skewing preferences towards the wealthy.

Two arguments should be mentioned, however, that suggest that the firm's use of market prices in its cost-benefit calculations leads to decisions that also reflect society's preferences with regard to the particular venture. One argument points to the social values reflected in prices of goods and services because the market responds to consumers' preferences for particular products through the market's pricing mechanism. If consumers demand more of a good, its price tends to rise, stimulating producers to increase its supply; if a product falls into disfavor, its price will fall as well, causing producers to supply less. As long as consumer desires are strong enough to keep a good's market price above the cost of producing it, thereby allowing suppliers to make a profit, suppliers will keep supplying as much as is wanted by the consumers who are willing to pay for it. Thus the market efficiently reflects consumers' (and therefore society's) collective preference for goods by allocating productive resources to meet those needs and desires in the most effective way. In addition, the prices established in the market place reflect in a democratic fashion (that is, by consumers "voting" with their dollars) to what extent members of society value goods relative to their costs and relative to other possible goods. When a firm uses those market prices to evaluate the profitability of a venture, it uses a proxy of what society's evaluation would be of the venture's costs and benefits. Though the firm's eye is on its own profits, its calculations employ the market price evaluations a social policy-maker might elect to reflect community choices to assess any particular venture from society's vantage point.[71]

The second argument follows from the first and that is the threat of post hoc legal accountability adequately deters corporate decision-makers a priori from making socially unpalatable choices.[72] The deterrence argument reasons that since successful lawsuits lead to monetary judgments, businesses must consider possible profit reductions due to liabilities from any harmful fallout in the efforts to maximize profits. Therefore some ventures, which might be the most profitable without liability attaching, will prove less attractive when potential liabilities are

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Furthermore, market pricing does not address a broad range of circumstances when the market mechanism fails altogether (the private market's incapacity to provide national military defense is one most notable example) and it does not adequately respond to long range larger social decisions that need to be addressed at policy levels. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS ch. 1, 2 (4th ed. 2004).

71 *See infra* note 73.

72 There are a number of sources that a reader can turn to for more extensive, complex aspects of the deterrence theory approach as well as criticisms of it. The classic text is RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2003). The reader is also referred to STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004) and AVERY WIENER KATZ, FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW (1998), which includes a number of well-known articles both extolling and critiquing the conclusions made by the analysis presented here.

considered. Thus management will choose to forgo those ventures that are too risky or, in the alternative, they may choose to invest in efforts to reduce risk levels to maintain the venture's profitability.

Even in the instances when the marketplace gives no measure of harm, the firm is still forced to contend with a social evaluation of the harm's costs. For example, in instances of pain and suffering for which there is no market price beyond medical and therapeutic costs, jury judgments are an independent body's assessment of the monetary value of the harm. Since juries consist of members of the community, their decisions reflect a social evaluation. Thus, to gauge accurately what financial risks it is undertaking, a firm must consider the social perspectives of the benefits and costs, whether through market prices or some other community monetary assessments of harm. Therefore, deterrence theory concludes, the firm's private choice on risk in the end reflects society's public choice on risk. The conclusion thus is that firms responding to market forces as well as lawsuit threats will lead firms inexorably to optimal social welfare decisions, as society would define them.[73]

Critics of law and economics' commendation of the cost-benefit process often view the analyses as an intolerable justification of infliction of harm. Representatives of an entity make decisions that put not themselves but others at risk[74] with business profits and not social well-being in mind.[75] Such decisions are innately suspicious as to their advantage for society as a whole. The response of the traditional law and economics approach is: that is the appeal of the marketplace evaluation—its inherent neutrality. Market prices, jury judgments, are not established by the firm, they are established by members of the community on the basis of what they think is worthwhile. The fact that the firm's decision-makers keep focused on the financial bottom line impels them to use the community's evaluation of the benefits and harm. From the endpoint view of society, it should matter not who makes these life and death cost-benefit decisions; what matters is that the decisions comport with society's val-

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[73] Two seminal works that address the correspondence between the firm's decision to undertake risk and what the social norm is or should be are: WILLIAM M. LANDES AND RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) and STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

[74] Gabaldon, *supra* note 27, at 1425-27. Though not identified as feminist analysis, the critique of cost-benefit decision-making in Lisa Heinzerling's *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189 (2000) is quite sympathetic to the values of feminist thought.

[75] For an excellent analysis of how the concept of firms using the cost-benefit approach to determine whether it is more profitable to violate legal sanctions and risk paying penalties is disruptive to the sense of corporate responsibility to obey laws as a good citizen, see Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998). Some of these concerns are addressed later when examining applications of feminist technique to moderate the corporate decision process. *See infra* text accompanying notes 190-220.

ues and approximate them as efficiently and cleanly as possible. This is the debate that lies most uneasily at the center of the conflict between the marketplace advocates regarding business decisions and those who eschew it.

Much feminist criticism of traditional law and economic evaluations indict the cost-benefit decision process itself along with the methods used for evaluating benefits and harms. They are not alone in doing so.[76] In some instances, the cost-benefit reasoning process and the evaluation of its elements have been so intertwined in scholars' minds that the process and the evaluation often have been condemned or applauded summarily without distinguishing between the two. In other instances, it is the bringing of the cost-benefit approach itself to decisions that assess whether or not to risk people's lives that brings censure.[77]

Clearly, though, avoiding all harm at any cost is not feasible nor is going to any lengths in an effort to do so likely to reflect a collective choice of society's members. A risk-free path is as unavailable to society's life as it is to the business enterprise or an individual.[78] Effective community decisions as to which risks to endure must employ some form of weighing and balancing, explicitly or implicitly, to reach socially preferred directions even at the risk of harm, though the goal is to seek social well-being and not enterprise welfare.[79] What distinguishes the social decision from the enterprise decision is not the process but the evaluation of the risks and benefits. Social choices stem from social concerns and different situations excite different social sensibilities.[80] Firms' cost-benefit decisions are, by and large, market-price driven.

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76 *See, e.g.*, Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L. J. 1511 (2003).

77 *See generally*, McCluskey, *supra* note 30.

78 For a recent analysis of how our decisions regarding risk have transformed, see Jason Scott Johnston, *Paradoxes of the Safe Society: A Rational Actor Approach to the Reconceptualization of Risk and the Reformation of Risk Regulation*, 151 U. PA. L. REV. 747 (2003).

79 Robert Frank gives an interesting example of the trade-offs between social benefits and costs when he has the reader consider a technology that "would reduce the cost of [energy] by half . . . [and] its only negative effect were to degrade our view of the Grand Canyon for just one 15-second interval each decade" and compares it with a technology "that produced only a negligible reduction in the cost of [energy] at the expense of a dark cloud that continuously shielded North America from the rays of the Sun." Robert H. Frank, *Why is Cost-Benefit Analysis so Controversial?* 29 J. LEGAL STUD. 913, 914 (2000). He goes on to say, "[w]e live in a continuous world. If the first technology is clearly acceptable, and the second clearly unacceptable, some intermediate technology is neither better nor worse than the status quo." *Id.* He, of course, acknowledges that some people might object to any degrading of the Grand Canyon view, in particular because of their concerns for the "slippery slope" problem. *Id.* at 914 n.2.

80 For example, consider the efforts expended to save Baby Jessica from a dire end as a result of falling into a well in Midland, Texas in 1987 including the donations accumulating to millions of dollars for a trust fund for her, see Mark Badineck, *Baby Jessica's Family Stays Lo-Key Ten Years After Water Well Drama*, ASSOCIATED PRESS, Oct. 14, 1997, compared to decisions not to add the $1100-$1600 costs for seatbelts for children in school buses costing

Cost-benefit reasoning has a wide range of meanings depending on the context in which it is being used. In law and economics, historically, it has been mostly identified with the Kaldor-Hicks definition of efficiency, one which has certain implicit value judgments on the weighting of individuals relative to each other and often by using market prices and current income distribution for that evaluation.[81] Even within the framework of economic analysis, however, one can find flaws in the process that would not comport with a societal evaluation of welfare. For example, economists have long observed that the use of market prices skew the measures of social welfare in favor of the preferences of those at the higher end of the income distribution.[82] There are a number of social concerns that do not get captured by market prices, for example, the consequence of environmental pollution and other toxic harms.[83] Another concern is the marketplace's inability to induce production of socially desirable goods and services because of lack of profitability, such as fundamental scientific research, or the inability to collect revenue, for example, to provide national defense.[84] Conceptually, however, assessments of costs and benefits of choices can consider as broad a range of concerns as seems relevant, beyond merely market goods and income, allowing the weighing and balancing of all factors deemed important by the decision-maker.

The real question is not whether decisions on risking people's welfare can be avoided—they cannot—but whether they can be made in a manner that bears the ethics and morals of the society in which they take place. It is in addressing this issue that feminist analysis of business conduct and its legal framework can provide the most useful insight.

$40,000-$70,000 even though 11 children die in school bus accidents every year, see National Highway Traffic Safety Adminstration, research information, *Seatbelts on School Buses, at* http://www.nhtsa.dot.gov/people/injury/buses/pub/seatbelt.hmp.html (last visited Feb. 15, 2006); Dr. Alan Ross, Testimony of the President of the National Coalition for School Bus Saftey, *at* http://www.ncsbs.org/testimonies/testimony_aross.htm (last visited Feb. 15, 2006) (It is still heavily debated, because of lack of data, as to what extent seatbelts in school buses would reduce the number of deaths and it is argued that the cost of the seat belts might be better spent in other safety programs).

81 *See discussion infra* text accompanying notes 103-07.

82 For an analysis of this issue and its ramifications with examples, see Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L. J. 165, 181-191 (1999).

83 For an excellent up-to-date discussion of these issues as well as presenting from another perspective a multi-disciplinary approach to the law and economic treatment of environmental harms, see Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U.L. REV. 675 (2003). The classic articles on this topic are A.C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932) and the well-known criticism of it, R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

84 More detailed as well as accessible descriptions and analysis of the drawbacks of relying solely on the markets can be found in COOTER & ULEN, *supra* note 70.

IV. (LAW AND) ECONOMIC EFFORTS TO IMPROVE COST-BENEFIT ANALYSIS

Recent literature in the law and economic arena emphasizes the need to improve the evaluation process of cost-benefit reasoning. The focus has been primarily on governmental agencies' decision process. These efforts are likely prompted by the fact that across the political spectrum, Presidential executive orders have mandated that regulatory agencies use cost-benefit reasoning in the agency's decision process.[85] Furthermore, courts have increasingly approved or required the use of cost-benefit analysis;[86] indeed one might argue that courts have been adopting the use of cost-benefit reasoning for the better part of a century, whether explicitly or implicitly.[87] There also has been an increasing awareness, with rapidly changing technology, that choices have to be made on a more *ex ante* basis as to what course to take and with greater rapidity. This requires evaluating deftly the potential consequences of each possible direction. Engaging in cost-benefit analysis for each of these decisions is inevitable, on the individual level, in the private market, and at the governmental level.[88] Though most of the recent examinations have focused on improving the government's use of cost-benefit analysis, the issues they raise and the analyses they offer can extend to

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85 *See* Robert W. Hahn & Mary Beth Muething, *The Grand Experiment in Regulatory Reporting*, 55 ADMIN L. REV. 607 (2003).

86 Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 323-24 (2001).

87 *See* Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand that Hides?*, 32 ARIZ. L. REV. 77, 96-102 (1990) (suggesting Cardozo as one of the first jurists to consistently use an implicit cost-benefit approach for judicial decision-making).

88 For examples of cost-benefit's expansion in government policy, see, *e.g.*, Cindy Skrzycki, *OMB Proposes Changes in Federal Rulemaking: Agencies Would be Required to do More Analysis of Risks, Costs, and Benefits*, WASH. POST, Feb. 2, 2003, at A07. Twenty-five years ago, courts were conflicted as to the use of cost-benefit reasoning in the private sector. *Compare* Grimshaw v. Ford Motor Co. *(The Pinto case)*, 119 Cal. App.3d 757, 813 (1981) ("There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits") *with* United States Fid. & Guar. Co. v. Plovidba, 683 F.2d 1022, 1026 (7th Cir. 1982) ("[T]he formula is a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors"). Today, courts more often acknowledge cost-benefit's role in the corporate decision process. *See, e.g.*, Verizon Communications, Inc. v. FCC, 535 U.S. 467, 548 (2002) (Scalia, J., dissenting) (criticizing the majority opinion for not recognizing the cost-benefit incentives for the firms who are parties in the case). Also, Corporate Finance, typically a required core course for an MBA degree, teaches the most effective techniques of cost-benefit decision-making in private enterprise. *See, e.g.*, RICHARD A. BREALEY & STEWART C. MEYERS, PRINCIPLES OF CORPORATE FINANCE (7th ed. 2003). Business-oriented law students must also become familiar with these more complex principles of private enterprise decision-making. *See, e.g.*, WILLIAM W. BRATTON, CORPORATE FINANCE: CASES AND MATERIALS (5th ed. 2003).

cost-benefit reasoning in general and in particular to private market evaluations.

A. INDETERMINACY WITHIN ECONOMIC REASONING

The social goal of using cost-benefit analysis, however implemented, is to make choices that comport with social values and improve social welfare. This social decision-making process, however, directly confronts an inherent ambiguity that lies in choosing what social values to enhance; this ambiguity can be characterized as an indeterminacy problem.[89] Each of the articles over the last half decade or so that have addressed the cost-benefit reasoning process, or the more encompassing question of how to determine enhancements to social welfare overall, have sought to remove the inherent ambiguity. These scholarly efforts look to improve upon the dissatisfactions of the strictly market price evaluation approach, which is one way to remove the inherent indeterminacy, but yields results drawing the criticisms discussed in Part I. The more recent considerations seek to discover superior methodologies to determine what is unambiguously socially preferred when weighing individual preferences and community moral values. Although their efforts narrow the range of indeterminacy that requires subjective evaluation by the decision-maker, they do not eliminate it.

1. *Origins of Indeterminacy and its Circumscription (though not elimination) Through Pareto Analysis*

At the core of the inherent ambiguity in social decision-making are questions of interpersonal comparisons as well as determinations of our moral social values in order to render an evaluation of what constitutes enhancements of our social welfare. The issues raised by these questions become clearer by first examining the analysis that most scholars in the area agree define unambiguous improvements in society's well-being but is one that is also limited in scope. The usual starting point is the Pareto Principle, which simply put, states an unambiguous improvement to society's well-being occurs if a venture (for example, producing a good or

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89 The choice here of the term indeterminacy is deliberate though not the one commonly used in law and economics (or in economics). A more typical economic characterization is to state that economic analysis does not give a complete ordering to all the available choices. *See, e.g.*, Adler & Posner, *supra* note 82, at 188. However, "indeterminacy' is a concept more familiar in the legal framework, earlier with the legal realists and more recently with critical legal studies. *See* Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989); *see also* John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L. J. 84 (1995). But the use of the term here is appropriate because, as we shall see, the indeterminacy revealed by economic analysis of cost-benefit reasoning is in nexus with the indeterminacy with which critical legal studies scholars and other authors are concerned. *See infra* note 99.

service either privately or publicly) makes at least one person better off while making no one else worse off.[90] As long as this is strictly true (for example, no "hidden" or unstated costs), the consensus is that there is an unarguable gain to society if the venture is undertaken. Note that interpersonal comparisons are not involved or necessary here. Undertaking such a venture is referred to as a Pareto Superior action.

A related concept is the state of Pareto Optimality, which is reached when it is no longer possible to undertake any additional venture that will make someone better off without making at least one other person worse off. Often the terms "economic efficiency" and "economically efficient" are used as substitutes for Pareto Optimality or Pareto Superior, though "economic efficiency" and "economically efficient" are also used to cover a broader range of concepts of social improvement. In addition, one may conceptualize Pareto analysis to address more intangible issues such as the distribution of property rights or more abstract notions of legal rights, but for ease of exposition, goods and services will be used here.[91]

In the first quarter century of the influx of law and economics reasoning into legal analysis,[92] a majority of the relevant literature advocated undertaking Pareto improvements. In particular, law and economics scholars drew on the fact that economists had shown that free markets, left unfettered and with no impediments, tended to reach Pareto Optimality—that is, a distribution of goods and services from which no Pareto Superior improvements could be made. This was one of the intellectual underpinnings of the wealth-maximization principle, recommended to guide legal decisions, that was pervasive throughout the literature at that time. This observation also motivated the use of market prices to evaluate costs and benefits described earlier.[93] It was believed that the prices established by the market reflected people's evaluation of goods and services and therefore constituted a good choice to measure society's evaluation of costs and benefits.

The stumbling block of Pareto analysis is that within any given society there are a multitude of Pareto Optimal allocations of goods and services.[94] Furthermore, there is no unambiguous way of choosing

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90 The Pareto Principle has been the hallmark of economic efficiency analysis for nearly a century. *See* Lewis A. Kornhauser, *The Domain of Preference*, 151 U. PA. L. REV. 717, 730-31 (2003).

91 For a discussion of distribution and distributional impacts of decisions, whether they be public or private enterprise decisions, see *infra* text accompanying notes 126-30.

92 Modern law and economic approaches to legal problems is usually dated as starting with the publication of Ronald H. Coase's *The Problem of Social Cost.*

93 *See supra* notes 69-71 and accompanying text.

94 The observation that (in a hypothetical two person world) there could be one Pareto Optimal allocation of goods that one person prefers while the second person prefers another is known as the Scitovsky Paradox. *See* T. De Scitovsky, *A Note on Welfare Propositions in*

which among those Pareto Optimal allocations is the "best one," at least not by any Paretian criteria. This is because, as we see in the graphs in the footnotes below, each Pareto Optimal point is associated with a different distribution of goods and services among society's members, or more generally a different distribution of income (or even more abstractly, different distributions of rights). To pick one particular Pareto Optimal point is also making a decision as to a particular distribution of income (or who should have what), which is strictly a deontological choice. There is no unambiguous way of choosing one distribution as better or superior from an efficiency standpoint. Of necessity, moving from one Pareto Optimal income distribution to another Pareto Optimal income distribution means that someone will be made worse off while someone else will be made better off. Thus, moving from one Pareto Optimal point to another Pareto Optimal point can never be a Pareto Superior move and therefore cannot be justified on efficiency grounds. What this implies then is that an unfettered marketplace merely leads society to one Pareto Optimal distribution out of many, with no guarantee that it is the socially preferred one. Hence, the only justification for moving from one Pareto Optimal point to another is an ethical consideration or the application of a fairness principle or a political purpose.

To see this, examine the following reasoning in conjunction with the graphical analysis in the accompanying footnotes. For simplicity, assume we have a society with two individuals: Ann and Bill, and there are only two goods to consume: food and gas and a finite amount of each, 100 pounds of food and 200 gallons of gas, that can be distributed between Ann and Bill. Each individual derives different levels of satisfaction from consuming various quantities of each of the goods. Furthermore, each is willing to have less of one good if compensated with sufficiently more of the other good so as to be as satisfied as before. The rate at which Ann is willing to exchange food for gas is likely to be different than the rate Bill is, because they are likely to have different preferences regarding the two goods. What is true however (or so we assume), Ann and Bill each will feel more satisfied if given more of one good while still having the same amount of the other good.[95] In other words, more is always preferred to less, regardless of the individual pref-

Economics, 9 REV. ECON. STUD. 77 (1941). A number of numerical demonstrations of the paradox exist in legal literature. A recent one is in Adler & Posner, *supra* note 82, at 184-86.

[95] The graphical exposition is as follows. There are two individuals, Ann and Bill; two goods, food and (heating) gas; and a finite quantity of each commodity, *e.g.*, 100 pounds of food and 200 gallons of gas. Assume that there are various levels of satisfaction Ann and Bill each derive from different quantities of consumption. Also, assume that any given level of satisfaction can be achieved from differing combinations of quantities of food and gas. This is based on the assumption that there is always some rate at which each individual is willing to substitute a portion of one commodity for a portion of the other and be indifferent between the choice of consuming the combination after the exchange or consuming the one prior to it.

erences of Ann and Bill. In the meantime, if we allocate all of the available food and gas between Ann and Bill, and at least one of them would prefer a somewhat different allocation and the other is indifferent, if not also preferring a somewhat different allocation, then they will trade—assuming they are free to trade with each other. They will trade food and gas with each other until they reach a point where further trading can no longer make at least one of them better off without making the other worse off.

For example, say that Ann is trading away to Bill pounds of food in exchange for gallons of gas. This means that Ann prefers the amount of gas she is receiving to the amount of food she is giving up and vice versa

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By portraying a particular level of satisfaction with an analytic concept called an "indifference curve" in economics, the combinations of quantities of meat and potatoes that give the individual the same level of satisfaction may be graphically represented. For example:

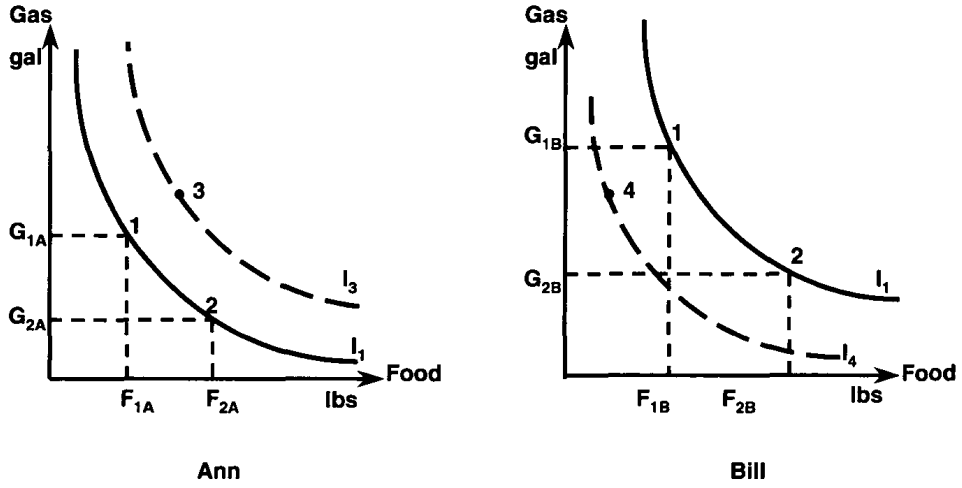

FIGURE 1

The curves labeled I_i are each, respectively, Ann and Bill's indifference curves. Points 1 and 2 on Ann's curve represent two different combinations of food and gas that give Ann equal levels of satisfaction. Any other point on the curve also represents a combination that gives her the same level of satisfaction. Similarly, points 1 and 2 on Bill's indifference curve give him the same level of satisfaction, and so forth. Any point above and to the right of Ann's I_i curve represents a combination of goods that gives Ann a greater level of satisfaction than any point on Ann's I_i curve. In a parallel fashion, any point below and to the left of Ann's I_i curve represents a combination of goods that gives Ann a lower level of satisfaction. Due to the assumption of substitutability of one good for another, we know that for each combination of goods, there are other combinations that also yield equivalent levels of satisfaction. Therefore, if a particular combination is not part of I_i, then it is part of some other indifference curve. An example of a combination yielding satisfaction greater than I_i is depicted on Ann's graph as point 3 and the indifference curve with which it is associated is drawn on Figure 1 using dashes. An example of a combination yielding less than I_i is depicted on Bill's graph as point 4 with its associated indifference curves for each individual, and that between any two indifference curves there always lies a third that can be depicted if one chooses to do so. The collection of indifference curves for each individual is referred to as that individual's "indifference map" and reflects that individual's tastes and preferences for food relative to gas at different levels of consumption.

for Bill. Once the two traders reach an allocation in which Ann is no longer willing to give up one more pound of food for the amount that Bill, at this point, is willing to give back in gas, they have reached a Pareto Optimal point or a Pareto allocation of goods. It is not possible to improve either party's well-being by transferring between them any amount of food or gas without making the other worse off. Each values more highly the next unit of the good they would need to give up than the quantity of the other good they would receive in exchange.[96]

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[96] We can create a picture of this "economy" by having Ann and Bill "face" each other through their respective indifference curves within the framework of a box that represents all the goods available for the two to consume. This is accomplished by "flipping" one of the individual's indifference map, Bill's in this case, to face the other.

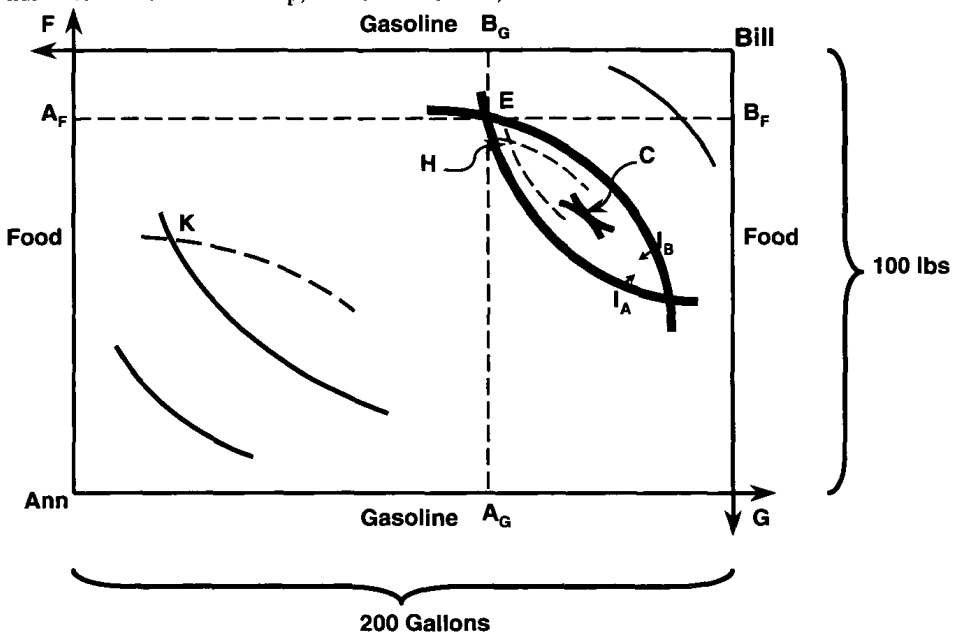

FIGURE 2

The dimensions of the box represent the entire quantities of goods available for consumption by the two individuals; the width of the box represents 200 gallons of gas and the height of the box represents 100 pounds of food. The construction of the box in this fashion is such that any point in or on the box represents a complete distribution between Ann and Bill of all the food and gas available for consumption. For example, point F on the box represents the allocation where Ann is endowed with all the available food and no gas and Bill is endowed with all the available gas and no food. Point G, on the other hand, allocates all the food to Bill and all the gas to Ann. Thus, once an allocation is made (i.e., a point in or on the box is selected) the only way Ann or Bill can improve their respective lots (short of one expropriating goods from the other) is to trade with each other. Trading with each other will only improve their lots if their preferences, given their endowments, are such that each is willing to give up some of what the other prefers in exchange for what the other prefers to give up.

Some potential gains from trade can be more rigorously explained through the following analysis in the graph above. Let E represent an initial endowment (arbitrarily chosen) for Ann and Bill, when Bill's initial endowment is B_G gallons of gas and B_F pounds of food, and Ann's is A_G gallons and A_F pounds. From their respective endowments Ann and Bill each derive their own level of satisfaction, which is reflected in their respective indifference curves associated with their endowments. These indifference curves are labeled I_A (for Ann) and I_B (for

However, even with the initial distribution of goods (as long as it was not coincidentally Pareto Optimal), the allocation of food and gas Ann and Bill each will have after trading is not uniquely determined. There are an infinite number of possible allocations they may bargain to, as long as at least one ends up at a higher level of satisfaction and the other is no worse off than the start.[97] The state they will end up in their negotiations depends on their relative bargaining skills. We only know for certain that at least one of them (and probably both) will be better off in terms of satisfaction after trading. We also know they will reach one of the possible Pareto Optimal points. Furthermore, each Pareto Optimal point is associated with a different allocation of food and gas between Ann and Bill. In other words, each Pareto Optimal point is associated with a different distribution of goods (or, more abstractly, rights) between Ann and Bill.

Finally, not only is there an infinite number of Pareto Optimal allocations that can be reached from a given (Pareto Inferior, or non-Pareto Optimal) initial allocation of goods, there are also an infinite number of Pareto Optimal allocations associated with any possible initial (Pareto Inferior) allocation of goods. Overall, within this two-person economy, there are an infinite number of Pareto Optimal allocations for the given

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Bill). Each can improve his or her lot by moving to a higher indifference curve, and the arrow on each current indifference curve indicates the direction of increase for that individual. Any point inside the intersection of the two initial indifference curves represents an allocation that puts both Ann and Bill at higher levels of satisfaction, i.e., at higher indifference curves. For example, point H is such a point, where the associated indifference curves have been partially drawn. Since H is a point in the box, it is a feasible allocation and therefore a possible trading result. Ann and Bill have an incentive to trade as long as at least one of them can improve his or her welfare as a result. The incentive to trade ceases once no more such additional gains can be made. Graphically, this occurs when Ann and Bill reach an allocation where their respective indifference curves do not intersect but are, instead, tangent to each other. Point C represents such a case, where again the indifference curves are partially drawn in. Clearly, no further improvements can be made through trading at point C because, unlike at point H, in order for one of the individuals to move to a higher curve, the other must necessarily move to a lower one; this is the result of the absence of trading space between the two indifference curves.

97 Between any two intersecting indifference curves there are a number of tangent indifference curves, thus making a number of ultimate trading outcomes possible. *See, e.g.*, J. GOULD & C. FERGUSON, MICROECONOMIC THEORY 423-27 (5th ed. 1980). Without more information about Ann and Bill's bargaining skills, which trading outcome actually will occur cannot be determined in advance. One can say unequivocally, however, that whatever trading outcome will occur, it will lie within the intersection of the two indifference curves associated with the initial endowments, i.e., within the area defined by the intersection of I_A and I_B.

From an economic standpoint, the initial endowment represented by E is inefficient or Pareto Inferior. Both Bill and Ann can each improve their well-being, at no cost to the other, by reallocating the commodities between themselves, which they can accomplish through trading. The movement from point E to an ultimate trading point such as C represents a Pareto Superior move, and C is a Pareto Optimal point. Moving from point E to point C, or any other point of tangency between Ann and Bill's indifference curves within the trading space is reaching a Pareto Optimal point.

amount of available goods (that is, 100 pounds of food and 200 gallons of gas) that might be achieved through trade and each is associated with a different distribution of those goods between Ann and Bill. Most importantly, there is no efficiency justification to prefer one Pareto Optimal allocation and its associated distribution of goods (or rights) to any of the others. The only way to pick one has to be based on some deontological or fairness concerns.[98]

In other words, if we were social planners and we were informed of the total amount of goods and services available to society, we would not be able to select a "best" distribution for the members of society solely on the basis of a "best" Pareto Optimal choice, as there is none. We would have to make a value choice as to which Pareto Optimal distribution we would prefer, making value decisions about satisfying some people's preferences relative to others or weighing one person's welfare against another's.

For example, one deontological choice could be to seek equality and define it as when most people's well-being was as equal to each other's as possible. Another deontological choice might be to set a "just" thresh-

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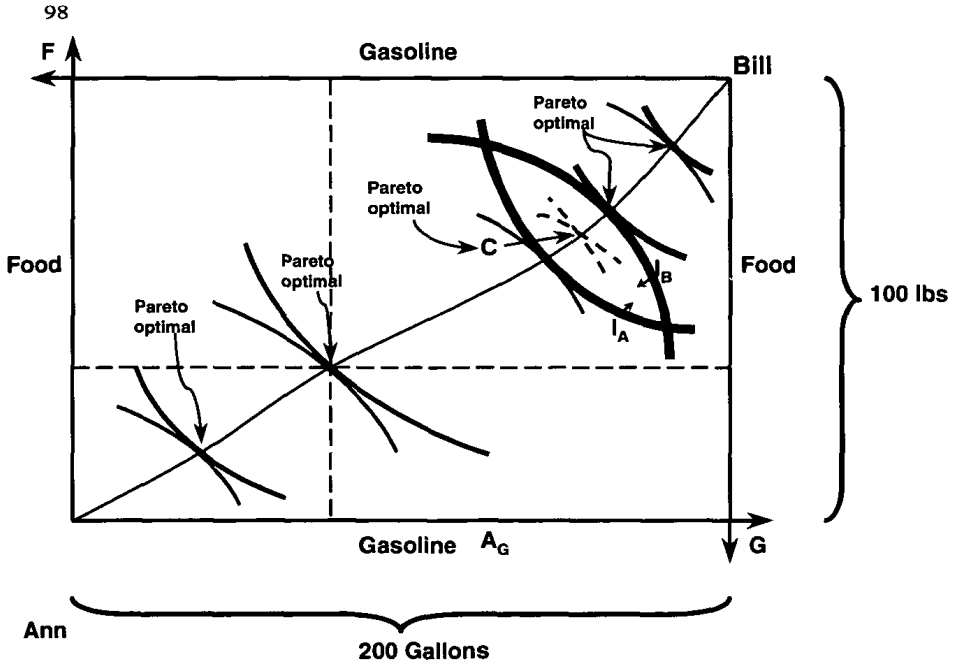

FIGURE 3

The points of tangency portrayed above between Ann and Bill's indifference curves represent some of the Pareto Optimal points and the associated distribution of goods. Each point on the curve connecting the points of tangency between Ann and Bill represents a different Pareto Optimal point and attendant distribution of goods. Those who recall their days in math class will remember that there are an infinite number of points on the curve, and therefore an infinite number of Pareto Optimal allocations and distribution of this finite number of 100 pounds of food and 200 gallons of gas.

old below which the lowest individual income would not be allowed to fall. A third deontological value might be to reject income distributions that might allow a few elite people to have extremely high standards of living while the rest of the population lives at a subsistence level. It would almost certainly be possible for each particular deontological standard one might adopt to find a distribution that is Pareto Optimal and approximates that goal—just as, in contrast, it would be possible to find different Pareto Optimal distributions for each of the obverse of those standards. For example, a Pareto Optimal distribution permitting a few elite people to be wealthy while the remainder of society lives at subsistence standards would probably not be considered "fair" but it would nevertheless be still (Pareto) efficient.[99] Fortunately, we are not restricted to only "unfair" Pareto efficient distributions.

All these distributions would be Pareto Optimal in that there is no possibility of improving one person's lot without reducing the lot of another's; however, which Pareto Optimal distribution to choose would be based on our perceived proper order of things, our notions of justice or our notions of elitism. What we do know is that, regardless of our value choices, choosing a non-Pareto optimal choice instead of a Pareto optimal choice would be a waste of resources because it would then be possible to make someone better off without making anyone else worse off and we have presumed that there would be no objections to that.[100]

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[99] It is here that one can see how the indeterminacy problem residing in the application of economic analysis to social choices dovetails with the indeterminacy problem in law, for example, as characterized by critical legal studies scholars. When critical legal studies scholars raise the question of indeterminacy, they are asserting that the structure of law itself does not lead to inevitable unique determinations to resolve legal conflicts and that judges necessarily fill in the gaps with their particular values and perspectives. ". . . [I]n general, there does seem to be a sufficient degree of commitment [by critical legal scholars] to three propositions about law: that it is . . . indeterminate; that it can be understood . . . by paying attention to the context in which legal decisions are made; and that . . . law is politics." Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L. J. 1515, 1518 (1991). "[Critical legal studies] assert[s] that law is politics . . . [in] that when one understands the moral, epistemological, and empirical assumptions embedded in any particular legal claim, one will see that those assumptions operate in the particular setting in which the legal claim is made to advance the interests of some identifiable political grouping." *Id.* at 1517. Thus what is being called here a value or moral choice, critical legal studies might call a political choice. The resonance of the two concepts acknowledges that value and moral choices can be ignoble as well as noble.

[100] Actually, in a free-market economy with no impediments to trade, we could in fact pick a sub-optimal distribution and the parties would then trade among themselves until they reached a Pareto Optimal point, as was shown in the example with Ann and Bill, because they each value the other's goods they receive in trade more than the ones they give in trade. This observation is why the free market is often viewed as "economically efficient."

Of course, when we are discussing allocations of more abstract rights, "trading" is often not possible. But it is important to remember that each Pareto Optimal distribution is "economically efficient" in this narrow sense of not being able to make someone better off without it being at the expense of someone else.

The indeterminacy is further complicated when one is considering whether to undertake a new venture that would expand the economic pie. In those instances in which the venture yields net benefits to some people (i.e., making them better off) while making no one worse off, the venture would clearly be a Pareto Superior choice. It is possible, however, that there could be a competing venture, one that would make a different set of people better off while leaving the rest the same. This would also be a Pareto Superior move. If there are constraints that prevent undertaking both, say a limitation on available resources, another question is raised then: which one to choose? Obviously this also becomes a distributional question: whom in society is the decision-maker going to choose to benefit? Pareto principles have nothing to offer on this question either. The decision once again must be premised on a value choice or moral criteria, one that involves interpersonal comparisons and extends beyond any question of "efficiency."

It is important to note that the inherent indeterminacy yielded by economic analysis is not a question of a trade-off between economic efficiency and moral, deontological considerations. It has often been held in both economics and law and economics literature that sometimes society is faced with a choice between efficiency and justice. Those outside law and economics have also frequently espoused this position as well. To the contrary, however, all the Pareto Optimal choices are equally economically efficient as defined by the Pareto principles, but the choice between them is an ethical, distributional choice, and ultimately a choice of justice. The choice between the two possible efficient outcomes is the *next* step in the decision process of the policy-maker; it is not *instead* of choosing an economically efficient outcome. Thus we have defined a

further area of indeterminacy with respect to courses of action that expand the economic pie.[101]

Thus Pareto analysis does not in itself determine the "best" distribution of goods. It can eliminate many, if not most, distributions as candidates but it still leaves a whole range of distributions, each of which is Pareto Optimal, from which, without more, it is not possible to choose the "best." This is the narrowest range of indeterminacy among choices that can be defined by economic analysis.

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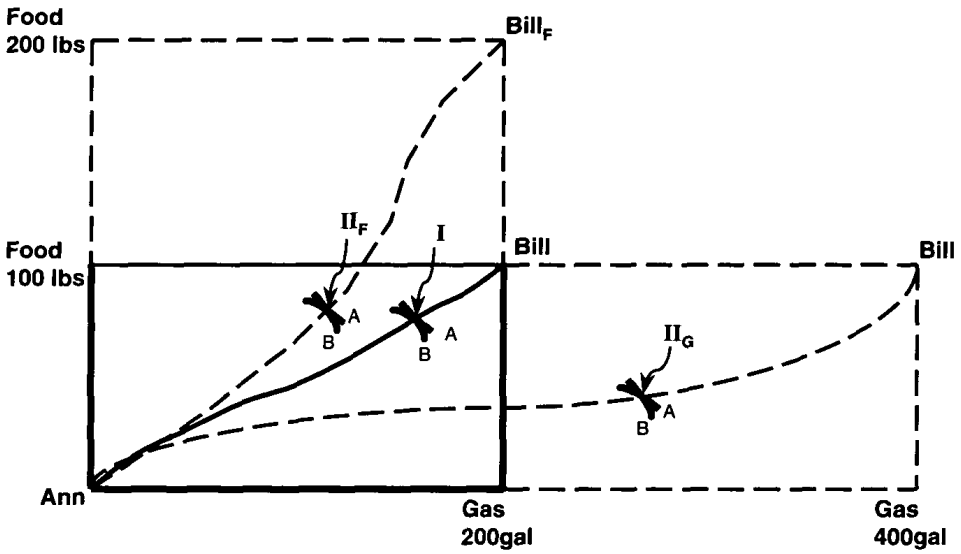

FIGURE 4

Assume the decision-maker has a choice between expanding the amount of food available or the amount of gas but must make a choice between the two. The solid rectangle above represents the original available quantities of food and gas and the solid curve between Ann and Bill traces out all the possible Pareto Optimal points. We assume that for whatever fairness issues guided the choice, society has settled on Pareto Optimal point I, with its attendant distribution of food and gas between Ann and Bill. The dotted extensions to the rectangle represent the new rectangle of available goods if the decision is to expand the amount of gas available (the horizontal extension to the right) or to expand the amount of food available (the vertical extension on top). The dotted curves connecting Ann and Bill in each case represent all the possible Pareto Optimal points for that expansion of that good. Though where Ann and Bill will be on the curve is dictated in part (though not completely – *see* note 98 and attendant text) by how the expansion of goods is distributed between them, two possibilities are demonstrated here. II_F represents one possible Pareto Optimal outcome if the decision is to expand the amount of food. II_G represents one possible Pareto Optimal point if the decision is to expand the amount of gas. In II_F, Ann is made a little better off but Bill is made substantially better off. In the case of II_G Bill is made a little better off but Ann is made substantially better off.

Note that whether each individual is better or worse off depends on whether a higher indifference curve is reached, not on the particular allocation of goods. The willingness to substitute one good for another and maintain the same level of satisfaction is what is reflected in the indifference curve.

The question then is whether there are other ways to narrow the indeterminacy even further, if not eliminate it altogether. That inquiry is discussed later in this article.[102]

2. *Indeterminacy in the Kaldor-Hicks Efficiency Criteria*

There is still a further wrinkle in choosing among various ventures. This is because, given the complexity of and interdependency within our society, a new venture usually has two facets to it. One is that the increase in the pie of goods and services will be available to some and the other is that some or all of the costs will be borne by those who do not benefit. For example, building a new freeway may reduce travel time dramatically for those living in the suburbs to arrive to work in the urban center, but if the freeway's course is through a low-income neighborhood (as is often the case), the residents of that neighborhood will be subjected to increased automobile and noise pollution. Thus, even if there were no problem in evaluating the benefits and harms, there is the problem of redistribution of well-being from the residents of the neighborhood to the freeway drivers, regardless of whether there are broad benefits to the freeway drivers. In other words, this venture is not a Pareto Superior move; individuals are being made better off at the expense of other individuals, who are in fact being made worse off. Yet, if the benefits to the drivers are enormous and the costs to the intruded-upon residents are rather minimal, a policy-maker might feel that despite the redistribution effect, overall society welfare is improved sufficiently to sacrifice the reduction in the well-being of the low-income residents.[103]

This further wrinkle raises another question: how does one decide when it is "worth it" to make the sacrifice of some individuals' well-being for the increased well-being of others? Is it merely a value choice on distribution—causing the decision-maker to resort to deontological evaluations involving interpersonal comparisons? Or is there an additional way of narrowing this range of indeterminacy, so that one can be confident that there is an unambiguous improvement in overall social well-being? In order to make decisions regarding ventures that increase the economic pie but also raise questions of redistribution, the Kaldor-Hicks efficiency criteria was developed.[104] Its basic thesis is that a ven-

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102 *See infra* text accompanying notes 155-89.

103 This idea is not a new one. *See, e.g.*, Losee v. Buchanan, 51 N.Y. 476 (1873) (holding defendant not liable for damage to plaintiff's land and personal property from defendant's accidentally exploding boiler because the benefits of technological progress outweigh any cost to members of society). *Losee* was decided long before the advent of law and economics and without the benefit of economic reasoning or the formality of cost-benefit analysis as it has evolved today.

104 For a good analysis of the Kaldor-Hicks efficiency principle, see Adler & Posner, *supra* note 82, at 190-91.

ture should be undertaken if the benefit to the recipients is sufficiently large that the recipients can compensate those who were harmed so that they are as well off as before the venture. This would seem to satisfy the spirit of Pareto criteria of unambiguous improvement in society's well-being in that the venture allows some individuals to be made better off without making anyone else worse off (albeit through compensation).[105]

The Kaldor-Hicks efficiency criteria was strongly advocated in the first few decades of the advent of law and economics.[106] More significantly, those advocates of the use of law and economic principles in legal decision-making latched onto the observation, that in order to achieve the net gain to society overall, it was not actually necessary to compensate the individuals who were made worse off by the venture. The fact that they *could be* was sufficient to demonstrate a Pareto improvement. Whether to actually provide compensation was a (re-) distribution question, an issue that economic analysis cannot address. Therefore law and economic advocates argued in favor of using the Kaldor-Hicks standard for decisions on ventures in order to achieve efficiency, regardless of whether compensation occurred.

Apart from the fact that, to many legal scholars, not compensating those who were made worse off seemed like an appalling position, causing many to eschew economic reasoning altogether, it was also well known among economists that the Kaldor-Hicks principle biased choices in favor of those at the higher end of the income distribution. In part, this is because people who have higher incomes value a particular addition to their well-being less than poorer people do. Thus, when ventures are evaluated, it takes more to compensate wealthy people if they are the ones harmed than it does to compensate poor people. Therefore, the benefit of a project has to be much greater if it is to compensate for harm done to the wealthy as compared with the poor. Thus, a cost-benefit analysis under Kaldor-Hicks criteria will skew choices in favor of projects in which the harms flow to the poor who, without further action, are also uncompensated. Though Kaldor-Hicks appeared to narrow the range of indeterminacy, it did so by simultaneously making implicit redistribution decisions but ones that redistributed in favor of the wealthy. Furthermore, the Kaldor-Hicks criteria did not solve the dilemma of choosing from among competing ventures. It merely determined which

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105 The Kaldor-Hicks efficiency criterion also suffered from the Scitovsky paradox in that it is possible in a two person economy for one person, in a move to state A, to benefit sufficiently to compensate the other and vice versa for the second person in moving to state B. Scitovszky, *supra* note 94.

106 *See, e.g.*, POSNER, *supra* note 72, at 3-6; Daniel A. Farber, *What (If Anything) Can Economics Say About Equity?* 101 MICH. L. REV. 1791, 1795-96 (2003); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

ventures were efficient by its criteria, but not which one of those to undertake.

B. RECENT CONTRIBUTIONS TO COST-BENEFIT REASONING

The preceding section demonstrates that there are three sources of indeterminacy that require value choices that traditional economics or law and economics cannot resolve by resorting to efficiency analysis: (a) the choice among multiple distributions of existing goods and services among members of society, (b) the choice among different Pareto Superior ventures that will expand the economic pie but benefit different members of society, and (c) the most realistic real world situation—the choice as to whether and when to sacrifice the welfare of some to benefit others. Using market prices to make these decisions, though that is indeed a value choice, is not very satisfying for reasons stated earlier. How we are to determine which value choices to employ is the same question as to how to evaluate the costs and benefits in cost-benefit analysis; again, these are not questions of efficiency but questions of fairness and not at the expense of efficiency goals.[107]

Because of the renewed interest in cost-benefit analysis in the policy realm,[108] there has been a resurgence of interest by law and economic scholars in its ramifications. Some articles have extended or expanded cost-benefit analysis to new areas by revisiting areas addressed before, such as entitlements,[109] criminal law,[110] product liability,[111] legislative entrenchment,[112] and the value of transitional justice after the toppling of a dictatorial regime.[113] These articles extend cost-benefit analysis to factors beyond those amenable to market place evaluations.[114] Some suggestions include ways of improving the application of cost-benefit

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107 "[T]he very concepts [of economic analysis] are value-loaded . . . [and] . . . cannot be defined except in terms of political valuations." GUNNAR MYRDAL, AN INTERNATIONAL ECONOMY 336 (1956).

108 Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546-47 (1989); *see, e.g.*, Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95 (2003).

109 David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633 (2004).

110 Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. J. 949 (2003); Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321 (2003).

111 Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700 (2003).

112 *See generally* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L. J. 1665 (2002); Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003).

113 Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004).

114 *See* Adler & Posner, *supra* note 82, at 188; Kornhauser, *supra* note 6.

analysis itself, such as taking into consideration the age of the individuals affected,[115] the importance in social well-being of changing people's wealth position relative to others in addition to absolute gains or losses,[116] and efforts to consider the distributional effects of cost-benefit decisions[117] as well as the impact of distribution on cost-benefit evaluations.[118] Some have shown how cost-benefit analysis can be a more sober evaluation for improving overall welfare than using merely individual preferences when due to various circumstances those preferences are cognitively distorted (such as a disproportionate fear of the spread of a disease or undue influence from promotional efforts in favor of a social position or legal presentation).[119] Some have alerted us as to how the requirement of cost-benefit analysis in government can be used positively or abused negatively by powerful political coalitions in government to the disadvantage of competing political coalitions.[120] Of course, the critics of cost-benefit analysis are still there, some because of its use at all, particularly objecting to quantifying values such as health, safety, and life itself, as well as the efforts to use or mimic market pricing mechanisms.[121] More often the criticisms are how specific applications of cost-benefit reasoning have failed to properly assess the true costs and benefits.[122] But despite these objections, the growing consensus is that some form of cost-benefit reasoning is necessary to make meaningful and useful social policy decisions, given the complexities of

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115 Cass R. Sunstein, *Lives, Life-years, and Willingness to Pay*, 104 COLUM. L. REV. 205 (2004) (explaining that using one measure for valuing a life lost or saved for all age groups does not take into account the number of life-years lost or saved).

116 Frank & Sunstein, *supra* note 86; *but see* Thomas J. Kniesner & W. Kip Viscusi, *Why Relative Economic Position Does Not Matter: A Cost-Benefit Analysis*, 20 YALE J. ON REG. 1 (2003).

117 Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114 (2001).

118 Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis when Preferences are Distorted*, 29 J. LEGAL STUD. 1105, 1122-24 (2000).

119 *See also* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003). *See generally id.*; Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059 (2000).

120 *See* Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343 (2002); Emerson H. Tiller, *Resource-Based Strategies in Law and Positive Political Theory: Cost-Benefit Analysis and the Like*, 150 U. PA. L. REV. 1453 (2002).

121 *See generally* MARGARET JANE RADIN, CONTESTED COMMODITIES (2001); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L. J. 1981 (1998).

122 *See, e.g.*, Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety and Environmental Regulation*, 80 TEX. L. REV. 1997 (2002); Lynn E. Blais, *Counting Costs and Calculating Benefits*, 80 TEX. L. REV. 2059 (2002); Vincent DiLorenzo, *Cost-Benefit Analysis, Deregulated Markets, and Consumer Benefits: A Study of the Financial Services Modernization Experience*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 321 (2002-2003).

the decisions that need to be made. The question still remains, however, as to how to improve its social efficacy—in particular to respond to the criticisms of cost-benefit applications in the past.[123]

V. IS THERE A TRADE-OFF BETWEEN EFFICIENCY AND FAIRNESS?

A. THE PROPER ROLE OF DISTRIBUTIONAL CONCERNS: WHEN FAIRNESS UNAVOIDABLY ENTERS THE DECISION PROCESS

Though debates on how to address redistributions will continue, there will always be some aspect of transfer of rights or other source of well-being affecting overall welfare that are not capable of monetary measure or compensation. Therefore, redistributive effects of policy decisions must be considered at the time the policy decision is made, instead of relying on corrections after the fact. Such redistributive considerations have been interpreted in much of the literature-in economics,[124] law and economics,[125] and criticisms of law and economics[126]—as constituting a trade-off between fairness and efficiency. In particular, considering distributive aspects has been construed typically to mean that the decision-maker must choose between an (economically) inefficient course that is distributionally fair or an efficient course that ignores distributional concerns.

But that is not the argument here. To the contrary, the assertion is that the purpose of considering distributional concerns is not to opt for an inefficient state but to choose from among different efficient states and to do so on the basis of social values of fairness.

As indicated above,[127] there are, invariably, a multitude of efficient choices, each one associated with a different distribution, consistent with different values of fairness. It is self-evident from the earlier analysis that regardless of what values society possesses with regard to fairness, society would prefer to choose a state of the world in which some people were better off with no one worse off over those states in which some

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123 *See generally* CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002); Abramowicz, *supra* note 6.

124 OKUN, *supra* note 3. Okun served on the Council of Economic Advisors as well as on the Yale faculty in the Economics department and discovered the empirical observation known as Okun's Law characterizing the inverse relationship between economic growth and unemployment rates.

125 A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7-10 (2d ed. 1989).

126 Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER & SOC. POL'Y & L. 115 (1999).

127 *See supra* notes 90-99 and accompanying text.

were worse off with no one better off.[128] By definition, this means that society would always prefer a Pareto efficient state than an inefficient state. Of course, the determination of what constitutes "better off" versus "worse off" is, in itself, a value choice. But once that is determined, it is only reasonable then to select as potential candidates those states in which it is not possible to improve someone's lot without reducing someone else's. Those potential candidates are all the Pareto Optimal (or efficient) states.

Thus, once determining the set of possible Pareto Optimal efficient states, selecting from the various efficient choices requires the implementation of fairness criteria. Efficiency and fairness considerations complement each other to bring the most benefit to society with regard to *both* aspects; they are not in conflict with each other, as advocates and critics of efficiency analysis often conclude. The significant inquiry is to determine when and how efficiency and fairness concerns ought to be addressed.

Of course, it is possible for some efficient choices to be coupled with counter-redistributional adjustments. For example, accompanying a policy decision with tax policy that adequately compensates the losers may be efficient (or at least a Pareto Superior move) and alleviate the need to make a value choice regarding the distribution effect. Given, however, that most decisions serve to expand the pie of well-being with multiple options, choosing which expansion and how it is to be allocated require distributional considerations. Moreover, since in the real world most expansions benefit some individuals at the expense of others, additional distributional issues arise, not all (or perhaps none) of which can be corrected by tax policy.[129] Finally, it is possible for a policy-maker to

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[128] For example, suppose the consensus is that a particular state that is not efficient is distributionally "fair," by whatever criteria for fairness is chosen. If this "fair" state is inefficient, i.e., non-Pareto Optimal, then by definition this means that some people's lot in this state can be improved without making anyone else worse off. For our purposes, we are taking into consideration the feelings, tastes and levels of satisfaction of individuals about all things and not just consumable goods. Therefore, there could be no objection to the Pareto Optimal version of this 'fair" state over the inefficient less well-off non-Pareto Optimal state. Thus for every state considered to be fair, there is a Pareto Optimal version of that state. Thus it is safe to conclude that whatever are the potential candidates for the set of states of the world that are fair, the only ones that should be chosen are the Pareto Optimal versions of each state.

[129] One after-the-fact remedy proposed is to engage in cost-benefit analysis solely examining efficiency criteria and resolving any distributional consequences through tax policy. Though generally critical of this justification in *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001), Chris William Sanchirico gives a succinct explanation of the argument at Note 2:

> Why does the ability to precisely and costlessly effect such corrective transfers justify setting legal rules solely on the basis of efficiency? Suppose, to take an extreme example, that the state demands perfect equality, but that, given perfect equality, it prefers that the equal amount allocated to each individual be greater rather than smaller. Imagine that the state has the ability to costlessly "re-slice the pie" however

conclude that by one measure, the social welfare pie is expanded, but under a different evaluation, the benefits to those who gain may be less than those who lose for any particular course of action. Therefore, whenever distribution is involved, as it is in most undertakings, a value choice affecting community members as to which course to take is complex, unavoidable and cannot be sidestepped through efficiency analysis.[130]

> it pleases. Further, consider a world in which legal rules are inefficient, but there is perfect equality. Then, the state should change legal rules so that they are efficient—i.e., so that they maximize the size of the pie—even if that initially produces inequality. After changing legal rules, the state can always re-slice the larger pie to restore the system to perfect equality. The end result is still perfect equality, but each individual now has greater wealth . . . .

See also Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000) (responding to earlier criticism by Sanchirico). A number of problems exist, however, with relying on tax policy. One is the lack of political will as such remedies are contingent on legislative and executive action, which also respond to lobbying efforts. *See, e.g.*, Scott Shapiro & Edward F. McClennen, *Law-and-Economics from a Philosophical Perspective, in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 460, 463 (Peter Newman ed., 1998) (according to law and economics scholars it would take a "radical restructuring of current political systems" to effectuate the income redistribution that also justifies ignoring the distributional consequences of legal rules). A second is that not all redistributions are compensable through monetary means. For example, the decision to send troops to war sacrifices some lives for the benefit of others and is difficult to compensate through financial redress. Regarding one controversial attempt to do so, see Justin Huggler, *Iraq:The Aftermath: Palestinian Families Mourn the Passing of Saddam's Donations for Suicide Bombers and Martyrs*, INDEP., May 7, 2003, at 12. A number of practical difficulties have been noted over the years as well, for example, issues of imperfect information and behavioral consequences. *See generally* Sanchirico, *supra.*

130 The significance of choice of distributive effects is implicitly or explicitly recognized in a number of recent works exploring the extent of the proper role of efficiency analysis. For example, Adler and Posner argue that "overall well-being is morally relevant. Government should choose a welfare-improving project, but all things considered, nonwelfarist considerations (for example, distributive or deontological considerations) may properly lead to the ultimate rejection of that project." *Supra* note 82, at 196. Though this may sound like an argument for a trade-off between efficiency and fairness, it is not. Adler and Posner are merely considering one project. Its rejection in the face of fairness concerns does not preclude choosing other welfare-improving projects that better satisfy those concerns. *See also* Kaplow & Shavell, *supra* note 4.

> There are a number of explanations for the common belief that income distribution is unimportant in normative economic analysis of law. First, some law and economics scholars have stated (incorrectly, in our view) that distribution ought not matter in principle. Second, much law and economic analysis omits distributional considerations, and many legal academics do not seem to appreciate that, even if one thinks that income distribution is important, there are often good reasons for leaving it aside in one's analysis (as we discuss in the text to follow). Third, because the framework of welfare economics has not been well presented in the legal academic literature, we believe that there is a lack of familiarity with the welfare economic approach and the reasons that the distribution of income is important under that approach." *Id.* at 989-90 n.53.

The authors later offer practical reasons why income distribution considerations should be set aide despite their acknowledgement of the importance of such considerations. *See id.* at 980-

The query is then, when selecting from the range of efficient choices, whether there are criteria to guide or parameters to limit deontological decisions so they indeed enhance overall social well-being. There is a considerable body of literature in law and other fields that address what values society does or ought to promote; an in-depth discussion of those issues is beyond the scope here. Instead, this article's purpose is to delineate when value choices necessarily enter the decision-process and to offer some guidance for selecting from among the available choices.

B. KAPLOW & SHAVELL'S *FAIRNESS VERSUS WELFARE*

1. *Kaplow & Shavell's Social Welfare Criteria*

Before proceeding to the proposals on parameters of fairness set forth below, it is important to discuss a recent significant and controversial contribution to the law and economics literature that has made its own assessment regarding the role of fairness in decisions to enhance social welfare; that is the work of Kaplow and Shavell, appearing in their publication, *Fairness Versus Welfare*.[131] A full analysis of the controversy is not presented here but aspects of it are that will prove useful for our purposes.

On its face, Kaplow and Shavell's article[132] states that whatever guidelines policy-makers choose, they should only choose those policies that increase overall welfare based on the increase of individuals' welfare, and not consider independently any ethical or other deontological values in the decision process.[133] This conclusion has generated considerable criticism in part because their assertion appears to mirror earlier positions taken by law and economics scholars supporting wealth-maximization principles that now have been largely softened or abandoned. Law and economics scholars who argued for the adoption of wealth-maximization (which focused almost exclusively on economic wealth) often claimed that issues of distribution were irrelevant or at least outside the purview of economic reasoning, or should be dealt with exogenously

98. The author discusses Kaplow & Shavell in more detail *infra* text accompanying notes 148-54.

131 Kaplow & Shavell, *supra* note 4.

132 Harvard Law Review chose to publish the authors' book in its entirety in one issue of the journal. See *supra* note 4. The page references here are all to the law review version.

133 "Our central claim is that the welfare-based normative approach should be exclusively employed in evaluating legal rules. That is, legal rules should be selected entirely with respect to their effects on the well-being of individuals in society. This position implies that notions of fairness like corrective justice should receive no independent weight in the assessment of legal rules." Kaplow & Shavell, *supra* note 4, at 967.

through tax policy.[134] The older law and economic positions often asserted that there was indeed a trade-off between fairness and efficiency but that, nevertheless, the best social welfare enhancing policy was to pursue maximizing efficiency, even at the expense of fairness,[135] a highly criticized position.

Kaplow and Shavell's thesis is broader as well as different from the older wealth-maximization arguments that ignored the distributional concerns. First, Kaplow and Shavell posit a measure of individual welfare that includes more than just pecuniary benefits but also includes individual taste for non-pecuniary benefits, in particular but not limited to, ethical and justice concerns. Most importantly, the authors then make a distinction between policy evaluations that consider fairness (using "fairness" as a term to encompass all ethical and moral concerns) when fairness enhances individuals' welfare because of their taste for it and considerations of fairness as a value to pursue apart from when it enters any individual's preferences. Kaplow and Shavell then argue that fairness should only be included in the decision process to the extent that individuals have a taste for it and not because it appeals to ethical concerns. In other words, fairness should be included solely because it enhances the welfare of those who have a taste for it and not for any reason of principle.[136]

2. *Kaplow & Shavell's Definition of Fairness*

It is clear that when fairness is a factor in individuals' welfare, it reflects value choices made by those individuals. To this extent, Kaplow and Shavell have designed a means to capture the variations among community members' value choices. Kaplow and Shavell then suggest that for policy purposes, social welfare is then measured by aggregating all the individuals' welfare, though the authors offer no suggestion to implement such aggregation. This is significant with respect to Kaplow and Shavell's results because it is in the aggregation that additional value choices must be made, this time by the policy-maker and not dictated by individuals' tastes. Aggregation requires interpersonal comparisons in order to weigh and balance the cumulative benefits against the cumulative costs and this requires establishing some criteria to weigh each individual's welfare against another's. Clearly, it is an ethical decision what

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134 Arguments that tax policy should address distribution issues remain, even though the dominance of the wealth-maximization approach has receded. *See supra* note 129.

135 The leading proponent of the wealth-maximization principle has been Judge (then Professor) Richard Posner. *See generally*, Richard Posner, ECONOMIC ANALYSIS OF LAW (4th ed. 1992); Richard Posner, THE ECONOMICS OF JUSTICE (1983).

136 "We further note a particular source of well-being that has special relevance to our Article, namely, the possibility that individuals have a taste for a notion of fairness, just as they may have a taste for art, nature, or fine wine." Kaplow & Shavell, *supra* note 4, at 982.

weight a policy-maker gives to different individuals' welfare (e.g., poorer persons more heavily than richer persons, or all equally, or by some other criteria). Kaplow and Shavell acknowledge this,[137] but refer the reader to other literature on the subject.[138] They merely point out that such value choices must be made in order to determine what constitutes an enhancement of social welfare; they only require that social welfare rises from increases in the aggregation of individual welfare.[139]

There are three important observations to be made regarding Kaplow and Shavell's work. One is the distinction between Kaplow and Shavell's goal of enhancing social welfare as they define it and the older wealth-maximization principle. In wealth-maximization analysis, the focus was usually on economic goods and services and did not concern itself with more ideational concerns that would affect individuals' well-being. The traditional law and economic approach thus skewed policy recommendations towards a form of consumerism as the creator and measure of happiness. In addition, wealth-maximization made an implicit value choice both in how to aggregate individuals' welfare to measure social welfare overall and in what constituted individual welfare. It did so by using market prices, whether actual or imputed, as the metric to calculate well-being. As noted earlier,[140] market-price calculations, among other problems, tend to bias decisions in favor of those who are more financially wealthy, giving those individuals as well as their preferences more weight in the measurement of welfare. Market prices do not have the neutrality or reflection of society's overall values as many law and economic scholars originally asserted.[141]

The second observation regarding Kaplow and Shavell's work is the implication of their argument that fairness principles should be used in

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137 "[A] method of aggregation is of necessity an element of welfare economics, and value judgments are involved in aggregating different individuals' well-being into a single measure of social welfare. The choice of a method of aggregation involves the adoption of a view concerning matters of distribution . . . Various methods of aggregation are possible." Kaplow & Shavell, *supra* note 4, at 987.

138 "[W]e do not defend any specific way of aggregating individuals' well-being; that is, we do not endorse any particular view about the proper distribution of well-being or income. Rather, we argue, in essence, that legal policy analysis should be guided by reference to *some* coherent way of aggregating individuals' well-being, in contrast to the view that policy analysis should be guided by notions of fairness and thus, at least in part, without regard to individuals' well-being." *Id.* at 988. The authors actually indicate some value preference of their own a little earlier in the section, "It is . . . generally supposed that each individual's well-being affects social welfare in a symmetric manner, which is to say that the idea of social welfare incorporates a basic notion of equal concern for all individuals." *Id.* at 985-86. This apparent inconsistency, however, may be the result of the inherent vagueness of notions of fairness and justice.

139 "Specifically, social welfare is postulated to be an increasing function of individuals' well-being and to depend on no other factors." *Id.* at 985.

140 *See supra* notes 81-84 and accompanying text.

141 *Id.*

the decision process only to the extent that there are individuals who have a taste for fairness (so as to increase their welfare by its presence) and not solely because some people will be made better off from its application. Despite the tenor of their assertion, this does not mean that decisions guided by fairness principles for which individuals have a taste, do not also enhance the well-being of those who are the recipients of that fairness application. In fact, to the contrary, under Kaplow and Shavell's recommendation, any extent to which decisions incorporate fairness to enhance the welfare of those who have a taste for it will also benefit those who are recipients of implementing that fairness. The fact that fairness is included based on people's preferences for it does not circumscribe the effects of its inclusion solely to those individuals whose preferences dictate it. Therefore, the full welfare-enhancing impact of included fairness principles will manifest itself in the aggregation process and is likely to affect more individuals than just those who have a preference for it.

Furthermore, the implication of Kaplow and Shavell's notion of policy evaluations based on the extent to which individuals' welfare is enhanced is really broader than simply including fairness according to individuals' taste for it. Although Kaplow and Shavell suggest no particular method for aggregating individuals' welfare to derive a measure of social welfare, they do not rule out, for example, considering distributional concerns in the aggregation process, concepts normally identified with principles of fairness.[142] They merely point out that distributional elements should be only implemented in order to increase overall welfare and not as an independent value unto itself.[143] Thus the "fairness" that Kaplow and Shavell state should not be considered in policy decisions is, in fact, quite narrowly defined; it consists only those aspects of "fairness" that do not enhance individuals' welfare.[144]

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142 The matters of distribution that Kaplow and Shavell refer to, however, are in essence decisions regarding fairness, though fairness in the broader, more commonly understood, sense rather in Kaplow and Shavell's narrower non-welfare-enhancing sense, as discussed *infra* notes 146-54 and accompanying text. In fact, the aggregation process in Kaplow and Shavell's framework cannot take place without some form of deontological decisions. *See* discussion *supra* notes 125-30 and accompanying text. For specific examples of the need for fairness decisions in Kaplow and Shavell's aggregation process, see, e.g., Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847 (2002).

143 "[D]istribution can play an important role even under a system of evaluation that is concerned exclusively with individuals' well-being . . . [T]he criticisms of notions of fairness that we offer are not criticisms of the language that analysts use or of the need to make value judgments in assessing legal policy; rather, they are specific criticisms of giving weight to factors that are independent of individuals' well-being. Hence, our analysis does not affect distributive judgments that are confined to individuals' well-being." Kaplow & Shavell, *supra* note 4, at 989.

144 *See infra* note 145.

The third important observation about Kaplow and Shavell's work is how the authors use their concept of fairness, the significance of which seems to have been overlooked by many of their critics. After distinguishing between the elements of fairness that enhances individuals' welfare from those elements that do not, the authors then define and use the term "fairness" for the balance of their article as only that part of fairness that does not enhance any community member's welfare.[145] Thus, their use of the term "fairness" does not include all aspects of fairness but only those aspects that are solely abstract principles and unrelated to anyone's well-being.[146] It is only then, with their circumscribed definition of "fairness", that Kaplow and Shavell can demonstrate that (their) "fairness" should never be considered part of the value choices a policymaker uses when selecting from various courses of actions to enhance welfare.

Their conclusion is based on an analytical demonstration that if the authors' definition of "fairness" is taken into account as an independent factor, it is possible for the policy-maker to elect a course of action that, in order to satisfy this non-welfare enhancing fairness principle, will cause at least some people to be worse off and no one to be better off as compared with ignoring the "fairness" criteria.[147] In other words, there may be only a net decline in overall social welfare and with no winners and only losers. Kaplow and Shavell argue that, presumably, no one

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145 "[O]ur definition of notions of fairness includes all principles—but only those principles—that give weight to factors that are independent of individuals' well-being." Kaplow & Shavell, *supra* note 4, at 989.

146 This has been recognized from different perspectives by others. *See, e.g.*, Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L. J. 173, 178 (2000) (" [A]lthough Kaplow and Shavell may present an effective critique of some theories of fairness, their critique cannot reasonably be viewed as effective against all theories of fairness").

147 In order to capture the essence of Kaplow and Shavell's argument that fairness should never be considered as an independent factor when making policy decisions to maximize social well-being, it is important to recall that Kaplow and Shavell define fairness for their argument's purpose as a principle that a policy-maker might admire but one that does not enhance well-being per se. *Supra* note 145. The essence of Kaplow and Shavell's argument is as follows: Assume that we have a State of the World A that yields a certain level of social well-being. Suppose we change that world to accommodate a principle of fairness to State of the World B, though the application of that principle, by definition, does not enhance anyone's well-being by social welfare measures. Since the only adjustment that has been made is to accommodate this principle of fairness—that means that nobody can be better off in State of the World B as compared with the original State of the World A. So, at the very least, no welfare has been enhanced. And, because State B constitutes a redistribution of goods, services, non-pecuniary and ideational values available to society at that time, though it is not possible that this redistribution to State B made anyone better off because it has no welfare enhancing properties, it is conceivable that in fact the redistribution made some people worse off. Hence Kaplow and Shavell's conclusion that fairness, as an independent principle, should never be considered in a policy-maker's decision process. The most rigorous formal exposition of their argument is found in Kaplow & Shavell, *supra* note 4, at 1012-14 n.102.

would prefer a course of action that only makes some or more people worse off and makes no one better off, regardless of whether principles of justice were adhered to. Their conclusion, and their article's title, gives a strong impression that they have proved, once again, that there is a trade-off between fairness and efficiency where efficiency implies welfare.

But this is not, in fact, what they have shown. They have only shown that including the non-welfare enhancing aspects of fairness principles in a welfare-enhancing decision process may possibly reduce welfare and will certainly not increase it. Given that Kaplow and Shavell's definition of "fairness" is limited to only those aspects of fairness that do not enhance welfare, clearly a trade-off between satisfying non-welfare enhancing principles and welfare-enhancing guidelines is not unexpected. To a certain extent, their conclusion is intuitively obvious. The question is, is it meaningful?

3. *What Are the Implications of Kaplow & Shavell's Conclusions?*

Kaplow and Shavell's conclusions, as expressed by their title, make a considerably stronger statement than in fact their arguments actually show. It is this stronger interpretation that has led, in part, to the controversy surrounding their work and as a result obfuscates many of their substantive contributions towards clarifying effective means for including value choices in decision-making processes.

Most significantly, what seems overlooked is that the original motivation for establishing principles of fairness is for the very purpose of contributing to the community's overall sense of well-being. Though one might complain that many legal principles of justice have taken on a life of their own,[148] both in rhetoric and legal analysis, the ultimate goal, fundamentally, is to improve the community's welfare.[149] There is more to welfare enhancing fairness than just those aspects that enter into the tastes and preferences of individuals. Those aspects enter into decisions about aggregating individual welfare and choosing among distribution outcomes.

As an illustration, suppose equality among community members is interpreted rigidly to generate a legal standard requiring equal income for

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148 *See generally* Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV.1556 (2004) (addressing in effect the same issues as Kaplow and Shavell, albeit from a different perspective).

149 *See* Rubin, *supra* note 1, at 1412. He writes, "Rights do not justify themselves, nor do they possess inherent legitimacy, no matter how hard one squints at precedents or the text of the Constitution. Their value, rather, is to be judged in terms of their ability to advance underlying social purposes." *Id.*

all.[150] Take into consideration that there is a distribution of talents, one that does not endow everyone equally. Under legal standard of equal income for all, a more talented individual would not be rewarded for any effort beyond what is necessary to contribute to the standard distribution of income. The disincentives to applying his or her talent fully would likely reduce the economic pie available for distribution for everyone. At the extreme, the equal distribution of income rule could lead to each member of the community living at barely subsistence levels.

If, in the alternative, there is some reward for being more productive, thereby allowing some to earn more than others, it is quite possible that people would be willing to work more according to their abilities and/or expend greater effort, thereby producing collectively a considerably larger economic pie. A value choice could then be implemented through a decision to redistribute this larger economic pie. It would be possible, for example, to set a threshold standard of living below which no one would fall, and to provide for this by taxing the wealthier proportionately more to generate tax revenues to distribute as income to those less well off. Everyone would be better off overall, though not mathematically equally so, by allowing for some differences in income distribution. What particular standard is used to distribute (or redistribute) the pie would also be a value choice.

So, for example, it seems unlikely that society would choose to adhere to a principle of equality rigidly defined as equal income, preferring a world in which everyone has precisely equal income but at a subsistence level, to a world in which everyone lives at least comfortably well—though some are somewhat better off than others.[151] And in fact, typically, notions of equality do not include absolute equal treatment.[152]

It is not difficult to see how Kaplow and Shavell reach their conclusion, given the way they framed the issue. By defining "fairness" as only that part of fairness that does *not* enhance welfare, it is evident that incorporating a factor that does not enhance the community members' welfare in the decision process (merely to adhere some abstract principle) will

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150 This is not unlike the notion of equality that was applied to health benefits that initially prevented women from having health coverage in the workplace that was as tailored to their needs as the men's were. *See supra* discussion *accompanying* notes 50-56.

151 This does not mean that there could not be some boundaries around how large the spread in income distribution would be. That could be accomplished by a progressive tax policy in which the rich pay a proportionally greater amount of their income to support social functions that the poor with a sliding scale in-between. Of course, many arguments have been made for not relying solely on tax policy to accomplish society's chosen ends. *See, e.g.*, Sanchirico, *supra* note 129, at 1064-69.

152 *See, e.g.*, Daniel Markovits, *How Much Redistribution Should There Be?* 112 YALE L. J. 2291 (2003).

inevitably lead to some decisions that render the community worse off.[153]

But Kaplow and Shavell's result, despite the title of their article, does not eliminate the consideration of fairness principles per se. What their work shows is that the fairness principles that should be pursued are those that enhance social welfare; even then, however, only those aspects of the principles that truly enhance welfare should be implemented.[154]

This is an important and useful insight that supports rather than undermines the use of fairness in policy considerations. It provides parameters on fairness principles so that their use indeed ensures that society's welfare is improved overall. Kaplow and Shavell, however, give little guidance for determining what fairness principles do enhance welfare beyond those elements that enter people's individual preferences. They leave that discussion to others.

VI. PARAMETERS OF FAIRNESS THAT DO ENHANCE WELFARE

> Differences imply choices, and choices imply judgment. We cannot escape from making judgments and the judgments that we make arise from the ethical preconceptions that have soaked into our view of life and are somehow imprinted in our brains. . . . We can see what we value, and try to see why.[155]
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> [M]oral heuristics play a pervasive role in moral, political, and legal judgments, and . . . they produce serious mistakes. . . . Usually such heuristics work well. The problem arises when the generalizations are wrenched out of context and treated as freestanding or universal

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153 Kaplow & Shavell, *supra* note 4, at 971. Kaplow and Shavell in effect acknowledge this when they state:

> Our first argument, that advancing notions of fairness reduces individuals' well-being, is in fact tautological on a general level. By definition, welfare economic analysis is concerned with individuals' well-being, whereas fairness-based analysis (to the extent that it differs from welfare economic analysis) is concerned with adherence to certain stipulated principles that do not depend on individuals' well-being. Thus, promoting notions of fairness may well involve a reduction individuals' well-being.

Id.

154 Other authors make similar inferences regarding Kaplow and Shavell's conclusions although they disagree with the two authors. For instance, Professor Fallon writes, "Kaplow and Shavell imply that there are no moral rights not directly founded on considerations of individual well-being." Richard H. Fallon, Jr., *Should We All Be Welfare Economists?* 101 MICH. L. REV. 979, 980 (2003). Furthermore, Professor Farnsworth writes, "Kaplow and Shavell's acknowledgment that policies should take fairness into account if people have a taste for it has more implications than they recognize." Ward Farnsworth, *The Taste for Fairness*, 102 COLUM. L. REV. 1992, 1993 (2002).

155 JOAN ROBINSON, ECONOMIC PHILOSOPHY 14 (1962).

> principles, applicable to situations in which their justifications no longer operate."[156]

The significant import of Kaplow and Shavell's work, that fairness principles should be pursued to the extent they enhance social welfare and not for independent deontological concerns, opens another question: when do principles of fairness enhance welfare beyond individuals' taste for it? Not only do different individuals have different ideas about what is welfare enhancing, even for themselves, but it is also difficult to capture what constitutes "in the best interest of the community," leading to a panoply of ethical values. Thus, the challenges facing a policy-maker are not simply how to reflect community values in the evaluation process, but which among conflicting values should be adopted.

As already discussed, values enter into the calculus of overall welfare at two levels. One is at the individual level that Kaplow and Shavell focus on, when each individual's measure of his or her own welfare includes that individual's own ethical choices that improve welfare for that individual. Whatever method of aggregation of individuals' welfare is applied, the result will likely reflect in some fashion the community's differing values. The second level of value choice does not provide such readily comprehensive measures of collective attitudes. At the second level, the policy-maker must choose among different Pareto efficient policies, each of which benefit different community members and sometimes will involve the sacrifice of welfare of others. These decisions reflect the same values chosen to weight individuals in order to aggregate each individual's welfare. If the policy-maker seeks to "reflect community values," the differing values among the community members render such a decision on that basis alone nearly impossible. As a result, the policy-maker is left to make his or her own choice between competing values, reflecting his or her own notions of justice, and this is unavoidable.[157] Selecting from among the Pareto efficient choices is the range in which the choice is "political" in the sense intended by the critical legal studies movement: within the range of Pareto efficient choices, the welfare-enhancing choice is subject to the values of the decision-maker.[158]

However, the range of political choice can be and is narrowed further in accordance to society's overall wishes than just the parameters

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156 Sunstein, *supra* note 148, at 1558.

157 "Fairness principles, for example, might be principles designed to resolve disputes only when preferences conflict; these principles would not be relevant when preferences are unanimous. It should seem natural to restrict the domain of fairness principles in this way: If there is unanimous agreement that one state of affairs is better than another, then there would be no issue for fairness principles to resolve." Chang, *supra* note 146, at 209.

158 In a congruous assertion in the context of criminal law, see Dan M. Kahan, *The Theory of Value Dilemma: A Critique of the Economic Analysis of Criminal Law*, 1 OHIO ST. J. CRIM. L. 643 (2004).

that Pareto efficiency offers. This further restriction arises from generally accepted principles of fairness, that over time, have gained social consensus that their pursuit does indeed enhance social welfare overall. These parameters ensue from the application of specific principles of fairness that have emerged, for example, into legal precepts and rules that set boundaries on legislative, executive, and judicial decision-making. They do not evolve from cost-benefit reasoning or other efficiency analysis,[159] but they nevertheless reflect a community's intuition and experience that pursuing these principles enhances community well-being.[160] These principles of fairness are not fully determinative of every decision, but they do limit further the range of choice and the extent of the "political" in the policy-maker's decision process. They serve as parameters of fairness that circumscribe policy choices to stay within the range over which there is broad consensus of what constitutes acceptable states of social well-being.

It is possible to point to a number of legal principles that serve as parameters of fairness yet still see that they are not completely determinative of social choice. Constitutional rights such as equal protection, the ban against takings, and due process are all examples of socially sanctioned parameters not only for choice among competing courses of action but also as boundaries on the evaluation of costs and benefits. Nevertheless, jurisprudence demonstrates that these principles do not always yield unambiguous determinative conclusions. Certainly, conflicting values over the choices within the acceptable range are indicated every time the Supreme Court does not reach a unanimous decision as to what rules effectively implement these rights. In addition, the Court's attitude as to what constitutes effective rules changes over time, sometimes because of changing circumstances or knowledge, or sometimes because of changes in the composition of the Court.[161]

Common law principles in the various areas of law also emerge to promote social welfare but are modified over time as circumstances indi-

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159 However, there has been considerable effort by law and economics scholars to demonstrate, after the fact, that many of these principles do reflect efficient choices, even though not consciously so. *See, e.g.*, Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (arguing that, as a result, legislation tends towards efficiency); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

160 Kaplow and Shavell also acknowledge this fact: "There is another respect in which notions of fairness may be relevant under welfare economics: they may serve as proxy devices to aid in identifying legal policies that tend to advance individuals' well-being." Kaplow & Shavell, *supra* note 4, at 975.

161 For example, the Court's revision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), of the trimester rule for abortions set forth in *Roe v. Wade*, 410 U.S. 113 (1973), reflects such a change, with some controversy. *See, e.g.*, Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703 (1994).

cate that change is necessary to enhance community well-being.[162] The doctrine of *res ipso loquitur* in tort law emerged in part because technological advances created complexities that made it impossible for some plaintiffs to prove negligence on the part of the defendant for suffered harm even though the circumstances were such that there was no other reasonable conclusion but the culpability of the defendant.[163] Kaplow and Shavell's own work examines a number of legal principles and rules that, though originally designed to promote community welfare, in their analysis, no longer best serve to do so.[164] But despite the regions of ambiguity that still remain, these principles of justice serve as important parameters to limit choice of outcome; the decision-maker chooses, when necessary, according to his or her own moral compunctions but within the boundaries set by the principles' constraints, constraints adopted by society in its own self-interest.

There is a growing body of literature offering additional suggestions as to how to make the areas of ambiguity even smaller and narrower. Many of them propose guidelines for making interpersonal comparisons in order to gauge, in some "fair" way, the level of social welfare.[165] There is no consensus, of course, and though differences in perspective among scholars may dissolve on some issues over time, ultimately, fundamental differences will always exist. Scholars and communities will always debate what should be, or how to determine, morally correct choices. Morality cannot be logically reasoned; it is a sentiment that is felt and varies across individuals.[166]

Nevertheless, consensuses emerge regarding some social norms or values as being in the best interests of the community and they serve as parameters limiting the range of value choices that individual decision-makers might elect.[167] It is important to recognize the role these parame-

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162 For example, the development of proximate cause used to consider the complexities of modern technology and resulting changes in community standards is discussed in Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U.L.Q. 49 (1991).

163 *See, e.g.*, Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887 (1994) (discussing the relationship between the doctrine and technological advance yielding a more likely presumption of compliance errors on the part of defendant).

164 Kaplow & Shavell examine legal rules for their welfare-enhancement capabilities in tort, contracts, legal procedure and law enforcement. *See* Kaplow & Shavell, *supra* note 4, at 1039, 1102, 1164, 1225 and subsequent pages.

165 *See supra* notes 108-23.

166 ROBINSON, *supra* note 155, at 12 ("Reason will not help. The ethical system implanted in each of us by our upbringing . . . was not derived from any reasonable principles").

167 *See* Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 587 (1998):

> I place 'social' before 'norm' to indicate a consensus in a community concerning what people ought to do. By this convention, agreement about what people ought to do indicates a possible social norm, whereas disagreement indicates a struggle to

ters play; they serve to enhance social well-being and not to conflict with it, as many law and economics scholars propose. A social or moral value should not be eschewed because of an erroneously held belief that it undermines social welfare;[168] nor should social welfare be eschewed in the erroneous belief that it is necessary to adhere to a moral principle.[169] In fact, morality and welfare should be mutually supportive of each other; notions of fairness should modify over time as the nature of well-being changes due to changes in economic, technological and political structure. Furthermore, indicia of welfare should also modify over time as changes in concepts of fairness that enhance a community's well-being evolve, either through deeper philosophical, ethical, or psychological understanding, or through a changing social environment. Thus, though it is not possible to have a means for determinative solutions for all possible questions of choice, there is substantial guidance for decision-makers to make value choices in a variety of potential welfare enhancing directions—guidance that reflects community values despite conflicting views within those values.

VII. FEMINIST CONTRIBUTIONS TO THE PARAMETERS OF WELFARE-ENHANCING FAIRNESS

A. REASONS FOR USING OUTSIDER SCHOLARSHIP

The number of resources for improving decisions regarding competing values is considerable: judicial opinion, legislative and executive action, as well as academic scholarship. Nevertheless, outsider scholars criticize mainstream doctrinality for shortcomings in its application of fairness and justice. The focus of outsider scholarship is the failure of traditional principles of justice to include adequately the well-being of specific outsider groups, most notably women, minorities and those of alternative sexual orientation. The very existence of outsider scholarship, however, indicates that our mainstream principles and rules of fairness fail to be inclusive of the *entire* community, despite the expressed or

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create a social norm. Consensus over an obligation, however, is not enough for the existence of a social norm. Following the positive theory of law, I also require a social norm to affect what people do, not just what they say. In brief, I use 'social norm' . . . to mean an effective consensus obligation. By this definition, a norm exists when almost everyone in a community agrees that they ought to behave in a particular way in specific circumstances, and this agreement affects what people actually do.

168 Farnsworth, *supra* note 154, at 1993 ("It may be that beliefs about fairness capture costs and benefits in a way different from, and preferable to, the way they are likely to be captured in an economist's analysis . . .").

169 Richard Craswell, *Kaplow and Shavell on the Substance of Fairness*, 32 J. LEGAL STUD. 245, 246 (2003) ("In any case in which a fairness theory would conflict with welfarism, why should we believe that the fairness theory has properly identified those acts that are truly unfair?).

implicit intent to enhance community welfare in general. This suggests that weaknesses in the parameters of fairness may also fail to include others who fall outside the mainstream perspective, even if only temporarily so—as victims of corporate harm often do. The failure may be exacerbated when decision-makers make choices among various ventures that impact faceless individuals. If true, then perhaps the methodology employed by outsider scholars to uncover discrimination against and extend fairness to discrete outsider groups such as women and minorities, can also be used to expand the set of parameters of welfare-enhancing fairness for decision-making in general.

The distributional impact inevitably created by policy choices motivates the expansion of the set of parameters of welfare-enhancing fairness. Economic reasoning can only go so far by determining the Pareto Optimal set of welfare-enhancing options,[170] but selecting from among those possibilities still involves a further decision as to who will be beneficiaries and who will bear the cost of any action.[171] Though mainstream guidelines and parameters of fairness limit the range by limiting the allowable distributions of pecuniary and ideational impacts,[172] awareness of the full distributional aspects are often distorted for reasons similar to what engenders discrete group discrimination.

For example, the decision to build a highway through a poor neighborhood in order to reduce the driving time of suburbanites to downtown offices may have more destructive impacts on the neighborhood residents than what is captured through more conventional evaluations. A conventional approach would be to measure what individuals would be willing to accept as payment to suffer the additional noise and pollution, or what compensation would induce them to sell their house. There are various statistical methodologies available to derive these estimates.[173] Though these estimates measure some loss to the neighborhood individuals, they are unlikely to capture other losses peculiar to that particular neighborhood environment. Perhaps the neighborhood is one of immigrants from a particular region of the world, for whom the community is an important source of support both psychologically and socio-economically. The welfare loss of the destruction of their neighborhood is not going to be captured by statistical measures of what price people typi-

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170 *See supra* note 94 and accompanying text. Welfare here includes both pecuniary and ideational values.

171 *See* discussion of Kalder-Hicks, *supra* notes 103-06 and accompanying text.

172 Distributional impact here includes more than just the impact on the distribution of pecuniary benefits and costs among community members; it includes ideational and other factors that enter into the well-being of the individual, e.g., rights to privacy versus freedom of information.

173 *See generally* Maureen L. Cropper & Wallace E. Oates, *Environmental Economics: A Survey*, 30 J. ECON. LIT. 675 (1992).

cally would be willing to accept to sell a house in a neighborhood such as this. Furthermore, even the best-intentioned policy-maker attempting to derive as accurately as possible the overall costs and benefits of a particular program may not even think about this dimension of cost. If the decision-maker is part of the governmental structure or on the executive level of a business enterprise, the decision-maker is more likely to be an assimilated individual, higher up in the socio-political hierarchy and not psychologically or financially dependant on support from the neighborhood in which his or her home resides. More likely, this individual's support network is derived from the connection with others of similar economic and social status, who may be living in a variety of different physical neighborhoods.

The lack of such awareness is one source of criticism for using the typical cost-benefit analysis in particular, and law and economic reasoning in general, for guiding social policy and private decision-making. It is true that much of the early inroads of economics into social evaluations severely lacked the "humanistic" element and even advocated policies for decision-making that ignored consideration of these concerns.[174] But there is a new generation of law and economic scholars who are endeavoring to incorporate much of the understanding offered by critics. As suggested earlier, economic reasoning is socially useful in that it leads to the range of beneficial choices that are the most socially advantageous.[175] However, it still leaves to the decision-maker to select from among these beneficial choices, hopefully on a basis of fairness to the community members. Economic reasoning even advises us to examine our principles of fairness to make sure they do indeed serve the community well-being and have not evolved into idolatrous watchwords that have lost their original merit. Ultimately, however, it is the principles of fairness and not economic reasoning that provide the parameters on value choices so that the distributional impact from these choices is "fair" as well as efficient.

B. FEMINIST PRINCIPLES FOR EXTENDING THE PARAMETERS OF FAIRNESS

How might feminist principles be of assistance? The most important goal of feminism (as well as other outsider analyses) is to meet the needs of the discriminated group. When the principles arising from established parameters of fairness fail to ensure that certain community members' welfare is considered, the techniques feminism offers serve to

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174 This has been poignantly portrayed in Ackerman & Heinzerling, *supra* note 121, at 1554.

175 *Supra* note 100 and accompanying text.

counter that failure.[176] The hypothetical of the highway through the immigrant neighborhood can demonstrate how the principles of feminist analysis can be of assistance.

We begin with the concepts of the "dominant voice" and the voice of the "other"—the "excluded voice," which are the elements of an analysis of the dynamics of power. The dominant voice is the one in the position to make decisions; the voice of the "other," the "excluded voice," is the one whose needs and concerns are not addressed by the dominant analysis.[177] In our highway example, the dominant voice would be the mainstream perspectives valuing the building of the highway, and the "other" would be the immigrant population whose sensibilities about the neighborhood to be destroyed are not reflected in the mainstream's evaluation of the project—in other words, the immigrant population is the one whose voice is excluded. The policy-makers, representing the dominant voice, decide which ventures to pursue, evaluating the costs and benefits of each possibility, weighing and balancing in the process. Is the ethos of how to assess cost-benefit values responsive only to the concerns of someone like the assimilated, middle-class government policy-maker of our hypothetical? Or is there flexibility to reflect the concerns of others, different from those in governmental positions?

Feminist analysis would highlight the difficulty someone from one background may have in appreciating the concerns of someone with an entirely different experience.[178] It is unlikely that the assimilated mid-

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176 The other "outsider" scholarship has evolved many of these techniques to make them applicable to their own concerns though feminist analysis for the most part predates them. Of course, feminist analysis did not develop autonomously on its own or uniformly. It drew from and built on over time certain trends in philosophy and social sciences and there were several different schools of feminist thought. *See, e.g.*, Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1 (2001) (discussing the trends and evolution of feminist theory and the different philosophies drawn upon as well as the references therein).

177 *See supra* notes 39-48 and accompanying text. Long before modern feminist analysis's advent, the role of the dominant voice was already implicitly recognized. For example, in 1776, during the colonialists' efforts to break free from England, Abigail Adams wrote to her husband, John, future president of the soon-to-be United States: "I long to hear that you have declared an independency. And, by the way, in the new code of laws which I suppose it will be necessary for you to make, I desire you would *remember the ladies* and be more generous and favorable to them than your ancestors." ADAMS FAMILY CORRESPONDENCE, 370 (L.H. Butterfield et al. eds., 1963) (emphasis added) *available at* http://www.masshist.org/digitaladams. "I cannot say that I think you are very generous to the ladies, for, whilst you are proclaiming peace and good-will to men, emancipating all nations, you insist upon retaining an absolute power over wives." *Id.* at 420.

178 This issue came up even in the discourse among feminists regarding the different needs among themselves. For example, the needs of women of color are different than the needs of women of the dominant group, i.e., white middle-class women. This discussion also raised the question of whether there were characteristics that were "essential" to all women or not. *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race*

dle-class government policy-maker of our hypothetical, without more, would be able to recognize the different needs of members of the poor immigrant community and incorporate those values in the weighing and balancing of the benefits and costs of the proposed highway project.[179] Furthermore, it is not only the differences in needs among individuals but also how those differences arise in the contexts in which the individuals function. "Context analysis"[180] would recognize not only the needs of the particular immigrant but also how those needs are being met in the immigrant neighborhood in order to ascertain a truer indicator of the neighborhood's value. A feminist analysis would recognize that the principle of equality of treatment is not the same as equal treatment[181] and that though an immigrant's needs may be different from those of the mainstream perspective, they are just as important to consider in any policy-making decision. Thus feminist analysis would extend the fairness parameter of equality to recognize the full differences in the immigrants' needs and dictate that those differences enter the calculus of costs and benefits.

The inclusion of the impact on non-mainstream individuals in any cost-benefit evaluations requires decision-makers to be alert to the possibility of different sensibilities and become educated about them. How might the policy-makers become educated to different sensibilities? The feminist method would suggest "consciousness-raising." Though that term may have for some, a negative connotation and for others, a positive one,[182] the concept's relevancy here is with respect to persons in power becoming aware of differences in others outside the power circle. Heightened awareness of the disparate impacts of various projects can be accomplished by drawing on different disciplines such as sociology, psychology, and economics, and in particular, on experts in those fields who are sensitized to issues of difference and who can bring forward elements that otherwise might be ignored. Another approach that in fact often is employed is to hold hearings at which people potentially impacted can express their reactions and concerns. Feminists would characterize this as using "narrative" to "raise consciousness," gaining understanding by listening to people tell their story and hearing of their subjective experience.

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and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L. J. 115 (1989); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J. L. & FEMINISM 305 (1990).

179 Rhode, *supra* note 38.

180 *See supra* note 47.

181 *See supra* notes 51-56 and accompanying text.

182 *See supra* note 44 and accompanying text.

Of course, the method to include differences in sensibilities in a cost-benefit reasoning process is still unresolved though much discussed. Proposals of what and how to include people's sentiments are not only very abstract,[183] but are also not fully determinative of choice. Every method of inclusion involves some value choice on the part of the evaluator. Ultimately, both the decision of how to include these factors as well as choosing from among the resulting options must rest on the evaluator's intuitive sense of justice.[184] Clearly that sense of justice contains elements of the subjective, wherein lies the dimensions of choice that are political.

Feminists would call attention, however, to what would be necessary to be assured of the strong sense of justice relied upon. It would require more than the policy-maker being sensitive to differences among individuals and contexts; it would be more than having the knowledge and good intuition about how to incorporate those differences in a weighing and balancing process. Feminists would assert that the policy-maker needs to be motivated by a commitment to the principle of equality of treatment for all members of the community, with a strong understanding that equality of treatment is not the same as equal treatment. It is only through the coupling of the principle of equality of treatment with the sensitivity to the differences among members of the community and their contexts, that it is possible to invoke a strong sense of justice to guide the intuitive and political dimensions of decision-making.

What if the decision-maker is not so inclined to make the efforts to acquaint him or herself with differences among individuals impacted by projects? What if the decision-maker is perhaps, instead, dismissive of the "other's" concerns? Feminists recognize that this can be and often is a problem. Such sensibility cannot be legislated alone, but must be instilled in the individual.[185] To address these concerns, feminists argue for an atmosphere in the decision environment that promotes an "ethic of

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183 For an extensive discussion of non-determinative approaches as well as suggestions for determinative approaches, *see generally* Adler & Posner, *supra* note 82, and references therein. *See also* Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998).

184 Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241, 297 (2000) ("[W]e ought to strive for a 'reflective equilibrium' where the chosen view is the one best supported by intuitive judgments as well as systematic considerations").

185 President Kennedy's speeches sought to inspire what feminists would call an ethic of care. With regard to racial discrimination, he stated:

> This is not a sectional issue. Difficulties over . . . discrimination exist in every city, in every State of the Union . . . Nor is this a partisan issue . . . men of goodwill and generosity should be able to unite regardless of party or politics . . . This is not even a legal or legislative issue alone . . . new laws are needed . . . but law alone cannot make men see right. We are confronted primarily with a moral issue . . . The heart of the question is whether all Americans are to be afforded equal rights and equal

care" for the needs of others, particularly for those whose needs are different from the decision-makers themselves. Obviously, to instill in an individual a sensibility he or she is not inclined toward is not readily achieved. We can learn lessons from the techniques feminists evolved to instill in men an awareness of and concern for the needs of women.

The methods of "consciousness-raising" suggest practical approaches, such as persons in positions of power becoming educated and more sophisticated with regard to unseen costs and benefits arising from differences among impacted individuals.[186] Attending seminars and conferences modeled on those designed to raise awareness of gender concerns can extend to more broad concepts of differences among impacted individuals in general. Another tactic is to incorporate into the decision-making process the evaluations of an individual or a board who is specially trained to be sensitive to factors of differences, and whose responsibility is to examine policy decisions for disparate impacts not readily observable. Creating an institutional "ethicist" instills a "raised consciousness" in the decision process, rather than in the individual decision-makers, though nothing would preclude implementing strategies towards both ends. An in-house review process to address ethical and fairness concerns is already familiar in other contexts. The scientific community has implemented special review processes whereby scientific investigations that use human subjects are required to obtain approval in advance from a board trained in evaluating treatment and concern for human subjects. The purpose is to instill in the experiment, if not the experimenters, an ethic of care for the human subjects, a need for which the scientific community obviously felt necessary to fill.[187] Feminists

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opportunities, whether we are going to treat our fellow Americans as we want to be treated.

President's Radio and Television Report to the American People on Civil Rights, PUB. PAPERS (June 11, 1963), *available at* http://www.jfklibrary.org/j061163.htm.

186 To a certain extent, there has already been efforts to adapt law and economic analysis itself to recognize the importance of taking into consideration differences among the impacted individuals. *See, e.g.*, Frank & Sunstein, *supra* note 86; Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1485-87 (1998); Eric A. Posner, *Law and the Emotions*, 89 GEO. L. J. 1977 (2001); Sunstein, *supra* note 127; Cass R. Sunstein, *Are Poor People Worth Less than Rich People? Disaggregating the Value of Statistical Lives* (2004) (paper on file with author).

187 *See generally* Paul Farmer & Nicole Gastineau Campos, *New Malaise: Bioethics and Human Rights in the Global Era*, 32 J. L. MED. & ETHICS 243 (2004). The authors there not only discuss the role of Institutional Review Boards but they also discuss the infamous Tuskegee Syphilis Study, in which the U.S. Public Health Service followed the lives of 600 poor African-American males, 2/3 of whom had syphilis, from 1932 to 1972 in order to study syphilis' effect. Though a cure for the disease, penicillin, was discovered in 1947, the Service never offered it to the subjects, even though the subjects joined the study on the presumption that they would be treated. Farmer and Campos's point is that despite the implementation of Institutional Review Boards, in the year 2000, the New England Journal of Medicine reported a study in Uganda of 415 HIV infected individuals to gauge the transmission of the virus in

also call for developing a sense of "connectedness" with the "other" to assist fostering an ethic of care. If feasible, for example, the decision-makers themselves might meet with impacted individuals or visit impacted areas so as to identify more readily with those affected.[188] Greater human contact has long been known to give greater empathic understanding and appreciation for those different from ourselves.

Thus, a feminist approach would cause the parameters of fairness to include more than the established applications of justice, such as equal protection, enforcement of promises, just compensation and rights of privacy; they would include the obligation to scrutinize for differences in needs among community members, which are then to be considered equally in assessments of fair decision-making. Including this obligation expands the parameters of fairness for evaluating the cost and benefits of an undertaking and in turn creates a more accurate picture of the distributional consequences of policy decisions. Moreover, expanding the parameters of fairness also further narrows the range of permissible efficiency choices, thereby circumscribing the degree to which the choice is political. Feminist principles can rectify, in these ways, much of the cause for criticism[189]of the use of cost-benefit reasoning as well as law and economic analysis in general in public and private enterprise decision-making.

C. FEMINIST PRINCIPLES IN THE CORPORATE DECISION PROCESS

Thus far the focus has been on decision-making in general, therefore the analysis developed from feminist principles should apply to both private and public arenas. Much of the literature evaluating and critiquing law and economic approaches to decision processes, particularly with respect to cost-benefit reasoning, has focused on governmental decision-making. The feminist approaches can be extended, though, to corporate and other business contexts as well. This section contains some additional refinements tailored specifically to the corporate environment and its underlying incentive structure.

As already noted,[190] firms' primary focus is on the profitability of the enterprise. Profits are the primary concern of shareholders since profits drive dividends and increase share value. Profits are also the primary concern of corporate management because, ultimately, management's positions depend on shareholder satisfaction since shareholders

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heterosexual sex. None of the volunteers were offered treatment, nor were their healthy sex partners advised that the subjects were HIV positive. What is most startling is that 4 Institutional Review Boards in the U.S. and Uganda approved this study and a data and safety monitoring board from the U.S. National Institutes of Health monitored their work. *Id.*

188 *See infra* note 214.

189 *See, e.g.*, Heinzerling, *supra* note 74.

190 *See* supra text accompanying notes 64-68.

elect the board of directors, who in turn appoint the rest of management. Traditionally, law and economics has argued that the process of corporate decisions maximizes social welfare because market forces cause firms, in seeking to enhance their own profits, to make choices that are consistent with society's. These arguments were premised on the fact that firms make their calculations regarding different ventures based on market prices so as to enhance their profits. The arguments were that these market prices reflect consumer choices under the constraints of the availability of resources. Therefore when firms seek to maximize their profits, they engage in a cost-benefit analysis in which the evaluations of the costs and benefits reflect consumer wishes and thereby enhance social welfare.[191]

The biases and distortions from using market prices in the firm's decision process have already been noted.[192] Market prices tend to reflect preferences of wealthier individuals, not to reflect social preferences for goods private markets cannot produce, and market forces do not encourage foundational ventures that are economically unprofitable in the short run but socially desirable for the long run.[193] The deterrence effect of lawsuits in the firm's cost-benefit calculation[194] also fails to capture fully social assessments of harm due to procedural and evaluation problems. Procedurally, the adversary system fails harmed individuals in obtaining an adequate remedy because of its costs, the inaccessibility of evidence, and the difficulties in identifying a defendant firm or being identified as a bona fide plaintiff. In addition, jury judgments are unlikely to capture the full ramifications of the harm, in part because the focus is on the plaintiff and not the whole context, and because of those elements that are non-pecuniary and truly impossible to compensate in monetary terms.[195]

Considering the problematic aspects of evaluating costs and benefits noted by both mainstream and feminist analyses,[196] it is not difficult to conclude that the current profit-driven corporate decision process determining what risk of harm to which the community should be exposed, becomes less than satisfactory for ensuring enhanced community welfare by society's standards. Driven by market prices and jury judgments, firms' decisions are likely to put individuals at greater risk of harm and have different distributional impacts than society would find tolerable or "fair." Furthermore, circumstances exist when society, regardless of the

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191 *See supra* notes 69-73 and accompanying text.

192 *See supra* text accompanying notes 81-84.

193 *Id.*

194 *See supra* note 73 and accompanying text.

195 For a discussion of these issues from a feminist perspective, see Bender, *supra* note 27.

196 *See, e.g.*, the source cited in *supra* notes 74-77, 82-84.

benefits, may not want to entertain the risks associated with a particular venture, or may evaluate the consequences of risk differently in different contexts.[197] The market-price, jury-judgment approach for evaluating cost and benefits does not have the capability to capture these social choices.

These are not questions of trade-offs between efficiency and fairness. Instead, they are questions regarding the selection from the possible Pareto Optimal or Superior choices. The concern is the basis for determining what is in fact Pareto Superior and how the firm selects which Pareto Superior projects to pursue. Once again, as with decision-making in general, the firm's evaluation and decision process should have boundaries circumscribed by social parameters of fairness.[198] What solutions might feminist techniques offer in the specific context of the firm?

Some feminist scholars propose that firms should abandon or at least reduce significantly the importance of profit-maximizing as a goal of the corporation.[199] Such a "fairness vs. efficiency" approach, however, would not necessarily offer a desirable solution. Whether decisions are driven by the profit motives of individual firms or by a more centralized government agency, some form of weighing and balancing must still be undertaken in order to choose which of the possible groupings of goods, services and ideational values the socio-economy is moving towards. Losing those benefits that the market mechanism does offer of spreading myriads of micro-cost-benefit decisions among those intimately involved in a particular product or service—either as a consumer or as a producer—would create a weight of bureaucratic decision-making that, at least by historical observation, has had crushing effects on even the most well-intentioned economies.[200] Not all of the impact of profit incentives and the use of market prices is completely contrary to social welfare. Market prices and responses to them do in fact convey consid-

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197 For example, compare the choice to spend millions to rescue Baby Jessica McClure from the well she fell down and provide her with a bright future with the debate over whether to incur the cost of seatbelts for children when riding school buses. *See supra* note 80. *See also* Douglas A. Kysar, *Climate Change, Cultural Transformation, and Comprehensive Rationality*, 31 ENVIRONMENTAL AFFAIRS 555 (2004) (suggesting different standards of choice other than the more traditional cost-benefit approach used in environmental law).

198 *See supra* discussion accompanying notes 155-69.

199 Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1666-68 (2002). Though Mitchell does not identify himself as a feminist, Gabaldon does. She also points out in another article that in her assessment, Mitchell's analysis is often subconsciously feminist, or at least draws on feminist principles. *See* Theresa A. Gabaldon, *Corporate Conscience and the White Man's Burden*, 70 GEO. WASH. L. REV. 944 (2002).

200 For discussions regarding former centrally-planned economics transforming to private markets, see LYNNE L. DALLAS, LAW AND PUBLIC POLICY: A SOCIO-ECONOMIC APPROACH ch. 12 (2004).

erable information about society's preferences and does so extremely efficaciously. Instead, a better approach than attempting to abandon profit maximizing and market prices would be to conceive a manner by which firms will incorporate welfare-enhancing fairness values into their cost-benefit reasoning process while still proceeding to make efficient decisions.[201]

The puzzle is how to imbue effectively the corporate decision process with welfare and fairness concerns. When addressing the decision process of governmental policy-makers, there is already an implicit presumption that those policy-makers pursue a mandate to evaluate and constrain their selections from efficient choices based on welfare and fairness principles. When assessing the decision-process specific to the firm, however, analyses and recommendations have to consider the context in which the decision process is made, and that context is profit-maximization.[202]

When exploring what applications of the feminist approach might be effective in influencing corporate conduct to comport more consistently with social values, it is possible to turn to what has been implemented in other contexts regarding other social concerns. Analyses addressing "market failures,"[203] suggest assessing whether imposing fairness concerns from outside the firm or inducing an environment internal to the firm stimulate incentives to incorporate those values. So for example, the government provides, external to the market, certain goods and services that enhance social welfare that the market fails to produce, such as national defense and funding fundamental scientific research at universities, ventures that are too unprofitable or risky for private firms to undertake. The government creates incentives internal to the firm by giving tax deductions and tax subsidies to induce firms to develop environmentally sound production techniques and to hire unprepared workers and train them. Some laws require firms to accommodate identified specific needs of various sectors of the community because the cost-benefit analyses that firms engage in using market prices leads to different, less socially desirable, conclusions. Examples are the Civil Rights Act of

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201 For a critique of legal treatments that encourage firms to only consider profit motives in their decision process instead of developing means for corporate social responsibility, see Williams, *supra* note 75.

202 Other efforts integrating social values with corporate conduct include: LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT (2001); Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363 (2002); Claire Moore Dickerson, *Corporations As Cities: Targeting the Nodes in Overlapping Networks*, 29 J. CORP. LAW 533 (2004) (using sociology and network theory to integrate theories of corporate social responsibility with theories of profit-maximizing behavior).

203 *See supra* notes 81-84 and accompanying text.

1964,[204] the Clean Air Act,[205] mandatory insurance provisions,[206] Occupational Safety and Health Act[207] and the American With Disabilities Act.[208]

Though particular concerns with specific industries or corporations ought to be assessed on a case-by-case basis, some general recommendations can be made. With respect to the firm's cost-benefit decisions, the contributions feminist theory can offer are analogous to its contributions to the parameters of fairness in general. Feminist techniques can suggest ways to induce the decision-makers to take account of the differences and needs of others, both in the firm's evaluative process of the cost and benefits of different projects and in its decisions as to which ventures to pursue. The feminist technique can provide guidance for developing effective means to imbue the internal corporate atmosphere with the "ethic of care" and suggest when it is appropriate to impose guidance externally to the firm.

In order to develop an atmosphere that will induce an ethic of care, recommendations parallel to those suggested earlier regarding decision-makers in general can be made. For example, to ensure meaningful corporate social awareness, there could be a requirement that in order to sit on a Board of Directors, a member must become educated with respect to ethical and social concerns of that corporation's behavior and become sensitive to the potential differences in the needs of others who may be impacted by the corporation's conduct. This could be achieved by the development of seminars or workshops specifically tailored to issues the corporation is likely to encounter. Another would be to require at least one member of the Board be specially trained to be alert for ethical issues in the corporation's decision processes.[209] Legal responsibility can be assigned to the Board's "ethicist," i.e., a "fiduciary duty of ethical care," to monitor and ascertain that fairness values are in place at key levels of decision-making throughout the corporate hierarchy.[210] Corpo-

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204 Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–2000h-6 (2005).

205 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2005).

206 For example, see ALASKA STAT. § 28.22.011 (Michie 2005); D.C. CODE ANN. § 31-2403 (2005); HAW. REV. STAT. § 431:10C-107 (2004); S.C. CODE ANN. § 56-10-220 (2005).

207 29 U.S.C. §§ 651-675, 677-78 (2005); 42 U.S.C. § 3142-1 (2005).

208 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2005).

209 This may prove to be unduly burdensome for small closely-held corporations who typically have a small number of members sitting on the Board or may have no members and the corporation is run by shareholders. In those instances, attendance to seminars alerting board members of the possibility of ethical concerns should satisfice.

210 For an interesting discussion, drawing on the work of psychologist John M. Darley and sociologist Robert Jackall, noting that the ethical approaches of those at the head of an organization have a significant impact on the moral and legal behavior of employees down through the organizations' hierarchy, see Mitchell & Gabaldon, *supra* note 199, at 1653-62 (citing ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988); JOHN M. DARLEY, HOW ORGANIZATIONS SOCIALIZE INDIVIDUALS INTO EVILDOING, IN CODES

rations can be obligated to retain a review board that examines corporate decisions for proper evaluation of costs and benefits with regard to impact on community members, similar to the board review requirements for scientific experiments involving human subjects.[211]

One problem noted by many scholars is the empathic detachment of corporate decision-makers from the individuals their decisions impact, corporate decisions often being based on statistical analysis of "faceless individuals."[212] As with decision-makers in general,[213] application of a feminist method would recommend means of creating a sense of connectedness with the other. "Connectedness" could be accomplished by requiring corporate management to hold public hearings regarding projects involving risk of harm, to meet personally with individuals potentially impacted and visit personally the locations that the corporate activity will take place, thereby creating an empathic connection between those who run the corporation and those affected by the corporation.[214] Appointing to the Board of Directors, representatives of potentially impacted individuals, such as employees of the firm[215] and members of the community in which the corporation operates, will introduce the concerns of the "other" into the discussion. Corporations could be obligated to submit projects to external review committees composed of community members, consumers, and others trained to recognize potential risk and fairness problems. The goal of all these approaches is to facilitate a development of social conscience in the corporate atmosphere so that the firm may avoid undertaking ventures that may possibly create an undue risk of harm.

If the likelihood is high that, even with all the above suggestions in place, voices of affected "others" would still not be adequately represented, then a feminist consideration would suggest that a statutory ap-

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OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13 (David M. Messick & Ann E. Tenbrunsel, eds. 1996)).

211 *See supra* note 187 and accompanying text.

212 *See, e.g.*, Bender, *supra* note 27; Heinzerling, *supra* note 74; Mitchell & Gabaldon, *supra* note 199.

213 *See supra* text accompanying note 188.

214 In the context of mass torts, Leslie Bender suggested that corporate officers be required actually to participate personally in the caregiving of their victims. She argues that this requirement would not only imbue the corporate officers with a greater sense of responsibility for their decisions to put others in the way of risk of harm (instead of just "buying" their way out of it by having the corporation pay monetary damages) but would also instill in them a greater ethic of care that might cause them pause before they make decisions to risk the lives of others in the future. *See* Bender, *supra* note 27.

215 *See, e.g.*, Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993); Fauver & Fuerst, *supra* note 62 (demonstrating empirically that not only does the presence of employees on corporate boards have their concerns address but the corporation operates more efficiently and increases in value).

proach may be necessary.[216] The question of whether to have an external rule (such as a statute) or internal incentive mechanisms (such as the requirement of an "ethicist" on the Board of Directors) is not decisive for all circumstances or even necessarily mutually exclusive. The advantage of a statutory requirement is that it guarantees that particular needs will be met. The disadvantage is that it is difficult to craft a statute to be well tailored to all circumstances, being over-inclusive in some and under-inclusive in others. The advantage of promoting ethical concerns from within the corporation is that the corporate-decision makers can then tailor their decisions to be more fine-tuned with the needs of those impacted. The disadvantage is that the firm may still attempt to shirk its responsibility. An external community review board can serve as a middle ground in that its oversight can reduce the likelihood that firms will choose policies that deviate too far from acceptable social levels of risk and yet the board can remain flexible enough to allow the firm to take courses of action that encompass the needs of others in a manner that is specific to the situation at hand. Of course even this circumstance has its disadvantage, probably the most serious one is the potential for corruption, as in any institutional process.

Feminist approaches may also enhance the effectiveness of lawsuits to deter firms from making socially unacceptable decisions with respect to risk. A difficulty in general of relying on lawsuits' deterrent effect is that firms are in possession of the information and evidence necessary to ascertain whether they adopted acceptable approaches to risk. Firms do not have the incentive to be forthcoming which impedes a plaintiff-victim's ability to be heard properly in court. Feminist analysis would recognize this as an imbalance of power, that is, there is an imbalance of power in control of critical information and would make recommendations to equalize that balance. For example, one feminist author has suggested reallocating the burden of proof to make the firm more compliant with disclosure, thereby putting the plaintiff on a more equal footing in the courtroom. The author recommends that, upon a plaintiff's limited showing that a harm has occurred and that it is related to a firm's activities, the burden of proof should shift from the plaintiff to the firm to

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216 For example, the State of Maryland passed a statute requiring insurance companies to provide two days of hospital stay for women who just gave birth even if there were no complications. The insurance companies' own cost-benefit calculations were that one day was all that was statistically necessary. The costs of providing a second day of hospital care for all mothers giving birth was in excess of the cost of caring for the potential complications arising from premature discharge. However, the State decided that the value of the possible harm to the child, if problems emerged on the second day after birth, was greater than the measure of medical costs to care for it. *See* MD. CODE ANN., INS., § 15-812 (2002 & Supp. 2005).

demonstrate that the firm did not make socially unreasonable decisions to risk harm.[217]

Creating transparency regarding decision processes with social implications can be mandated, for example, through SEC disclosure requirements.[218] The corporation is then subject to public scrutiny and, in particular, to potential scrutiny by those representing impacted individuals. All participants in the corporate decision process will know that they will be held accountable for their decisions, and accountable based on social principles of welfare-enhancing fairness, and not just on profit-maximizing goals of the corporation.[219] This will create a form of social deterrence not available through the marketplace mechanisms. This will also increase the shifting of power balances between plaintiff and defendant when the corporate activities are associated with harm. These possibilities foster an ethical "corporate conscience" to act as constraints in the evaluation and selection process of corporate decisions.[220]

Thus, we can see that feminist principles, originally designed to address the concerns of women, can be used to address the excluded voice of victims of corporate harm as well. The approaches follow those developed over time to gain equality for women. Some of the techniques are to implement change from within the organization and others are to impose change from without. Some of the techniques are designed to foster an ethic of care so that corporate decision-makers will provide their own constraints on the decisions they make with regard to putting others at the risk of harm. Other techniques serve to constrain the range of risk by incorporating outside sensibilities to the decision-process. Applying feminist analyses to the corporate decision context assists in highlighting not only how corporate conduct might diverge from socially acceptable behavior but also offers means to stimulate corporate activity to align more with society's values.

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217 Bender, *supra* note 27.

218 Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999); *see also* Claire Moore Dickerson, *Ozymandias as Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035 (2003).

219 Allowances can be made for those corporate decisions that need to be held secret for a time to serve competition needs in the market place.

220 Lorenzo Sacconi, *Corporate Social Responsibility (CSR) as a Model of "Extended" Corporate Governance. An Explanation Based on the Economic Theories of Social Contract, Reputation and Reciprocal Conformism*, Liuc Papers n. 142, Serie Etica, Diritto ed Economia 10, suppl. a febbraio 2004 (on file with author) (for an analysis of the European efforts to incorporate ethics into business conduct and arguments that properly implemented self-regulation incentives for ethical conduct can be effective).

CONCLUSION

This article provides resolutions to a number of conundrums that have vexed policy-makers and scholars for some decades. The most significant conclusion is that efficiency and fairness concerns do not conflict but rather mutually support each other in the goal of maximizing social welfare. This is contrary to the more widely-held view by both advocates of law and economic reasoning and those favoring deontological concerns that a trade-off between fairness and efficiency is inevitable. This article demonstrates how the coalescence of the two frameworks, the cultivation of fairness with law and economics' efficiency maximization, yields greater enhancements of social welfare by simultaneously satisfying the criteria of both. The analysis also points out that more than one state of the world likely exists that satisfies both sets of criteria. Furthermore, the selection from among those various possible states is a political choice not determined by any objective criteria, but one to be chosen by the subjective criteria of the decision-maker.

The article first delineates how law and economic analysis, using Pareto Optimality as the criterion, can determine a complete set of all possible efficient states. It then points out that in selecting from among those efficient states one can rely only on deontological approaches. However, these deontological concerns are qualified in that their implementation must actually be welfare enhancing and not just abstract idealistic concepts unanchored in any way to welfare considerations. This view of deontological applications recognizes dimensions and roles for fairness evaluations in welfare maximization beyond the narrower definition of fairness implied by the work of Kaplow and Shavell.[221]

The analysis then addresses how deontological concerns influence the selections from among the preferred efficient states. This article suggests that deontological concerns manifest themselves by creating boundaries of ethical conduct outside of which there can be no socially acceptable selection of efficient states. These ethical boundaries are labeled here as the parameters of fairness. Examples of parameters of fairness are the requirement of equitable treatment, privacy, due process, and other fairness concerns. Though these parameters of fairness narrow the range of acceptable efficient states to those that also satisfy social ethical norms, since they are only boundaries, they do not determine one unique state. The intersection of efficiency criteria with the boundaries created by the parameters of fairness yields fewer but nevertheless still numerous potential optimal choices, the selection from which can only be determined by the political values of the decision-maker.

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[221] *See supra* Part VI. B. 2.

An application of this theoretical framework to a particularly pervasive problem, the excessive incidence of corporate harm, demonstrates the approach's usefulness. The article shows how law and economics analysis can describe why corporate harm occurs; it stems from the firm's use of cost-benefit reasoning in its pursuit of maximizing profits. Law and economics, however, cannot provide a widely accepted solution to the excessive incidence of corporate harm. The reason is that the source of undue incidence of corporate harm lies in the social applications of the parameters of fairness and not in the application of efficiency criteria. The deficiencies in social policy with respect to corporate harm are not due to shortcomings in economic analysis but rather in the failure of the parameters of fairness to circumscribe adequately permissible harmful conduct.

To provide a resolution to the incidence of undue corporate harm, this article turns to feminist theory, not to address any gender concerns, but to draw from its analytic tools. First, the application of the feminist method uncovers the failings in the decision-making environment that allow for choices of excessive corporate harm. The feminist method then offers remedies for these failings. In particular, feminist analysis shows that excessive corporate harm arises because of the failure to consider what constitutes the well-being of those who are outside the periphery of the decision-makers' awareness. The feminist method then proposes general principles and specific techniques to incorporate the concerns of those who are excluded from the decision-makers' calculations. These general principles suggest an ethical requirement that decision-makers use due diligence to become aware of those whose concerns do not naturally fall within the typical decision calculations. This ethical requirement is, in effect, an expansion of the parameters of fairness; it yields additional boundaries on and further narrows the range of possible efficient states from which a decision-maker may select. The principles underlying the techniques that the feminist method would suggest are premised on the feminist concepts of the "ethic of care," the "voice of the other" (that is, the "excluded voice") and the ethical obligation of inclusion, in particular, the inclusion of the needs of the "other." For the purposes of redressing corporate harm, the inclusion of the "other" would be to include the concerns of those outside the norms of corporate consideration. As a result, the feminist approach offers a resolution to the problem of excessive corporate harm through the expansion of the parameters of fairness and not through rejecting law and economic contributions to increasing social welfare. Collaterally, this article demonstrates that two disparate jurisprudences normally seen as antagonistic to

one another—feminist analysis and law and economics—can in fact create a synergy by resolving issues that each alone is not able to address satisfactorily.