IN A SIMILAR VOICE: A UNIFYING ECONOMIC ANALYSIS OF GILLIGAN'S AMY AND JAKE

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INTRODUCTION

In her groundbreaking work *In a Different Voice,* Carol Gilligan observes that girls and boys make moral decisions in a strikingly different manner. Through her analysis of interviews with two eleven year-old children named Amy and Jake, Gilligan concludes that there are two contrasting modes of moral judgment. The interviews focus on the children's answers to a moral problem entitled the Heinz dilemma. Based upon their responses to this dilemma, Gilligan argues that the moral development of girls follows a different, but not

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1. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE* 4 (1982) (relating her goal as expanding the understanding of human development using data on women's experiences to provide the basis of a new theory).
2. This paper focuses on one chapter, "Images of Relationship," of Gilligan's book *In A Different Voice* in which she analyzes interviews with two eleven year-old children. *Id.* at 24-38. These interviews consist of a girl's and a boy's responses to the Heinz dilemma, a moral problem presented by Lawrence Kohlberg. *See* LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* 12 (1981) (presenting the dilemma Heinz faced: whether to steal a drug that he cannot afford to buy to save his dying wife). According to Kohlberg's grading scheme, the girl's moral development is inferior to the boy's. *Id.* at 14. Gilligan suggests, however, that this difference arises because Kohlberg's grading system assumes that male responses are the norm and categorizes female responses as inferior aberrations. *See GILLIGAN, supra* note 1, at 25.
3. *See* GILLIGAN, *supra* note 1, at 25 (explaining that "[t]he dilemma that these eleven-year-olds were asked to resolve was one in the series devised by Kohlberg to measure moral development in adolescence by presenting a conflict between norms and exploring the logic of its resolution."). "In this particular dilemma, a man Heinz considers whether or not to steal a drug which he cannot afford to buy in order to save the life of his wife." *Id.* Thus, the question posed is, "[s]hould Heinz steal the drug?" *Id.* at 26. The answers of the children are further explored by questions designed to "vary and extend the parameters of the dilemma." *Id.*
inferior, pattern than that of boys. She terms the female solution to moral problems the "ethic of care" and labels the male approach the "ethic of justice."

In this paper, I will use economics and related legal theories to deconstruct the dichotomies that Gilligan finds between Amy's and Jake's responses to the Heinz dilemma. I employ economics as a method to study feminist thought because I believe that the comparative economic method developed here provides valuable insights not gleaned from other feminist approaches. Economic theory has been used to analyze legal issues that do not intuitively appear to be economic in nature. Although some feminists have implemented analyses derivative of economics in their work and have critiqued some of the assumptions underlying the application of economics to the law, the feminist jurisprudence movement has not yet em-

4. See GILLIGAN, supra note 1, at 30. Gilligan argues that the female approach to moral dilemmas initially values care while the male approach initially values autonomy. Id. at 27-30.

5. See infra note 9 (discussing the three primary feminist approaches).

6. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 16 (2d ed. 1977) (explaining that "the hallmark of the 'new' law and economics ... is the application of the theories and empirical methods of economics to the legal system across the board—to common law fields such as tort, contract and property, to the theory and practice of punishment, to civil, criminal and administrative procedure, to the theory of legislation, and to law enforcement and judicial administration.").

7. Some feminist scholars have made legal critiques similar to critical legal studies ("CLS") approaches and classical surplus theory which underlies CLS. See infra text accompanying notes 45-83 for a discussion of CLS and classical surplus theory. See, e.g., Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 SIGNS 515 (1982) and Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 695 (1983) (comparing sexism to Marx's concept of class and feminism to Marxism); Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497, 1567 (1983) (discussing the interrelated, reinforced relation between the market and the family by explaining that the market and the family both oppose and reinforce each other).


9. This movement is described by Carrie Menkel-Meadow as a feminist critique that sometimes employs CLS theory but generally implements its own methods and processes which diverge from CLS. Carrie Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School," 38 J. LEGAL EDUC. 61, 64-65 (1988).

There are three basic schools of feminism, which may for convenience be called the "sameness," "difference," and "dominance" approaches. Id. at 72-73. The sameness school, associated with the Equal Rights movement, posits that women and men should face equal terms in both the public and domestic arenas; thus, women and men should be treated alike and there should be no distinctions on the basis of gender. Id. at 74. The difference school, associated with Carol Gilligan, argues that differences between men and women should be recognized, accepted, and affirmed. See GILLIGAN, supra note 1, at 1-4. Finally, the dominance school, associated with Catharine MacKinnon, states that present gender inequality in areas such as prostitution, rape, and pornography is due to the historical subordination of women by men. See CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 3 (1987). Thus, this school argues that the subordination and domination of women by men must end. See generally Cass R. Sunstein, Feminism and Legal Theory, 101 HARV. L. REV. 826 (1988) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODI-
braced the use of economic theory as an alternative method to study feminist issues.

Feminist jurisprudence generally seeks to develop new approaches to the law by using methodologies focusing on and affirming the shared lives of women. To this end, feminists have developed new methods to focus on contextuality, question implicit assumptions, and grapple with hierarchies of power. These traits of feminist jurisprudence are quite similar to economic theories outlined in this paper. Just as feminist jurisprudence has a history of implementing other disciplines such as social history and literary theory to study feminist concerns, economic theory should be used as another method for considering feminist issues and furthering the development of feminist theory.

In the first and second sections of the paper, I will demonstrate the parallels between neoclassical economics and traditional law and economic theory on the one hand, and classical surplus theory and the critical legal studies (CLS) movement on the other. In the third section of the paper, I will present the Heinz dilemma along with Gilligan's interpretation of Amy's and Jake's responses to this problem.

In the fourth section, I will establish that, when examined from an economic perspective, the dichotomy which Gilligan posits tracks the divide in economic theory between neoclassical and classical surplus

FIED (1987)); Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 5 (1988) (stating there "are many feminisms, all with distinctive priorities").

10. See Gary Minda, The Jurisprudential Movements of the 1980s, 50 OHIO ST. L.J. 599, 600 n.5 (1989) ("Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see contrasting perspectives.") (quoting Martha Minow, Foreword: Justice Engendered, 101 HARV. L. REV. 10, 95 (1987)); see also MACKINNON, supra note 9, at 2 ("An explanation of the failure of feminism to change the world for women must be a study in that world as well as of it.").

11. See Bender, supra note 9, at 4 (explaining that all feminist strategies focus on women, matters that concern women, and the oppression of women); Minda, supra note 10, at 601 ("Modern feminist legal theory seeks, in turn, to establish a distinct 'feminist method' of 'engendered' or 'unmodified' jurisprudence by developing insights and theoretical criticism from perspectives shaped by the lived-experiences of women whose interest feminist theory seeks to affirm.") (citing Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635, 643 (1983)).

12. See Bender, supra note 9, at 37 (explaining that questioning implicit assumptions against hierarchies of power are "critical to a 're-vision' of our tort law system.").

13. See Menkel-Meadow, supra note 9, at 65 n.21 (advocating an inquiry that "peers beneath the traditional view of history of family law by exploring social experience, rather than the law on the books.") (citing Martha Minow, "Forming Underneath Everything that Grows": Toward a History of Family Law, 1985 WISC. L. REV. 819, 820 (1985)).

14. See Menkel-Meadow, supra note 9, at 65 n.20 (equating law with literary theory and explaining that "law, like every other cultural institution, is a place where we tell one another stories . . .") (citing Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 YALE L.J. 997, 999 (1985)).
The ethic of justice relates to the fundamental concepts of rationality and utility maximization in neoclassical theory. Furthermore, the proponents of traditional law and economics base their applications upon neoclassical tenets. Likewise, the ethic of care relates to the social and historical foundation of classical surplus theory. The CLS school also bases some of its applications on classical surplus economics. As depicted in the chart below, I will demonstrate that, studied from an economic perspective, Gilligan's analysis of the differing ethics suggested by the children's responses parallels contrasting economic theories. These opposing moral systems can in turn be compared to divergent approaches in legal thought.

### CONFLICTING PARADIGMS IN GILLIGAN'S ANALYSIS OF AMY'S AND JAKE'S RESPONSES

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<th>Moral System</th>
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<td>AMY</td>
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In the final section of the paper, I will explore the degree to which the use of economics to view the children's actual responses presents fruitful insights. The analysis that I will use integrates moral, economic, and legal theory and indicates that the children's actual responses may not be as diametrically opposed as Gilligan suggests. Rather, my approach demonstrates that both the girl and the boy create structurally similar moral, economic, and legal paradigms.

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15. Gilligan neither refers to economic theory in her work nor bases her interpretations on it. The parallel is that of the author.

16. See infra notes 20-27 and accompanying text.

17. See infra notes 28-30 and accompanying text.

18. This chart describes the dichotomies established in Gilligan's analysis of Amy's and Jake's responses. When viewed from moral, economic, and legal perspectives, Gilligan's interpretation of the children's responses do appear quite opposed. See GILLIGAN, supra note 1, at 29 ("Both children thus recognize the need for agreement but see it as mediated in different ways—he impersonally through systems of logic and law, she personally through communication in relationship."). In the main portion of this paper, however, I will break down these dichotomies by using an economic perspective to study the children's actual responses and not just Gilligan's interpretation thereof.
While the manner in which Amy and Jake express themselves is quite different, Gilligan overstates the divergence between Amy's and Jake's actual statements. The children do not always articulate the same concepts; however, they do use similar approaches which combine elements of apparently opposed paradigms. Surprisingly, a unification occurs. That is, the moral system suggested by each child's response unifies elements of the ethics of care and justice. Likewise, the economic ideology implied in each child's response integrates components of neoclassical and classical surplus theory. Finally, the legal theory suggested by each child's response combines elements of both law and economics and critical legal studies. Thus, the examination presented in this paper will show that many of Amy's and Jake's statements are indeed based upon similar theoretical considerations. This economic analysis of Amy's and Jake's reactions to the Heinz dilemma is valuable as it reveals that the children do not create dichotomous paradigms but develop structurally similar, integrated theories.

I. TRADITIONAL NEOCLASSICAL THEORY

In simply constructing a form of analysis, all economic paradigms make a statement regarding not only their purpose, but also the elements that they consider most valuable. It is often the elements excluded from the paradigm's basic model that shed light upon the fundamental theory of the model. Such is the case with neoclassical and classical surplus economics. Although there is certainly a sense in which each paradigm is broader than that which is described here, the characterization of the models below is true to the central outline of each theory. Brief overviews of these theories are useful in providing a conceptual framework both to discuss the dichotomy between the two paradigms and to analyze Amy's and Jake's responses to the Heinz dilemma.

A. Fundamental Concepts of Neoclassical Theory

Traditional neoclassical economics, which emerged in the 1870s, has been refined by contemporary theorists such as Paul Samuelson, Kenneth Arrow, and Milton Friedman.\(^1\) This paradigm is based

\(^{19}\) See James M. Buchanan, Economics: Between Predictive Science and Moral Philosophy 3, 4 (1987) (noting that "Milton Friedman . . . provided the clearest statement of the positivist position," and that Paul Samuelson was an advocate of the "social welfare function"); see also Paul A. Samuelson, Economics, 788 (1980) (stating that Kenneth Arrow was a contemporary of modern welfare economics which "emphasized the prima facie case against laissez faire and in favor of action.").
upon a few fundamental concepts, such as the rational and utility-maximizing nature of each individual, which shape the neoclassical economists' entire analysis.\(^\text{20}\) Plainly stated, this theory asserts that human behavior can be predicted according to principles of rationality and self-interest. Although the particular tastes and preferences of individuals may differ, this theory holds that all people respond rationally to incentives.

In constructing their basic model, neoclassical economists reduce the diversity of human motivations to a single dimension: they assume that all individuals seek to maximize their utility.\(^\text{21}\) Although neoclassical economists acknowledge the social relations of production, their studies generally commence with the assumption that pivotal individual characteristics are independent of these social relations.\(^\text{22}\) As a result, individual characteristics are introduced into the analysis only in specific situations.\(^\text{23}\) For the neoclassical economist, the economy and society itself are simply the aggregate effect of these utility-maximizing, self-interested decisions.

The basic neoclassical paradigm makes certain tactical assumptions. For example, neoclassical theory is based on the presumptions that all people have access to perfect information, that resources are freely mobile, and that the market is unfettered by artificial restrictions such as government regulations.\(^\text{24}\) Moreover, neoclassical theory fails to question the existing distribution of resources and wealth. Based upon these assumptions, neoclassical economists assert that the equilibrium pattern of distribution of wealth and resources can be determined.\(^\text{25}\) These economists further espouse that, if competitive conditions reign, this equilibrium is an efficient and optimal result.\(^\text{26}\)

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\(^{20}\) See Richard D. Wolff & Stephen A. Resnick, Economics: Marxian versus Neoclassical 50-51 (1987) (observing that neoclassicists assume "it is part of the nature of human beings to be able to make rational choices or decisions in regard to all economic opportunities.").

\(^{21}\) Id. at 7 (explaining that neoclassical theory attaches basic importance to owning, buying and selling).

\(^{22}\) Id. at 6.

\(^{23}\) See Paul M. Sweezy, The Theory of Capitalist Development 5 (1970) ("[E]conomic theorizing is primarily a process of constructing and interrelating concepts from which all specifically social content has been drained off."). Sweezy further contrasts the absence of social relations in this traditional model to its clear presence in Marxian economics. Id. at 14-15. Indeed, this latter economic theory begins with a focus on social existence and the process of social change. Id. at 14. Only then does it attempt to define the relation between economic and social factors. Id. at 15.

\(^{24}\) See generally Wolff & Resnick, supra note 20, at 95-99 (discussing criticisms of neoclassical theory).

\(^{25}\) See Wolff & Resnick, supra note 20, at 48 (explaining that capitalism encourages citizens to reach their production and consumption potential).

\(^{26}\) See Wolff & Resnick, supra note 20, at 48-49 (arguing that market imperfections are caused by the interference of people and bureaucracies).
For most neoclassical economists, truth is absolute, singular, and accessible through proper scientific inquiry.\(^{27}\)

**B. Law and Economics**

Neoclassical economics has a parallel in legal theory, the traditional law and economics model.\(^ {28}\) The law and economics approach, generally attributed to Ronald Coase and Guido Calabresi,\(^ {29}\) emerged in the early 1960s. It explicitly applies neoclassical analysis to common law subjects such as contract, tort, and property.

Richard Posner later expanded this notion and suggested that neoclassical analysis could be applied to law across the board because the common law is basically consistent with ideas of economic efficiency.\(^ {30}\) This concept of efficiency is firmly rooted in neoclassical economics.\(^ {31}\) Indeed, Posner states that the type of abstraction or reduction of complex phenomena into simplified rules, found in both neoclassical economics and his legal analysis, “is of the essence of scientific inquiry.”\(^ {32}\)

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28. This paper studies the traditional law and economics approach which originated with the work of the “Chicago School.” There are, however, other approaches influenced by this school. For example, liberal law and economics theorists at New Haven have used some of these insights to propose somewhat reformist policy solutions. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Indemnability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (articulating a concept of ‘entitlements’ to present a framework applicable to different areas of law). In an effort to break away from the Chicago School, some other law and economics scholars have created a new reformist branch of law and economics. See Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 342 (1988) (defining three dominant strands of law and economics as wealth maximization, well-defined property rights, and a public choice theory).

29. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (demonstrating that the traditional neoclassical approach obscures the nature of the choice to be made when the problem is really to avoid the more serious harm); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (using economic theories to analyze legal problems in nuisance, extrahazardous activities, respondeat superior, and negotiable instruments). The neoclassical law and economics movement did not truly emerge as an academic movement until the 1970s with the publication of books on the subject by Calabresi and Posner. See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 5 (1970) (“Despite this state of general uncertainty about the theoretical bases of accident law, plans and suggestions for reform abound, varying as much as their authors both in terms of what they propose and in the degree of theoretical justification they offer.”).

30. See POSNER, supra note 5, at 16 (explaining that the “old” law and economics was limited to laws governing explicit economic relationships (i.e., contracts), whereas the “new” law and economics recognizes no such limitation on the economic analysis of law).

31. See WOLFF & RESNICK, supra note 20, at 8 (stating that efficiency and optimality are assured by the market, “[e]very transaction is mutually beneficial or else it will not occur.”).

32. See POSNER, supra note 5 at 15 (illustrating the belief that the real test of a theory is not how realistic its assumptions are, but how its results conform to reality).
C. Legal Applications of Neoclassical Theory

The Hand Formula\(^33\) may be seen as a legal precursor of the traditional law and economics model. This concept, presented in 1947 by Judge Hand, is essentially a formula for judging tort liability. It states that individuals should be judged in tort liability by rationally balancing the magnitude of the risk multiplied by the gravity of the harm against the utility of the conduct.\(^34\) If the harm factor is greater than the utility of the conduct, the tortfeasor will be held liable. In contrast, if the harm factor is less than the utility of the conduct, the tortfeasor will not be held liable. Neoclassical economists assert that this model and its applications can be objectively calculated through the use of abstract, simplified formulae.\(^35\)

Another legal application of the basic tenets of neoclassical thought is the famous Coase Theorem formulated by Ronald Coase.\(^36\) In a world in which no costs are involved in carrying out market transactions, the Coase Theorem asserts that, because of communication between the parties, property rights will end up in the possession of those who value them most.\(^37\) In effect, the parties will "bargain around"\(^38\) any rule which constrains their behavior. Thus, the rule of law applied in a particular case may not affect the end result because the parties will negotiate an optimal outcome. This conclusion is characteristic of neoclassical analysis—the largely automatic adjustment to equilibrium reconciles and harmonizes what seemed initially to be conflicting interests. Coase does note, however, that the assumption of no transaction costs may be unrealistic.\(^39\)

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33. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (using algebraic terms to establish tort liability as follows: if the probability is called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL).

34. See id. at 173.


36. Coase, supra note 29.

37. See Coase, supra note 29, at 8 ("[U]ltimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost.").

38. By "bargain around the rule," I mean that the parties may privately agree to alter the arrangements outlined in the legal ruling to reach the outcome they believe is the optimal one.

39. See Coase, supra note 29, at 15 ("In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on."); see also infra notes 146-55 and accompanying text for a more detailed discussion of potential problems with the Coase Theorem.
In addition, Richard Posner has also argued for the application of traditional law and economics to criminal law. He asserts that theories of economic efficiency can explain most of the theories of criminal law.\(^{40}\) Thus, the main goal of the criminal law is to discourage inefficient acts such as "market bypassing." Posner argues, for example, that it would be inefficient for a poor person who cannot afford a car to steal it.\(^{41}\) This transfer is inefficient because it does not move resources from a lower to a higher valued use. Posner concludes that "[s]ince I am unwilling (because unable—\textit{but it does not matter why}) to pay my neighbor's price for the car, it follows that the car would be less valuable in an economic sense in my hands than in his." Classical surplus theorists would argue, however, that the crucial point is precisely the one that Posner disregards: it does matter why one is unable to pay. The history and the social context of each situation must be taken into account.\(^{44}\)

II. CLASSICAL SURPLUS ECONOMIC THEORY

A. Fundamental Concepts of Classical Surplus Theory

A conflicting economic approach to the neoclassical theory outlined above is what I shall term classical surplus theory (an eclectic group including most Post-Keynesian,\(^{45}\) Marxist,\(^{46}\) and Marxist-Feminist\(^{47}\) approaches). Because neoclassical and classical surplus theories have fundamentally different entry points or premises defining the objectives of each theory, they present sharply contrasting views of society. The premise in neoclassical theory is the rational, utility-
maximizing, and self-interested individual. There, the economy is an aggregation of autonomous individuals with pre-formed preferences. Classical surplus theory, however, begins with an analysis of preexisting social relations in a determinate historical setting. These relationships are viewed as formative of human behavior. According to classical surplus theory, individuals learn their identities and acquire their preferences and values through social experiences which bear the mark of one's place in the existing pattern of class, race, and gender relations.

Classical surplus economists' emphasis on history and on social and institutional contexts suggests a set of questions different from those implicit in the neoclassical concepts of utility maximization and market efficiency. Not all rights and duties can be reduced to utility and placed in a scheme of lexical ordering. Rather, the classical surplus paradigm emphasizes social connection by focusing on social relations, and particularly on differentials of income, wealth, and power embedded in those social relations. Because these connections are largely skirted by the basic neoclassical model, classical surplus economists note that neoclassical "equilibrium" values are really a coded version of social decisions about what to produce and how to distribute it. These economists, therefore, reject the neoclassical conclusion that competitive equilibrium necessarily generates an economically objective, efficient outcome.

In addition to their critique of neoclassical concepts regarding utility and efficiency, classical surplus economists also challenge neoclassical assumptions regarding human rationality and self-interested motivations as confining and not empirically validated. They reject the neoclassical entry point or premise of the rational

49. See Wolff & Resnick, supra note 20, at 15 (stating that, in neoclassical theory, individual wants, thoughts, and deeds make up society).
50. Sweezy, supra note 29, at 3.
51. Cf. Wolff & Resnick, supra note 20, at 142 (claiming that theory influences how society behaves).
53. See Jeffrey L. Harrison, Egoism, Altruism, and Market Illusions: the Limits of Law and Economics, 35 UCLA L. Rev. 1309, 1331-32 (1986) (arguing that moral rights and duties cannot be reduced to the concept of utility and the traditional law and economics cost-benefit analysis, the very things with which the traditional law and economics model is concerned).
54. Id.
56. Id.
57. Harrison, supra note 53, at 1310.
individual. Instead, classical surplus economists espouse the entry point of social relations and class. Thus, rather than applying an abstract efficiency or maximization formula in confronting dilemmas, classical surplus economists first study the overall social and historical circumstances and then determine a contextual solution.

B. Critical Legal Studies

The parallel to classical surplus economic theory in the law is the critical legal studies ("CLS") movement. CLS scholars, such as Martha Minow and David Kairys, use classical surplus economics combined with a variety of other theories to critique traditional legal doctrines. One basic tenet of the CLS school is its commitment to addressing the contradictory results traditional legal doctrines often produce. For example, CLS scholars critique the neoclassical-based Coase Theorem by advancing the "offer-asking problem" which focuses on the socially conditioned nature of neoclassical efficiency criteria. For CLS scholars, market outcomes do not necessarily succeed in harmonizing initial conflicts of interest.

A second tenet of CLS and classical surplus economics is a focus on an historical and socio-economic analysis of the relations in question. These schools suggest that the effect of history on present social and moral judgments is an important aspect of analysis. In discussing the offer-asking problem, for example, CLS scholars first

58. Id.
59. For a discussion of the notion of class, see WOLFF & RESNICK, supra note 20, at 143-45, 171-72.
61. See Mark G. Kelman, Trashing, 36 STAN. L. REV. 293 (1984) (defining "trashing" as the process by which CRITS take specific arguments seriously in their own terms, find them foolish and then look for some order in the internal contradiction exposed).
63. Baker, supra note 62; Kennedy, supra note 62.
64. Minow, supra note 60, at 84-85.
65. Minow, supra note 60, at 84-85.
66. The following represents a simple example of the offer-asking problem. First, suppose that Amy has a home with a lovely view of the mountains. Jake wants to build a house that would obstruct her view. Next, assume that a house on this particular location is worth $3,000 to Jake. Further assume that Amy has the entitlement to the view. She will sell the entitlement to Jake and allow him to build his home for $4,000. Because this figure is greater than the $3,000 that the location is worth to Jake, the traditional law and economics model would state that resources are efficiently allocated at their highest valued use—Amy has the entitlement. Suppose now, however, that Jake has the entitlement to build. There is a problem here if a wealth effect exists regarding the valuation of Amy's preferences. A wealth effect occurs when
determine which parties originally possessed the rights in question. They then seek to discover how the parties obtained their respective rights, questioning whether race, class, or gender played a role in the allotment. The CLS school often criticizes neoclassical law and economics theory, claiming that its implicit political ideology tends, at best, to divert attention from the effects of gender, race, or class and, at worst, to reduce those effects to consequences of individual rational behavior. Contrary to neoclassical law and economics, CLS asserts that gender, race, or class disadvantages cannot be accepted as the unbiased, logical outcome of individual choice. All human experiences cannot be captured by rationality, efficiency, or some other concept premised upon abstract, universal values. Indeed, the CLS school suggests that each experience is the product of varying historical and social relations.

C. Legal Applications of Classical Surplus Theory

One legal application of CLS is the concept of "individualized justice," which stresses the uniqueness of individualized facts in a case rather than precedent. Although CLS scholars employ general rules of law, they do not encourage blind adherence to legal rules. The CLS argument for individualized justice states that a judge should be given the ability to focus more on the context of the parties and

the amount that someone is willing to pay for something is a function of her wealth rather than the market value. Now, Amy must scrape together her money to offer Jake enough to dissuade him from building. Suppose that the amount that she would be willing to pay him to prevent him from building is $2,000. Because this is less than what she previously had offered to sell her entitlement for ($4,000), there is a wealth effect. In this situation, the traditional law and economics model again states that the resources are efficiently allocated at their highest value use ($3,000 versus $2,000)—Jake has the entitlement. In this example, the problem is clear; the entitlement determines the cost-benefit analysis. Whoever has the original entitlement becomes the most efficient owner of the resource.

67. See, e.g., Gary Peller, Race Consciousness, 1990 DUKE L.J. 758 (explaining the role of race in American society); Gary Minda, The Jurisprudential Movements of the 1980s, 50 OHIO ST. L.J. 599, 615 (1989) (noting that critical legal scholars engage in "[a]nalysis to see how particular interest groups, social classes or entrenched economic institutions benefit from legal decisions . . .") (quoting Minow, supra note 60, at 83).

68. According to a critical legal scholars conference statement, they "[s]eek to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian relations." Quoted in CRITICAL LEGAL STUDIES (P. Fitzpatrick & A. Hunt eds., 1987).

69. See Minda, supra note 67, at 617 (noting the CLS argument that law and economics logic depends upon concepts which are artificially created and which fail to appreciate differences in race, class and gender).

70. Minda, supra note 67, at 618.


72. Malloy, supra note 52, at 255.
of a case and less on the formal background rules.73 CLS scholars question the value of rigid deference to formal rules when such rules do not allow individualized justice.74 In sum, CLS emphasizes the need to view the human interrelationships and social background involved in a particular problem in order to determine a contextual solution.

In addition to the concept of individualized justice, the CLS movement espouses the use of “framing” in criminal law.75 Either narrow or broad time-framing may be used in criminal law to decide which events prior to a particular act will be taken into account in the determination of a defendant’s culpability.76 Narrow time-framing views only the elements establishing the particular case to be prosecuted.77 Broad time-framing, however, considers the personal histories of the individuals involved along with facts about events before or after the criminal incident.78 The emphasis in classical surplus economics and CLS on history and social relations suggests that these theories advocate the use of broad time-framing.79 Mark Kelman argues, however, that the decision whether to disjoin or to unify the earlier moment with the crime is still difficult in broad-time framing.80 That is, should all of the pertinent facts be viewed as one incident or as separate events? Again, classical surplus economics and CLS focus on history and human interrelations suggests the unification of the events and the use of broad time-framing in criminal law, thereby incorporating the particular social and historical context of each case.

A further legal application of the CLS movement is the offer-asking problem.81 In posing this problem, the CLS school suggests that the neoclassical Coasian analysis may be indeterminate because it requires a preexisting rights framework in order to produce tangible conclusions. CLS scholars argue that it is precisely this framework, which the basic neoclassical model takes as a given, that may dictate the

73. See Massaro supra note 71, at 2116 (calling for more flexible and open-ended law).
76. Id. at 593-94.
77. Id. at 594.
78. Id. at 611.
79. This is the opinion of the author; Kelman does not draw a normative conclusion regarding the use of framing.
80. Kelman, supra note 75, at 595.
81. For an explanatory example of this problem, see supra note 66 and accompanying text.
result of the analysis. Furthermore, both CLS and law and economics scholars discuss potential problems, such as transaction costs, bargaining failure, and income effects in the application of the Coase Theorem.

III. GILLIGAN’S AMY AND JAKE

A. The Heinz Dilemma

Amy and Jake, two participants in a study on adolescent moral development, are presented with the following dilemma: Heinz’s wife is going to die unless he can get her a drug which he cannot afford to buy. Should he steal the drug?

In her response, Amy discusses the different relationships between the characters and the potential effect of their actions on each other:

Well, I don’t think so. I think there might be other ways besides stealing it, like if he could borrow the money or make a loan or something, but he really shouldn’t steal the drug—but his wife shouldn’t die either . . . . If he stole the drug, he might save his wife; but then if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn’t get more of the drug . . . . [T]hey should really just talk it out and find some other way to make the money.

On the other hand, Jake is certain from the outset that Heinz should steal the drug. He explains his response as follows:

For one thing, a human life is worth more than money, and if the druggist only makes $1,000, he is still going to live, but if Heinz doesn’t steal the drug, his wife is going to die . . . . [T]he druggist can get a thousand dollars later from rich people with cancer, but Heinz can’t get his wife again.

Jake continues by stating that math is “the only thing that is totally logical” and that the Heinz dilemma is “sort of like a math problem with humans.”

B. Gilligan’s Interpretation of Amy’s and Jake’s Responses

Based upon this interview, Gilligan posits that Amy views the world as comprised of relationships between different people rather than of

82. See supra notes 71-74 and accompanying text.
83. See infra notes 146-55 and accompanying text for discussion of these problems.
84. See KOHLBERG, supra note 2, at 12 (setting forth the original Heinz dilemma used by Gilligan).
85. GILLIGAN, supra note 1, at 28-29.
86. GILLIGAN, supra note 1, at 26.
87. GILLIGAN, supra note 1, at 26.
people standing alone.\textsuperscript{88} Amy's judgments embody the "ethic of care\textsuperscript{89}" because she constructs "a network of connection, a web of relationships that is sustained by a process of communication."\textsuperscript{90} Amy does not view the dilemma within a system of pre-determined rules; rather, she addresses the human connections to which the druggist fails to respond. Instead of following a strictly analytical formula, Gilligan asserts that girls study each situation as a "narrative of relationships that extends over time."\textsuperscript{91} Girls acknowledge the history inherent in each event and then proceed to resolve the conflict depending on the particular context and characters involved.\textsuperscript{92} They focus on social cooperation rather than on abstraction to formulae which presume that each individual acting rationally would make the same decision.\textsuperscript{93}

On the other hand, Gilligan notes that Jake sets up the analysis like an equation. He begins with the premise that life takes priority over property.\textsuperscript{94} He then works through the application and arrives at the conclusion that Heinz should steal the drug. Gilligan thus observes that boys tend to make moral decisions by presuming the rational nature of each individual.\textsuperscript{95} Accordingly, boys employ a rule-like formula to derive the "solution," that is, to determine the rights of the particular individuals.\textsuperscript{96} Gilligan asserts that boys conceive social reality as a set of hierarchically ordered rules, equations, and truths.\textsuperscript{97} Boys assume that people act rationally and rely on formulae in order to resolve dilemmas. Gilligan terms this male reasoning the "ethic of justice."\textsuperscript{98}

**IV. PARADIGM CLASH?**

In her analysis of the interview with Amy and Jake, Gilligan establishes structurally, as well as theoretically, a conflict between the children's responses. Gilligan's entire analysis of this interview calls

\begin{itemize}
  \item \textsuperscript{88} GILLIGAN, supra note 1, at 29.
  \item \textsuperscript{89} GILLIGAN, supra note 1, at 30.
  \item \textsuperscript{90} GILLIGAN, supra note 1, at 32.
  \item \textsuperscript{91} GILLIGAN, supra note 1, at 28.
  \item \textsuperscript{92} GILLIGAN, supra note 1, at 29.
  \item \textsuperscript{93} For examples of theorists who do not agree with Gilligan's observation that Amy is relations-based and Jake is rational see Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 YALE L.J. 1373, 1384-85 (1986); Jeanne L. Schroeder, Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence, 75 IOWA L. REV. 1135, 1142 n.12 (1990).
  \item \textsuperscript{94} GILLIGAN, supra note 1, at 26.
  \item \textsuperscript{95} GILLIGAN, supra note 1, at 26-27.
  \item \textsuperscript{96} GILLIGAN, supra note 1, at 26.
  \item \textsuperscript{97} GILLIGAN, supra note 1, at 32.
  \item \textsuperscript{98} GILLIGAN, supra note 1, at 30.
\end{itemize}
attention to the “differing logic” inherent in each child’s answers. Indeed, Gilligan manages to repeat elements of this conflict four times in one sentence:

Asking different questions that arise from different conceptions of the moral domain, the children arrive at answers that fundamentally diverge, and the arrangement of these answers as successive stages on a scale of increasing moral maturity calibrated by the logic of the boy’s responses misses the different truth revealed in the judgment of the girl.

Gilligan furthers this contrast by placing Amy’s and Jake’s responses in opposing columns on the page, an arrangement which highlights the conflict in their answers. Gilligan’s interpretations of the children’s self-descriptions, responses to the Heinz dilemma, and views of responsibility all contrast Jake’s neoclassical perspective with Amy’s classical surplus outlook.

A. Self-Description As Paradigm Clash

Gilligan uses Amy’s and Jake’s self-descriptions to highlight the apparent paradigm clash implicit in each child’s responses. Although both children enumerate their likes, wants, and beliefs, Amy focuses upon her career aspiration to become a scientist in order to achieve her goal of “help[ing] other people.” Jake, however, begins his self-description with facts about himself such as his age, name, and place of residence. Gilligan suggests that Amy describes herself in connection to others; Amy measures the worth of her activity against an “ideal of care” and places herself in relation to the world. Gilligan notes, however, that Jake “places the world in relation to himself as it defines his character, his position, and the quality of his life” and measures himself against “an ideal of perfection.”

Gilligan appears to view Amy as concerned with the community and relations between people, and Jake as defining himself through

100. Gilligan, supra note 1, at 31 (emphasis added). But see infra part V of this paper which suggests that although Amy and Jake “ask different questions” (or more precisely, express themselves differently) the children’s answers neither fundamentally diverge nor draw upon different truths. Further, this article demonstrates that the children’s responses are structurally and often substantively quite similar.
102. Gilligan, supra note 1, at 33-35.
103. Gilligan, supra note 1, at 34.
104. Gilligan, supra note 1, at 33-34.
105. Gilligan, supra note 1, at 35.
106. Gilligan, supra note 1, at 35.
individuality and as measuring himself against an ideal of perfection. Viewing Gilligan’s interpretation from an economic perspective, Amy advocates classical surplus theory while Jake embraces neoclassical thought. According to Gilligan, Amy focuses on moral conduct, human interrelationships, and social cooperation and does not seek to assess her actions against an abstract, pre-determined standard. Rather, situated within actual society, Amy considers the context around her. Amy is not motivated solely by self-interest but is fueled by altruism and moral concerns. These concerns are difficult to place within the lexical ordering of the neoclassical model. Thus, Amy contradicts the basic neoclassical tenet that human behavior is fueled by principles of rationality and self-interest.

Examining Gilligan’s analysis of Jake’s responses from an economic perspective reveals, however, that Jake adopts most of the basic attributes of neoclassical theory. Gilligan implies that his whole discussion is based on self-interest and separation from society, fundamental tenets of neoclassical theory. For example, Jake begins his self-description with facts about himself such as his name, his age, his social position (his given endowments), his ability to do all of his school work (his technological facility), and his statement that he does not “really like to get down to work” (his preferences and productivity). Gilligan interprets this self-description as “Jake’s ideal of perfection, against which he measures the worth of himself.” Observed in an economic light, then, Gilligan uses Amy’s and Jake’s self-descriptions to highlight the paradigm clash implicit in each child’s response.

B. Conflicting Economic Responses to the Heinz Dilemma

Gilligan employs Amy’s and Jake’s responses to the Heinz dilemma as her principal testimony to the conflicting ethics of male and female children. An economic analysis of Gilligan’s interpretation of these interviews establishes a contrast between the classical surplus theory

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107. GILLIGAN, supra note 1, at 35.
108. GILLIGAN, supra note 1, at 28.
109. GILLIGAN, supra note 1, at 35.
110. See generally, WOLFF & RESNICK, supra note 20, at 39 (1987) (explaining that in neoclassical theory individuals seek to utilize their ability to create the maximum wealth possible).
111. GILLIGAN, supra note 1, at 35.
112. GILLIGAN, supra note 1, at 34.
113. GILLIGAN, supra note 1, at 35. The final section argues, however, that if Jake’s actual statements are studied, it is not clear that he does in fact compare himself to an abstract ideal. Instead, it is Amy who truly measures herself against an ideal—one of care. See infra text accompanying notes 135-174.
of Amy’s responses and the neoclassical philosophy of Jake’s answers. Gilligan notes that Amy displays her own method of approaching the dilemma and that although the interview was “[c]onceived as an interrogation, it appears instead as a dialogue.”¹¹⁴ Because Amy studies the whole social context of the situation, Gilligan suggests that Amy sees in the dilemma “not a math problem with humans, but a narrative of relationships that extends over time.”¹¹⁵ Gilligan also notes that Amy considers the Heinz dilemma as arising from the druggist’s failure to respond.¹¹⁶ Economically speaking, Amy implements a classical surplus economic analysis of the actual social context and the interrelations of the characters involved. She does not equate moral conduct with efficiency or maximization. Indeed, Amy does not take the facts presented by the situation as exogenous givens as the neoclassical tradition advocates, but rather looks beyond them to the specific social context involved. Thus, Gilligan’s interpretation of Amy’s responses to the Heinz dilemma may be seen as the archetype of the classical surplus economic focus on social context and history.

In contrast, Gilligan’s analysis situates Jake as the epitome of the neoclassical actor. Jake himself states that the dilemma is “like a math problem with humans” and that math is “the only thing that is totally logical.”¹¹⁷ Gilligan further suggests that Jake abstracts the moral problem to an equation and rationally works out the solution.¹¹⁸ She also asserts that Jake believes that all persons confronted with this situation would rationally reach the same conclusion.¹¹⁹ Gilligan implies that Jake employs and advocates the fundamental neoclassical concept of rational behavior. Moreover, Gilligan notes that Jake sets up the dilemma as an abstract equation and, unlike Amy, accepts the facts of the dilemma as exogenous givens. As such, he views the result as a type of objectively determined equilibrium that is socially optimal or “the right thing to do.”¹²⁰

In addition, Gilligan suggests that because Jake “discerns the logical priority of life” over property,¹²¹ he uses a hierarchical system of ordering to reach his final solution. This interpretation parallels the Hand Formula, a renowned legal application of neoclassical theory to tort liability. As discussed above, Judge Hand asserts that individuals

¹¹⁴. GILLIGAN, supra note 1, at 31.
¹¹⁵. GILLIGAN, supra note 1, at 28.
¹¹⁶. GILLIGAN, supra note 1, at 28.
¹¹⁷. GILLIGAN, supra note 1, at 26.
¹¹⁸. GILLIGAN, supra note 1, at 26-27.
¹¹⁹. GILLIGAN, supra note 1, at 26-27.
¹²⁰. GILLIGAN, supra note 1, at 28 (emphasis added).
¹²¹. GILLIGAN, supra note 1, at 26.
IN A SIMILAR VOICE

should be judged in torts by rationally balancing the magnitude of the risk, multiplied by the gravity of the harm, against the utility of the conduct or the cost of prevention. By stating that the harm of the death of Heinz’s wife is worth more than the cost of preventing it or the cost of the drug, Jake implicitly applies a cost-benefit analysis similar to the Hand Formula in his response to the Heinz dilemma. In effect, Gilligan construes Amy’s and Jake’s responses to the Heinz dilemma as fundamentally contradictory. In economic terms, her interpretation of these answers firmly establishes a paradigm clash between classical surplus and neoclassical theory.

C. Economic Dichotomy in Views of Responsibility

Gilligan’s interpretation of the children’s views of responsibility also displays the conflict between these two economic theories. In response to the question “[w]hen responsibility to oneself and responsibility to others conflict, how should one choose?” Amy’s first answer is that “it really depends on the situation.” She elaborates that “you’ve just got to decide in that situation which is more important, yourself or that person . . . .” In contrast, Jake replies that “[y]ou go about one-fourth to the others and three-fourths to yourself” and that “the most important thing in your decision should be yourself.” Gilligan suggests that while Amy sees a world of care and protection and a life lived with others, “Jake abstracts the problem of responsibility from the context in which it appears, replacing the themes of intimate relationship with his own imagery of explosive connection.”

From the beginning, Amy couches her response in terms of the social context of the situation. She realizes that any particular solution will depend upon the context and characters involved. Indeed, Amy states that, because in some situations you will care more about another person than yourself, you will change your actions accordingly. Amy therefore undermines the basic neoclassical

122. See Carroll Towing, 159 F.2d at 173; see also supra note 33 and accompanying text.
123. Jake does not, however, accept the entire Hand analysis which, if applied to the criminal law, would allow Heinz to go free if the cost of prevention is less than the value of the harm. Instead, Jake feels that Heinz should be judged and given a light sentence rather than simply be allowed to pay the cost of the drug and go free. GILLIGAN, supra note 1, at 35.
124. GILLIGAN, supra note 1, at 35.
125. GILLIGAN, supra note 1, at 35.
126. GILLIGAN, supra note 1, at 35.
127. GILLIGAN, supra note 1, at 35.
128. GILLIGAN, supra note 1, at 35.
129. GILLIGAN, supra note 1, at 35.
130. GILLIGAN, supra note 1, at 36.
tenet that human behavior is motivated largely by self-interest and rationality, and implicitly asserts that moral conduct cannot be equated with a predetermined formula.131

Gilligan's discussion of Jake's self-motivated, formulaic response, however, again epitomizes neoclassical theory. Gilligan notes that Jake not only begins with his responsibility to himself, but also takes this interest for granted.132 In establishing his equation of "one-fourth to others and three-fourths to yourself," 3 Jake suggests that all people will rationally use the equation to maximize their happiness. By transposing Gilligan's discussion into economic theory, Jake appears to embrace the neoclassical view that people are motivated by rationality and self-interest and that equilibrium can be objectively determined by substituting exogenous givens into an abstract formula.

V. IN A SIMILAR VOICE? DECONSTRUCTION OF AMY'S AND JAKE'S RESPONSES

An economic analysis of Gilligan's interpretation of these interviews suggests that the children's responses embrace two conflicting economic paradigms: Amy advocates a typical classical surplus view while Jake espouses an archetypal neoclassical one. Using an economic perspective to examine the actual text of the interview—leaving Gilligan's interpretation aside134—it is clear that the children each implement elements of both economic theories in their responses. Although Gilligan acknowledges that both Amy and Jake display an extremely sophisticated understanding of the nature of choice,135 her analysis is too committed to the notion of duality between the two children's perspectives. That is, Gilligan uses Amy's and Jake's contrasting rhetoric to overstate their actual theoretical differences. An economic analysis of the children's actual responses reveals a more subtle, integrated process of thought on the part of each child.

131. I do not mean to suggest that altruism has no place within the neoclassical paradigm. Applications of interdependent utility functions may lead to what appears to be altruistic behavior. Plainly stated, it may be argued that Amy derives a certain amount of utility from her altruistic behavior. Generally speaking, though, altruism is submerged or assumed away in the basic neoclassical paradigm. Furthermore, as suggested above, often what is not taken into account in formulating a theory is what truly describes the basic elements of that particular paradigm; the absence of altruism is significant in understanding neoclassical theory.

132. GILLIGAN, supra note 1, at 37.

133. GILLIGAN, supra note 1, at 35.

134. Gilligan conducted a second interview of Amy and Jake at age fifteen and concluded that the children were no longer as bipolar as she had presented them in the essay now under analysis. For a discussion of the second interview see Gilligan's comments in Carol Gilligan, Feminist Discourse, Moral Values, and the Law—A Conversation, 34 BUFF. L. REV. 11 (1985).

135. GILLIGAN, supra note 1, at 31-32.
The economic analysis presented in this paper suggests that Amy's and Jake's responses each combine elements of the ethic of care and the ethic of justice. Likewise, each child's answers implement elements of both the neoclassical and the classical surplus paradigms. Finally, Amy's and Jake's statements each support a legal theory based in CLS and law and economics theory. This examination demonstrates that Amy's and Jake's responses are not bipolar, as Gilligan suggests. Rather, the boy and girl present structurally and sometimes substantively similar theories within the moral, economic, and legal realms.

A. Amy's and Jake's Integrated Moral Systems

By realizing that Heinz's wife is extremely important to Heinz, Jake comprehends that moral obligations and love, not simply efficiency and rationality, play a critical role in the solution. Jake thus displays the ethic of care and the corresponding classical surplus concept of connectedness with others. Jake is arguably more concerned with relationships and care than is Amy because his response suggests that a husband's love for his wife (and subsequent willingness to face criminal sanctions because he stole a drug for her) is greater than other competing social values. Further, Jake's response that when responsibility to oneself and to others conflict, one quarter of the time he would defer to the others does reflect an understanding of the importance of community and human interrelations. Altruism plays a larger role in Jake's thoughts than in the basic neoclassical paradigm where it is generally assumed not to exist.

A close study of Jake's words reveals that he does not measure himself against an ideal of perfection as Gilligan suggests. On the contrary, Jake does not appear to measure himself against anything; his is a critical rather than an aspirational ideal. He recites facts—his likes, his dislikes, his height, his father's profession, and his fondness of sports and corny jokes. His sentences are descriptive, static, and based upon present facts.

Amy, on the other hand, begins with the facts that she likes school and studying, but then moves to a description of what she wants to do in the future to help other people. While the majority of her discussion is devoted to the idea of assisting others within the

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136. GILLIGAN, supra note 1, at 35.
137. GILLIGAN, supra note 1, at 35.
138. GILLIGAN, supra note 1, at 35.
139. GILLIGAN, supra note 1, at 33-34.
140. GILLIGAN, supra note 1, at 33-34.
community, it is really Amy who measures herself against an ideal of perfection—in her case, an ideal of care. Hers is a more aspirational ideal. She is normative, active, and future-oriented. Altruism also plays a fundamental role in her world. Furthermore, the process that Amy uses of measuring herself against an ideal is arguably typical of the utility-maximizing and rationality bases of neoclassical thought, as well as the associated ethic of justice.

Moreover, Amy's response is arguably more rational and logical than Jake's. Jake simply states his conclusion and never questions the actual repercussions thereof. Nor does he test the boundaries of the hypothetical presented to him. Amy, on the other hand, moves beyond the hypothetical by contemplating solutions besides theft. She also probes the consequences of these choices; for example, what would befall Heinz's wife if Heinz were imprisoned. Furthermore, in reaching her solution, she both examines competing moral values and attempts to preserve the rule of law. Amy's response interpreted in economic terms is precisely reasoned, rational, and again indicative of neoclassical thought and the related ethic of justice.

Rather than different, Amy's and Jake's theoretical considerations are similar in their focus on altruism, a fundamental aspect of classical surplus thought and the ethic of care. In their self-descriptions and desire to save Heinz's wife, both children focus on human interrelations and the community. Transposing both Amy's and Jake's answers into the language of economics exposes a conflict with the traditional neoclassical model which generally leaves altruism aside.

Amy's and Jake's actual responses use elements of the importance of the rational individual, a typically neoclassical concept. However, both children simultaneously stress contextual social relations and altruism, which are classical surplus tenets. Indeed, this analysis suggests that Amy is more rational and mathematical than Jake is (she exhibits the ethic of justice), while Jake is arguably more concerned with relationships than Amy is (he exhibits the ethic of care). Although Jake's method of expression implements numbers and facts while Amy's method generally describes human interrelations and ideals, the children's theories and substantive answers are not so dichotomous. This economic examination is important because it

141. GILLIGAN, supra note 1, at 34.
142. GILLIGAN, supra note 1, at 26.
143. GILLIGAN, supra note 1, at 28.
144. GILLIGAN, supra note 1, at 28.
145. GILLIGAN, supra note 1, at 28.
suggests that each child's self-description and responses to the Heinz dilemma are not divergent, gendered moral systems, but rather are structurally similar theories that implement elements of both the ethic of care and ethic of justice.

B. Conflicting Economic Approaches Combined: Amy's and Jake's Theories

Amy's and Jake's responses do not rely on conflicting economic theories as an economic study of Gilligan's interpretations suggests. Rather, their actual responses depict theories which implement elements of both neoclassical and classical surplus thought. Indeed both Amy's and Jake's responses underscore rationality and ideas similar to the Coase Theorem, typical neoclassical concepts. Their answers, however, also present potential problems with this theorem, characteristic classical surplus tenets.

1. The Coase Theorem: Applications and Obstacles

In her response, Amy repeatedly focuses on the need for agreement between the parties involved in the Heinz dilemma. She states that Heinz should not steal the drug, but rather that the druggist and Heinz "should really just talk it out . . . ."146 Amy's concentration on communication may be seen as a rough corollary of the Coase Theorem, a legal application of neoclassical theory.

In a world without transaction costs,147 the Coase Theorem asserts that, because of communication between the parties, rights will end up in the possession of those who value them most. The parties will in essence communicate fully with each other in order to "bargain around" the pre-determined rule allocating the rights.148 Amy's response, which emphasizes agreement between Heinz and the druggist, suggests that where the circumstances permit negotiation the most efficient outcome may be reached through communication among the parties.

As classical surplus theory highlights, however, there are obstacles such as transaction costs, bargaining failure, and income effects that may affect the functioning of the Coase Theorem.149 For example, if there are high transaction costs such that it is very costly for the

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146. GILLIGAN, supra note 1, at 28.
147. For a discussion of transaction costs and the Coase Theorem see supra notes 36-39 and accompanying text.
148. See supra note 38 and accompanying text (discussing the concept of "bargain[ing] around" the rule).
149. As discussed infra part I, these potential problems with the Coase Theorem are also studied in some neoclassical models.
parties to communicate, the Coase Theorem may not produce the optimal result. As the Heinz dilemma is presented, transaction costs do not appear to pose a problem. The bargain between Heinz and the druggist is presumably one between two individuals who live in the same town, speak the same language, and are not representing other people. Likewise, bargain failure or inability to reach agreement in the allotted time appear unlikely. Bargain failure could result, however, if Heinz's wife needed the drug immediately and Heinz, finding the store closed and the owner absent, simply broke into the store to take the drug. This, however, does not appear to be the case in this hypothetical.

The word "entitlement" is used in this paper to denote the allocation of rights by the state or legal system when the parties' interests conflict. The decision regarding whom is given the legal entitlement may affect the final outcome of a particular conflict. Moreover, even if the outcome is unchanged by the entitlement, the entitlement may still affect the income of the particular parties involved or cause a wealth effect. Indeed the children's responses recognize a simple version of this phenomenon, referred to as the offer-asking problem.

Both children think Heinz's wife should receive the drug and realize that for Heinz, his wife's life cannot be valued in terms of money. For example, Jake states, "people are all different and so you couldn't get Heinz's wife again." Similarly, Amy envisions Heinz's continuing concern for his wife and argues that people are under a moral obligation to surrender life-saving things to those in need. The children's responses underscore the idea that if Heinz had started with the drug, the druggist would not have been able to pay Heinz enough to give it up. For Heinz, no amount of money could replace his wife. Thus, the allocation is at its most efficient, highest-value use.

150. For example, in the hypothetical presented in note 66, the state must decide whether Amy has the legal entitlement to an unobstructed view or whether Jake has the legal entitlement to build his home in Amy's view. For a detailed discussion of entitlements, see Madeline Morris, The Structure of Entitlements, 78 CORNELL L. REV. 822 (1993) (analyzing the allocation and construction of individual legal entitlements).

151. A wealth effect occurs when the amount of money that someone is willing to pay for something is a function of wealth. See generally Jeffrey L. Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. REV. 1309, 1357-58 (1986) (providing a brief discussion of the impact a wealth effect has upon cost-benefit analysis). Thus, a wealth effect occurs where Amy has the entitlement and would sell it for $4,000, but would pay only $2,000 to preserve her view if Jake had the entitlement.

152. See supra note 66 (illustrating the "offer-asking" problem).

153. GILLIGAN, supra note 1, at 26.

154. GILLIGAN, supra note 1, at 28.
Consider, however, an opposite situation in which the druggist has the entitlement. Heinz is poor and simply does not have the $1,000 to buy the drug. This is the context of the hypothetical presented to Amy and Jake. A traditional law and economics analysis would again suggest that this allocation is the most efficient one. However, the children do not agree. Their responses highlight the systematic inclination that the wealth effect and the offer-asking problem produce toward a conclusion that resources are allocated inefficiently. Systemic bias, implicitly recognized in both Amy and Jake’s responses, indicates that resources are not always allocated as efficiently as neoclassical theory might suggest. Furthermore, it shows that the initial allocation of resources, which neoclassical economists generally take as a given, is very important.

Amy’s response suggests the value of the Coasian analysis, a typical neoclassical argument, but at the same time indicates its potential limitations. Furthermore, both children’s responses indicate that distributional goals other than the initial market goals may be optimal here. Amy and Jake realize that the wealth effect may bias the distributionally “efficient” outcome, a concept drawn from the classical surplus paradigm. Thus the economic theory underlying the children’s replies to the Heinz dilemma shows that the children’s responses are not conflicting paradigms. Instead, Amy’s and Jake’s answers employ elements of both neoclassical and classical surplus theory to create solutions to the dilemma.

2. A Substantive Similarity: Amy’s and Jake’s Choices of a Property Rule

As Guido Calabresi and A. Douglas Melamed suggest in their article Property Rules, Liability Rules and Inalienability: One View of the Cathedral, an entitlement may be granted through either a property or a liability rule. A property rule is similar to a contractual solution because it protects the entitlement by forcing the parties to negotiate. An example is theft. Under a property entitlement rule, the thief is required to return the stolen article—the thief cannot simply take the item and then pay the true owner to be allowed to keep it. The alternative entitlement rule, called a liability or “take and pay” rule, is used when it is impractical to negotiate a contractual

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156. See Calabresi & Melamed, supra note 28 (introducing the traditional law and economics theory).
158. Calabresi & Melamed, supra note 28, at 1092.
An example is a car accident. The harm is already completed at the time of the accident itself (as opposed to theft) so that the offender, unable to restore the victim, must compensate for the harm done.

Entitlements protected by property rules may only be transferred through voluntary transactions in which the seller and buyer agree on a price. Applying the concept to Amy's response, then, Amy appears very committed to using a property rule to protect entitlements. Even when questioned repeatedly, she holds firm to the conclusion that Heinz should not steal the drug and insists that he and the druggist should work out a deal.

Although Amy recognizes the theft of the drug as an alternative, she searches for a more adequate solution through negotiation or by securing a loan for Heinz. Amy thus seems to have a strong sense of the need to protect entitlements using a property rule.

Calabresi and Melamed explain that an entitlement protected by a liability rule is an entitlement that may be destroyed by a person willing to pay an objectively determined amount. At first glance, it appears that Jake is less committed to a property rule than Amy because Jake argues that Heinz should just steal the drug and then have the judge determine the appropriate sentence. Jake's hope that the penalty will be adjusted to the circumstances suggests that a property rule should not be absolute and appears to move in the direction of a liability rule.

This diminished commitment to a property rule breaks down, however, when Jake suggests that the judge give Heinz a lenient criminal sentence and not simply impose a fine upon him. Calabresi and Melamed argue that criminal sanctions are used in order to deter future attempts to convert property rules into liability rules. That is, simply charging a thief with a monetary penalty equal to an objectively determined value of the stolen object (applying a liability rule) would change all property rule entitlements

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159. Under the liability rule, a party may destroy an entitlement by paying the amount for which the holder would have sold it; thus, she can “take” the entitlement as long as she “pays” the proper amount for it. Calabresi & Melamed, supra note 28, at 1092.


161. GILLIGAN, supra note 1, at 29.

162. GILLIGAN, supra note 1, at 28 (“If he could borrow the money or make a loan or something, but he really shouldn't steal . . .”).

163. Calabresi & Melamed, supra note 28, at 1092.

164. GILLIGAN, supra note 1, at 26.

165. GILLIGAN, supra note 1, at 26 (suggesting that “the judge, ‘should give Heinz the lightest possible sentence’”).

166. Calabresi & Melamed, supra note 28, at 1126.
to liability rule entitlements. In order to enforce a property rule entitlement in the case of theft, criminal sanctions should be applied to the thief. The use of a criminal penalty, albeit lenient, is exactly the approach Jake suggests for Heinz. Thus, Jake appears to endorse the use of property rules. In spite of their different methods of expression, Amy's and Jake's responses here suggest substantively the same idea: a commitment to the use of property rules to protect the druggist's entitlement.

C. Integrated Legal Theories

As discussed above, Amy's responses portray many important elements of classical surplus economics and CLS theories. Conversely, Jake's responses display integral tenets of neoclassical economics and law and economics. Both children's statements, however, do not invoke these philosophies to the exclusion of other ideas. Indeed, Amy and Jake merge elements of both CLS and law and economics theories. Structurally, each child's response integrates components of seemingly opposed economic and legal theory.

When pressed for a reason why Heinz should not steal the drug, Amy repeats, "[b]ecause it's not right." Amy's rigid application of the prior-stated rule, coupled with the concept of formal rationality which underlies it, is typical of traditional neoclassical theory. Her reply is in direct contrast to Gilligan's interpretation of her philosophy transposed into economic theory. Furthermore, viewed from the perspective of legal theory, her response implies a Posnerian concept of the efficiency of the criminal law. That is, Amy's strict deference to the legal rule implies the following: that the law reflects the most efficient allocation of resources; that the current distribution of wealth is taken as a given; and that market bypassing (ie. Heinz stealing the drug) would create economic inefficiency. In this sense, Amy's response implements Posnerian law and economics reasoning.

Amy's commitment to Posnerian philosophy is not as clear, however, when her other responses are also taken into account. Amy's statement that "if somebody has something that would keep somebody alive, then it's not right not to give it to them," demonstrates her belief that fairness dictates that Heinz receive the drug.

169. GILLIGAN, supra note 1, at 29.
170. See discussion supra part I (explaining fundamental concepts of neoclassical theory).
171. See generally Posner, supra note 5 (discussing use of economic theory in the analysis of assorted legal issues).
172. GILLIGAN, supra note 1, at 28.
She does want to resolve the situation through communication between Heinz and the druggist. However, Amy's statement that "it is not right for someone to die when their life could be saved"\textsuperscript{173} suggests that, if communication proved ineffective, Amy might advocate that Heinz steal the drug and receive only a light penalty. This solution, which is the one Jake suggests from the beginning, is based on the CLS concept of individualized justice. In contrast, Jake believes from the onset that Heinz should steal the drug. Explaining that the "judge would probably think it was the right thing to do,"\textsuperscript{174} Jake realizes Heinz will be subject to and judged in accordance with the law. However, Jake's answers suggest a CLS approach of individualized justice in that he advocates a lighter sentence.

Amy's and Jake's responses are more similar than different because they both believe that Heinz is morally obligated to help his wife (indicative of a CLS approach), but that Heinz should still be subject to the law (resembling a law and economics approach). Thus, although Amy upholds the importance of the existing criminal law from the onset and only hints at Jake's CLS-like idea of applying criminal rules leniently, both children end up within a rule-based paradigm typical of law and economics theory. While Amy and Jake do not articulate matching responses, their responses are structurally similar as they integrate elements of seemingly opposed legal theory.

**Conclusion**

The title of Gilligan's chapter dealing with Amy and Jake, "Images of Relationship," along with her almost exclusive analysis of the children's rhetorical and gender differences suggest that Gilligan is overly focused on the imagery of the children's responses at the expense of what Amy and Jake actually say. Gilligan is correct in suggesting that there are differences between the children's answers. The differences between Amy's and Jake's responses, however, are mainly rhetorical. While it is true that Amy frames her statements in terms of experience and the community while Jake uses equations and numbers, Gilligan uses this distinction to overstate the actual differences.

The comparative economic method developed in this paper provides important insights not readily apparent from other feminist methods. For example, the analysis shows that Amy's and Jake's methodologies are structurally similar because they both draw on

\textsuperscript{173} GILLIGAN, supra note 1, at 29.
\textsuperscript{174} GILLIGAN, supra note 1, at 26.
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elements of sophisticated moral, economic, and legal paradigms. Both responses outline a moral structure that unifies elements of the ethics of care and justice, an economic paradigm that implements components of neoclassical and classical surplus theory, and a legal theory that integrates elements of law and economics and CLS. Thus, both children draw on elements of seemingly conflicting theories to create solutions to the Heinz dilemma. In some instances, such as their use of altruism, their examination of wealth effects, and their commitment to the property rule, Amy’s and Jake’s solutions are substantively similar. This examination breaks through both the children’s rhetorical differences and Gilligan’s interpretation of their methodological, gendered bipolarity. Additionally, the analysis exposes the similar underlying structure and often substance of their statements. Instead of the dichotomy posited by Gilligan, this moral, economic, and legal analysis of Amy’s and Jake’s responses reveals the more subtle, integrated nature of each child’s thinking. In effect, this paper demonstrates how valuable traditional methods of analysis, such as economic thought, can be when applied in a new manner to feminist theory.

The economic analysis presented in this article also addresses some important criticisms of Gilligan’s approach. One such criticism is that Gilligan does not take into account the origin of the different voice; that is, she ignores initial inequalities in wealth and power between the sexes and instead takes these conditions as a given. Classical surplus economics confronts the omission by stressing that history and social effects such as race, gender, wealth, and class should be examined from the beginning. Additionally, Gilligan’s approach risks oversimplification. For example, emphasizing men’s link with rationality and women’s association with interactive nurturing may actually restrict opportunities for both men and women. More-


176. See Deborah L. Rhode, The “Woman’s Point of View”, 38 J. LEGAL EDUC. 39, 43 (1988) (discussing the implications of a singular feminist view in light of historic diversity and challenges). Rhode notes the particular significance of gender stereotyping and discusses substantial research which undermines Gilligan’s concept of a different voice. Id., at 43. Approximately sixty recent empirical studies of moral reasoning show almost no significant differences based on gender. Id. The studies and discussions referenced by Rhode include: Catherine G. Greeno & Eleanor E. Maccoby, How Different Is the “Different Voice”?, 11 SIGNS 310, 312 (1986) (finding Gilligan’s work on moral development unsupported by existing studies which indicate no gender differences); James C. Walker, In a Different Voice: Cryptoseparatist Analysis of Female Moral Development, 50 SOC. RES. 665 (1983) (examining the two theses of self-differentiated moral psychologies and sex-differentiated moralities present in Gilligan’s theory
over, because Gilligan's work implies that the ethic of care is a trait of all women, her analysis obscures the diversity of women. The same may be said for men. The analysis in this article attempts to deconstruct Gilligan's dichotomy by using economics to reveal the similar theoretical construction of both the boy's and girl's responses.

Economic theory is a strong tool as it provides a structured, established, and rich method of analysis. It is important to note that just as there are varied schools of feminism, there are many different economic theories. Although certain aspects of neoclassical theory may be counter to feminist ideas, economic methods and thought may prove very powerful if molded by feminist hands. For example, economic theory provides valuable insights—such as the similar caliber and structure of the theoretical considerations of each child—that generally would not be gleaned through the use of other feminist techniques. In addition, classical surplus theory may be used in order to focus on the shared lives of women and on women as a class rather than as individuals. Alternatively, when it is necessary to analyze individual women, a comparative economic method such as the one developed in this paper may prove valuable. Finally, the use of the established method of economics may also serve to make feminist thought accessible to a wider audience.

There are no definitive answers within any of the schools of feminism. Gilligan's work, like that of other feminist legal scholars, has made very strong contributions to the field. It is only through these types of continuing insights that feminist jurisprudence will continue to evolve. Just as Amy and Jake both used a variety of means to solve the problem presented to them, so too must feminist

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177. Menkel-Meadow, supra note 9.

178. See supra note 8 (providing West's critiques of Posner's assumptions that individuals are rational wealth maximizers, a fundamental tenet of neoclassical economics).

179. See MacKinnon, supra note 9, at 37-45 (describing various feminist theories on sex discrimination).

180. Martha Minow, Feminist Reason: Getting It and Losing It, 38 J. LEGAL EDUC. 47, 52-53 (1988) (advancing feminist critiques which alleviate the singular woman's point of view and encourage differences). Martha Minow argues that:

"[t]he dominant culture has established certain criteria for theories, for legal arguments, for scientific proofs for authoritative discourse. These established criteria are the governing rules. If we want to be heard—indeed, if we want to make a difference in existing arenas of power—we must acknowledge and adapt to them, even though they confine what we have to say or impose us in the patterns we claim to resist."

Id. Cf. Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV. 797, 839 (1989) (advocating the "deinstitutionalization" of gender by developing rules that erode "traditional correlation[s] between gender and sex.").
\end{quote}
jurisprudence employ a variety of methods in order to address and forward the diversity of women's experiences. The use of economic methods and theories should be recognized as one important technique in continuing the ongoing development of feminist legal thought.