INTRODUCTION: LAW, ECONOMICS, AND SOCIAL CONSERVATISM

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The inclusion of this topic in the symposium and the structure of the debate suggest that one should be surprised that law-and-economics theorists have something in common with social conservatives. The history of American conservative thought in the last half-century, however, demonstrates that there is significant overlap between conservative economic theory and the values of those who often are referred to as social conservatives. If overlap between the two schools of thought was non-existent, then the presidency of Ronald Reagan would have been significantly less successful.

Without laboring over definitions of social conservativism, conservative economic theory, or law and economics, it may provide some perspective on the following debate to pause to recall one issue on which social conservatives and conservative economic theorists share a common ground. School vouchers, a key element of the social conservative agenda, are the product of conservative economic theory.

In 1962, Milton Friedman set forth an argument that free market capitalism is essential to a free society.[1] Although Friedman refused to surrender use of the term "liberalism" in its nineteenth-century usage and described his theories in those terms,[2] the ideas expressed in *Capitalism and Freedom* are one of the pillars of modern conservative thought.

In this seminal work, Friedman's exploration of free market principles led him to propose what was then a new concept, school vouchers. According to Friedman, government intervention in education is proper on two grounds,

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1. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (2d ed. 1982). The first edition was published in 1962.

2. *See id.* at 5-6.

"neighborhood effects"[3] and a paternalistic concern for children.[4] These grounds justify a uniform minimum level of required schooling and even state financing of such schooling. They do not justify government administration of schools, "the 'nationalization,' as it were, of the ... 'education industry.'"[5] Friedman suggests, instead, that the government give vouchers to parents redeemable for a maximum sum per student per year at any school meeting minimum governmental standards.[6]

Under Friedman's theory, vouchers allow the government to serve the goals that justify government intervention in education and at the same time maximize individual liberty. The political process would continue to determine what forms of education deserve public support and the level of that support. After making those decisions, the government's role in education would lessen from that of administrator to inspector.[7] Because the school voucher system would make capital for investment in education more widely available to people of all income levels,[8] the system would "do much to make equality of opportunity a reality, to diminish inequalities of income and wealth, and to promote the full use of our human resources."[9] Fundamentally, Friedman uses the idea of school vouchers to illustrate how the pursuit of free market principles serves the larger ends of political and individual freedom.

The adoption of school vouchers as an important goal of social conservatives validates Friedman's confidence that following free market principles preserves individual liberty. Vouchers are valued by social conservatives as a means to escape from governmental teaching of ideas they do not share. Acknowledging the neighborhood effects and paternalistic

3. *Id.* at 85-86. Neighborhood effects are "circumstances under which the action of one individual imposes significant costs on other individuals for which it is not feasible to make him compensate them, or yields significant gains to other individuals for which it is not feasible to make them compensate him—circumstances that make voluntary exchange impossible." *Id.* More recently, economists use the term "externalities" to describe these effects.

4. *See id.* at 86.

5. *Id.* at 89.

6. *See id.*

7. *See id.*

8. *See id.* at 107 ("Existing imperfections in the capital market tend to restrict the more expensive vocational and professional training to individuals whose parents ... can finance the training required.").

9. *Id.*

concerns discussed above, the government continues to collect taxes to fund education. Vouchers give parents the power to direct those funds to schools that express and reinforce their own values and educational priorities.

Thus, social conservatives and conservative economic theorists do share important common ground. This common ground is the departure point for the debate on law, economics, and social conservatism.

In the pages that follow this introduction, Professors Rasmusen and Epstein engage in a debate within the framework of law and economics.[10] Because it is a debate by those who share a common approach, the discussion begins mid-stream. There are assumptions underlying the analysis of both positions that are not fully explicated in this forum. Thus, a reader from outside the law and economics school may be somewhat insecure about the initial premises. Furthermore, the fact that both professors begin with the same assumptions leaves their conclusions unchallenged by insights from outside their system of thought.

The participants in this debate share an underlying premise that the efficient result is the most desirable result. Efficiency, however, does not necessarily have to be accepted *a priori* as the highest good by a believer in the law-and-economics approach. Friedman, for example, values efficiency as a means to maximize individual freedom. *Capitalism and Freedom* is an effort to demonstrate that economic freedom is a necessary precondition for political freedom.[11] Friedman sees two alternate means of coordinating human action. The first is central direction—a totalitarian state. The second means is "voluntary co-operation of individuals (for example, efficient transactions—a free market state)."[12] Friedman favors the latter because he feels that all government intervention limits the area of individual freedom,[13] and voluntary transactions do not pose that threat.

In addition, Friedman posits that free market transactions favor political freedom because economic power acts as a check

10. *See* Richard A. Epstein, *Externalities Everywhere?: Morals and the Police Power*, 21 HARV. J.L. & PUB. POL'Y 61 (1997); Eric Rasmusen, *Of Sex and Drugs, and Rock'n'Roll: Does Law and Economics Support Social Regulation?*, 21 HARV. J.L. & PUB. POL'Y 71 (1997).

11. *See* FRIEDMAN, *supra* note 1, at 4.

12. *Id.* at 13.

13. *See id.* at 32.

against the concentration of political power. Whereas political power tends toward concentration, "[e]conomic power can be widely dispersed. There is no law of conservation which forces the growth of new centers of economic strength to be at the expense of existing centers."[14]

If efficiency is not an end in itself but a means to achieve a greater goal, then the results of the efficiency analysis should be amenable to evaluation in light of that more fundamental goal. For example, if efficiency is favored because it maximizes individual liberty (Friedman's more fundamental goal), then the specific application of an efficiency analysis should be able to be evaluated in light of the extent to which it achieves that goal. Efficiency analysis should not be viewed as foreclosing an evaluation of its results based on the extent to which the results serve the fundamental goal underlying the choice of method.

If one recognizes that efficiency analysis serves a more fundamental goal, then it becomes clear that a choice of other goals may yield different results. Thus, the results of an efficiency analysis may be criticized by arguing that, in a particular circumstance, other values should outweigh the fundamental goal that is served by efficiency. For example, Professor Rasmusen asserts that our basic criminal laws, such as laws against rape, can be derived by considering individual preferences, that is whether the harm to the victim outweighs the benefit to the perpetrator.[15] The result of an efficiency analysis of a rape "transaction" can be criticized to the extent it does not serve the goal of protecting individuals from coercion. Indeed, even within the framework of traditional free market theory, it is accepted that an independent goal of government is to ensure that transactions are bi-laterally voluntary. By definition, rape is not a voluntary transaction.

Professor Rasmusen's application of the efficiency model also glosses over enforcement problems. His analysis purports to avoid enforcement of social choices by relying on consensual agreements.[16] But on closer examination, Rasmusen's theory does not successfully avoid the problem of legal coercion.

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14. *Id.* at 15-16.
15. *See* Rasmusen, *supra* note 10, at 77.
16. *See id.* at 75.

Professor Rasmusen poses the hypothetical example of Jim, who makes a consensual agreement to refrain from ingesting heroin in return for payment of a certain amount of money. The efficiency analysis suggests that, rather than banning drugs, one should allow people to purchase a drug-free society, if that is their preference and the price is right.[17]

The hypothetical, however, does not take into account what is likely to happen next. Drug addiction being what it is, Jim, having made the agreement, is likely nonetheless to take the proceeds and use them to buy more heroin.

Enforcing Jim's contract raises a host of questions. What would specific performance mean in this context? Are damages an adequate remedy? If Jim entered into the agreement with no intent to perform, does a cause of action for fraud provide an effective remedy? Finally, if Jim may rescind the transaction, is there anything left to the concept that others may make Jim comply with their values and desires once he expresses a willingness to do so for a price?

What Rasmusen has done, then, is to take a problem of criminal law enforcement and make it one of civil law enforcement. The advantage, if any, of civil over criminal enforcement with respect to the problem of drugs is left unexplored. It is far from clear that compliance would be more successful under a civil enforcement scheme than under a criminal penalty system.

The pieces that follow represent powerful theoretical arguments for and against social and economic regulation in our society. Professors Rasmusen and Epstein provide a fresh and challenging perspective on the common ground between social and economic conservatives. It is left for the reader to consider whether the efficiency analysis should be measured against goals outside its economic framework and to decide in which direction this debate pushes the regulatory scale.

17. *See id.* at 75.