

JOE CAMEL EXPLAINS IT TO THE BOARD: CORPORATE LAW, WOMEN IN THE WORKFORCE, AND THE EXPLOITATION OF CHILDREN

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A USER'S GUIDE

The premise of this article is that corporate law, as it is currently understood and allowed to operate, inevitably leads to the exploitation of children as consumers. The article acknowledges, deconstructs, and reconstructs some of the common understandings about both parenting and corporate function. In doing so, it employs feminist method, including the use of storytelling and the invocation of experience in individual, anecdotal and statistical terms. It also makes use of shifting voices, such as that of the recurring Joe Camel, who will guide the reader and a fictional corporate board through an understanding of the relationship between corporations and underage consumers, providing an articulation of the considerations that have motivated other boards in real life. Joe's initial introduction to the board is succeeded by a prologue describing a fictional scene set during the period in which the stay-at-home mother perhaps was most idealized, but children's consumption preferences nonetheless were being felt. This is followed by a formal introduction.

INTRODUCING JOE

Having lost his job as spokesperson for Reynolds Tobacco,¹ Joe Camel has traded in his bomber jacket for pin-stripes. [Readers now should imagine a cartoon camel in a suit.] Meet Joe Camel, corporate consultant. Joe speaks:

Gentlemen and lady [with nod toward token woman],² thank you for inviting me to address the board. My subject is why, today, there are

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1. "Old Joe" was retired as part of the settlement in *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994).

2. See Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363 (2002) (describing relative scarcity of women on the boards of publicly held corporations, but relating increased representation of women, minorities, and non-nationals on corporate boards to new managerial attitudes); cf. David A. Carter et al., *Corporate Governance, Board Diversity and Firm Value*, 38 FIN. REV. 33, 50-51 (2003) (describing increases in firm value correlating with increased board diversity); Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 739-40 (2003) (discussing general benefits of increasing diversity); Steven A. Ramirez, *Diversity and the Board Room*, 6 STAN. J.L. BUS. & FIN. 85 (2002) (discussing matters related to limited but possibly increasing diversity).

opportunities to maximize shareholder value in ways unlike any in history. By way of introduction, a few words sum it up. Busy moms, contributing to production of new products. New ways to reach kids and new research showing how to keep 'em hooked. I like to call it "creating a need and filling it" or "the free market never fails!" [More from Joe later.]

PROLOGUE

Oakdale, 1960

Autumn had embraced Oakdale early that year. A sapphire sky framed crimson and ochre leaves, providing a classic backdrop for the pilgrimage back to school. Students large and small drifted through the streets, fully outfitted with the tools of their unchosen trade: new footgear, new clothing, new pencils, and, for the younger set, new crayons and new lunch boxes. In the latter regard, girls largely endorsed Barbie or Cinderella, but young gentlemen had more to sort out. Darby Wallace's choice of Daniel Boone trailed him on a plastic strap as he traipsed toward Burkett Elementary, considering what was to come.

Burkett was the newer of the town's two grade schools. The other, Oakdale Elementary, was a red-brick toaster on what passed, by village standards, for a busy street. Burkett, however, settled its several one-story arms across a verdant expanse with a good-sized copse of trees. Darby eagerly anticipated a rendezvous under arboreal cover with his best friend, Michael Levy, just as soon as the bell pealed three. Michael was a passionate aficionado of Davy Crockett, and most certainly would insist on his favorite game of "Alamo," a revisionist version in which Davy, handily assisted by Daniel Boone, always won.³ Side-by-side or back-to-back, the comrades would slash at the cunning "Messicans," represented by the highest clumps of undergrowth, until subjugation was complete. Darby wished, for a moment, that his mother had not prevented him (forcefully, after tactful persuasion had failed) from bringing along his birthday pocket-knife, which surely would have impressed both Michael and the Messicans.

Enough was novel about the school day itself, however, to distract Darby from any regrets. First, of course, was the New Teacher, although the fact of the matter was that Mrs. Smith had taught Darby's two older brothers and thus was well-known to the entire Wallace household. Then, there was the matter of the New Desk. Yes, indeed, for the first time since he had commenced his academic career, Darby was the initial occupant of a fresh-from-the-factory desk. The desk was of the new style: rather than placing his personal effects in a metal bin with a wooden lift-up top underladen with gum and thoroughly scarred with someone else's initials, he put his books and other paraphernalia in an open box built-in sideways under his seat. This new desk model afforded on a regular basis, the opportunity to hang upside down and observe the world from a new

3. See generally Rachel Borup, *Bankers in Buckskins: Caroline Kirkland's Critique of Frontier Masculinity: Critical Essay*, 18 AM. TRANSCENDENTAL QUARTERLY 229 (2004) (discussing, among other things, the legends of Davy Crockett, Daniel Boone, and the Alamo); S. Derrickson Morre, *As Kids, We All Had a Gun and a Rope and a Hatful of Hope*, LAS CRUCES SUN-NEWS, Oct. 16, 2005, at 1A (discussing popularity in 1950s of Davy Crockett and Daniel Boone).

vantage point, and Darby availed himself of this opportunity frequently throughout the day.

Darby thus was occupied as the New Boy entered the classroom. The New Boy was ushered in mid-day and introduced to the class. His name was Alan, and each and every one of the other boys noted with relief that the New Boy was small and that he looked like them. From upside down, salt n' pepper corduroy legs gave way to red-plaid flannel torso; a Lone Ranger lunch pail swung to the side, successfully completing and complementing the ensemble. Alan assumed his designated seat with an odd combination of diffidence and swagger. Mrs. Smith, perhaps, was able to detect the tutelage of an elder in the way he carried himself; in any event, its effect upon the boys in the class was as desired. They saw neither David nor Goliath, neither patsy nor foe.

I. INTRODUCTION

Stating the Issue

Speaking, for the moment, in sweeping and un-footnoted generalities, it has always been important to children to "fit in." As Darby's story is meant to suggest, this has been true in America, notwithstanding some limited exaltation of "standing out" associated with idealization of rugged individualism and frontier spirit. Popular reportage would lead one to believe that the pressure to fit in is even stronger in many other countries.

Sweeping generalities point also to the ready conclusion that, at least in America, the nuclear family has played a critical role in introducing children to the ways of the larger community. The family has served, in addition, as a counterweight to certain forms of juvenile peer pressure. Few in number may be the members of the reading audience who actually have achieved their adult height without having heard from a parent, "If [fill in the name of your best friend in high school] jumped off a bridge, would you do it too?"

The predictable next step in this line of thinking is a lament for the modern decline in the ability of the nuclear family to fulfill the roles just described. The decline, of course, often is characterized as a consequence of the women's liberation movement.⁴ The argument is as follows. When mothers went to work in large numbers,⁵ they inescapably had less time to attend to concerns associated with hearth and home.⁶ When mothers began to see no need to legally cement their own relationships with the fathers of their children,⁷ the father-child bonds too became less stable.⁸ Alienated fathers and overworked mothers turned to the television for babysitting⁹ and . . . bingo, the children were

4. See *infra* note 36 and accompanying text.

5. See *infra* notes 19-22 and accompanying text.

6. See generally Lynn Doan, *Girl Power*, VISALIA TIMES-DELTA, May 21, 2005, at 5A (commenting on reduction in women's time at home).

7. See *infra* note 27 and accompanying text.

8. See generally Glenn Sachs, *Are Boys Better Off Without Fathers?*, THE SEATTLE POST-INTELLIGENCER Sept. 6, 2005, at B7 (acknowledging the effect of absentee fathers); Kyuon M. Song, *Marriage as Learned Behavior: Can Divorce be Foretold?*, SEATTLE TIMES, Jul. 27, 2005, at F1 (commenting on disruption of familial bonds).

9. See *infra* note 96 and accompanying text.

body-snatched by programmers and advertisers. The rest is history, a history accelerated by today's video games and internet access.

On a superficial level, the logic suffices. No amount of hypothetical rebuttals—"But why should it be the *woman's* job to take care of the children?," or "Why should *women* be blamed for the decline in family stability?"—can make this superficial logic disappear. Nor does "But studies show that high-quality day care and/or some amount of television can be *good* for children" suffice. Logic is logic, and neither day care nor television addresses the issue of whether the nuclear family is available to acculturate and guide. That some amount of day care or television can have value merely suggests that they are palatable substitutes for familial guidance that might be consciously selected by responsible parents.

The next anticipated logical assault comes from the ilk of, "But working women have higher self-esteem and therefore can be *better* mothers." Strictly speaking, this argument only works if women with high self-esteem come home and effectively communicate their values to their children. This logical inroad, however, is somewhat refuted by experience, which shows us that what women with high self-esteem actually do is come home from work and let their children watch television, play video games, and surf the internet (all activities, incidentally, that were not widely available to the young children when Darby Wallace roamed the schoolyard and Donna Reed held sway).

Taking a step back, however, the decline in the effectiveness of nuclear families in communicating values is cause for lament only if the consequences themselves are lamentable. In other words, if children still manage to acquire socially beneficial values, where's the beef? The fact of the matter is, no one really can tell whether the beef is even missing, since debate about which values are socially beneficial generally precludes any empirical conclusions as to how these values are or are not acquired. Although there may be modest consensus that resort to violence—which we vaguely, if incorrectly, suspect of increasing¹⁰—is a social wrong, agreement about the social contribution of even such traditional values as monotheistic belief is not readily forthcoming.

In other words, we cannot collectively know exactly what our values are, or precisely where, or even if, our children are now acquiring them. We do know a great deal, however, about what else children are acquiring, and that is "stuff." A ton of stuff.¹¹ A ton of very expensive stuff. A ton of very expensive stuff that has to be replaced very quickly as a result of changes in fancy and planned obsolescence.

At the other end of the snake, more stuff is being produced, in part, because our economy is more productive than ever before, both owing to technology and to the entry of women into the work force.¹² More marketing takes place because technology has coughed up more ways to do it and, perhaps, also because of shifting values. More marketing to children takes place because it seems to work—a proposition that is essentially self-proven by the above-referenced phenomenon of children's burgeoning acquisition of stuff,

10. See *Chasing the Dream*, ECONOMIST, Aug. 4, 2005, at 53, 54.

11. See *infra* notes 84-86 and accompanying text.

12. See *infra* notes 19-22 and accompanying text.

coupled with an exploding amount of resources devoted to marketing to children.¹³

The choices—or non-choices—children make in the course of their purchasing frenzy are the focus of this article, which utilizes feminist method to examine the interaction of child-driven markets (defined as markets in which consumption is influenced, in whole or in part, by the desires of children) and corporate law. It is the author's position that corporate law, as currently understood and allowed to operate in an early twenty-first century context, inevitably leads to exploitation of children's desires. This point is made and reiterated in the voice of Joe Camel "explaining" to the board what they almost certainly already know, but probably paid him, as an independent consultant, to justify. The case for the proposition is buttressed as follows. Part II-A provides background on the effect of the women's liberation movement on economic development (including increased productivity and technology), family life, and analytic methodology. It introduces and employs feminist method in setting the stage for the conclusion that women's presence in the workforce has contributed, in complex ways, to corporate opportunism *vis-à-vis* children as consumers. Part II-B addresses corporate law, explaining its insistent privileging of shareholder interests and describing its abstract justifying assumptions about marketplace rationality. This analysis sheds light on the propensity of corporate decision-makers to avoid contemplation of the effects they may have on the quality of children's lives. Part II-C describes the burgeoning phenomenon of consumption by children, as well as detailing some of its consequences. Part III integrates the disparate discussions of Part II, explaining how feminist analysis of women's experience and corporate form and function leads to the conclusion that corporate America is engaging in the effective rape and pillage of the pocketbooks and, more importantly, the psyches of American children. Part IV proposes partial solutions.

Notwithstanding any "but-for" correlations (or lack thereof), it is no doubt objectionable and offensive to place any part of the exploitation of American children at the door of working women. Nonetheless, there is something sullyng working women's collective door mats, and that something is the *experience* of guilt, whether irrational or not.¹⁴ Catholic guilt, Jewish guilt, name your ethnicity guilt are mere nothings compared to working-mother guilt. This article concludes by taking the only half-frivolous position that working women might confront and attempt to alleviate their feelings of guilt by implementing at least some of the suggestions advanced.¹⁵

And now for a word from Joe:

I'm sure, gentlemen and lady, being who you are,¹⁶ that you already get my drift. Like any good speaker, I've told you what I'm going to tell you.

13. See *infra* notes 84, 87 and accompanying text.

14. See *infra* note 32 and accompanying text.

15. See *infra* Part V.

16. Studies indicate that persons rising to the level of the board of publicly held corporations are likely to express fairly uniform values, notwithstanding facial attempts at diversity. See *infra* note 160 and accompanying text.

Now, I'll tell you what I'm telling you, before I tell you what I told you. Here's the important part of what I'm saying: It's your duty to make money for your shareholders. You do this by filling consumers' needs, which they express by paying for what you provide. As long as they keep paying, it proves that the system is working. Are we all on the same page here or what?

II. BACKGROUND: THE WOMEN'S MOVEMENT, SHAREHOLDER PRIMACY, AND CHILD-DRIVEN MARKETS

Thus far, this article has suggested that the women's movement has interacted with the widely acknowledged corporate valuing of shareholder primacy in such a way as to permit—and even to demand—the exploitation of child-driven markets. Before persuading the reader that the linkage is as suggested and that it is problematic, particularly for women, a bit more explanation is required.

A. The Women's Movement: Changing Demographics and Changing Analysis

Even those who vehemently deny evolution probably will admit that the position of women in society has undergone dramatic change within the last few decades. The only dispute is whether the change has been a desirable one. This article seeks to avoid that question. It does, however, briefly illustrate the change by reference to the author's family history, as well as document it by reference to demographic trends. It then describes some of the analytical tools introduced by feminism, which served as the catalyst for this dramatic social change. Part III uses those tools to demonstrate that the change itself retrospectively may be characterized as one of the elements in this "perfect storm" resulting in the wholesale exploitation of American children.

1. Changing Demographics

a. One Family's Story

Inez Chavez Gabaldon
1879–1963

My grandmother, Grandma Inez, had fifteen children and never worked "outside the home"—or, at any rate, never received wages for her labor on the family's subsistence farm. Upon the death of her husband at age forty-eight, she became an entrepreneur of sorts, sending her two youngest sons door-to-door to sell her cheese. She did not speak English, had no formal schooling, and did not own a television until she was eighty-years-old.

Jacqueline Sykes Gabaldon
1930–1971

My mother married in college, but earned both her B.A. and M.A. while caring for my sister and me. The family television received four channels, and we were regular viewers of *Romper Room*, which was broadcast only three days a week but nonetheless was a boon of time while Mom did her homework and

housework. She taught us to read, and our devotion to that activity provided her with even more time. My grandmother cared for us while my mother was in class; Mom took us with her to do her student teaching. The year I, her youngest, started kindergarten, she entered the traditional work force as a teacher. She thereafter happily relinquished the lion's share of her salary to pay a five-day-a-week housekeeper to do the cleaning and laundry and to watch us during the one-hour gap between our arrival at home and hers.

The Author
1954–

I went to college, on to law school, and into law practice. If I had stayed in practice, I might have had children, but I don't know how. (Well, yes, I know *how*, it's really the *when* that I'm quibbling about.) In any event, I became a partner, went into teaching, got married, got tenure, had a child during a sabbatical, and put him into day care when he was six months old. He is now twelve years old, and because of all I had read before he was born, he has never watched more than an hour of television a week (do not tell his friends). Movies, however, are something else, and he uses the internet (sometimes at the behest of his school), and then there are the video games . . . but I am getting ahead of the story.

The Point

We all are familiar with idealized accounts of earlier social conditions in which the spheres of home and work were separated and the former was allocated to dedicated domestic goddesses.¹⁷ These accounts come closest to reflecting a possible reality during the brief period between the Industrial Revolution and the Technology Revolution.¹⁸ Even when these accounts are confined to this temporally plausible context, however, they necessarily fail to reflect the stories of many women's real lives. Readers rummaging through their own closets of recollection may, before moving on, be interested in testing their own recent family histories against popular mythology.

b. A Numbers Story

Relevant facts about the changing lives of American women could fill volumes, and individually are quite interesting. More important for purposes of this article, they provide an impressionistic rendering that well may be the

17. See generally Stephanie Coontz, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992); Nancy F. Cott, *THE BONDS OF WOMANHOOD* 70 (2d ed. 1997); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1428-29 (1992) [hereinafter Gabaldon, *Lemonade Stand*]; Dorothy E. Smith, *Women, the Family and Corporate Capitalism*, in *WOMEN IN CANADA* 17 (Marylee Stephenson ed., 1977).

18. See Marlene O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital in Turbulent Times*, 77 S.C. L. REV. 1258, 1277-89 (2004) [hereinafter O'Connor-Felman, *Human Capital*]; see also Barbara Bennett Woodhouse, *Reframing the Debate about the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 113-14 (2004) (describing effect of industrialization on "sacralization" of childhood and characterizing childhood as a cultural construct).

source of our perception of the decline and fall of the American family. The following facts are provided to document critical differences in the lives of American women between the middle and the end of the twentieth century. This documentation provides a basis for concluding, among other things, that parental time and energy for the supervision of children has declined.

Fact: In the middle of the twentieth century, approximately one-third of American women worked outside the home (loosely meaning “got paid in money for what they did”).¹⁹ By 2004, over two-thirds did so.²⁰

Fact: For women with small children, the shift was an even more dramatic rise from less than twenty percent to approximately sixty percent.²¹

Fact: An increase in the work force attributable to the entry of women is correlated chronologically with an increase in productivity in the American economy.²²

Fact: On average, Americans work more hours today than they did before the Industrial Revolution.²³

Fact: Over half of American households now believe they cannot afford the things they really need.²⁴

Fact: Half of American marriages end in divorce; sixty percent of American divorces involve children.²⁵

Fact: One out of three American children is born out of wedlock (up from one out of thirteen in the 1960s).²⁶

Fact: Almost a quarter of American households are headed by single women.²⁷

19. Ronald Rindfuss et al., *Women, Work and Children: Behavior and Attitudinal Change in the United States*, 22 POPULATION & DEV. REV. 457, 461 (1996).

20. Press Release, Bureau of Labor Statistics, Employment Characteristics of Families (2005), <http://www.bls.gov/news.release/famee.toc.htm>.

21. *Id.*; see also Teresa Arendell, *Mothering and Motherhood: A Decade Review* 13 (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 3, 1990).

22. Mona L. Hymel, *Consumerism, Advertising, and the Role of Tax Policy*, 20 VA. TAX REV. 347, 380-90 (2000); see also MARTIN CARNOY, SUSTAINING THE NEW ECONOMY: WORK, FAMILY AND COMMUNITY IN THE INFORMATION AGE 111 (2000) (asserting that women’s movement preceded rise of the “new economy”).

23. Hymel, *supra* note 22, at 392.

24. *Id.* at 387.

25. Arendell, *Mothering and Motherhood*, *supra* note 21, at 10.

26. *Id.*

27. *Id.* at 12. It is estimated that sixty percent of American children will spend time in a single-parent household. Anita Garey & Terry Arendell, *Children, Work, and Family: Some Thoughts on Mother Blame* 15 (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 4, 1999).

Fact: Mothers work fewer hours outside the home than do other workers;²⁸ however, they earn substantially less, bringing home approximately sixty percent of what other workers receive.²⁹

Fact: Notwithstanding employment outside the home, women spend significantly more time on childcare and housework than do men.³⁰

Fact: Working mothers are sleep-deprived and time-crunched.³¹

Fact: Working mothers feel guilty about not spending more time at work and feel guilty about not spending more time with their children.³²

c. New Tools

Sometime during the earliest days of the late twentieth century evolution in women's lives, something changed about the way a significant number of them thought about those lives.³³ It is arguable, in fact, that this change in perspective—generally referred to as “feminism”—was a condition precedent for the momentum of the demographic shift described above.³⁴ To the extent that the popularization of feminist thinking and deliberate demographic shifts indeed can be linked, they are collectively referred to in this article as the “women's liberation movement.”³⁵

All of the many manifestations of feminism share a root concern with identifying the various causes of women's subordinate position in a patriarchal society, as well as a common goal of ending that subordination.³⁶ Inequality

28. Jane Waldfogel, *The Effects of Children on Women's Wages*, 62 AM. SOC. REV. 209 (1997).

29. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 78 (2003).

30. Linda R. Hirshman, *Homeward BOUND*, AM. PROSPECT, Dec. 2005, at 20; ARLIE HOCHSCHILD & ANNE MACHENY, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 271-79 (1989); see generally RHONDA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* (1995) (describing domestic allocations of labor); cf. Arlie Hochschild, *Who Cares for the Elderly?*, LA TIMES, Dec. 10, 2005, at B21 (describing similar phenomenon in context of eldercare).

31. Phyllis Moen & Stephen Sweet, *The New Workforce, the New Economy and the Lock-Step Life Course: An American Dilemma* 3 (Cornell Univ., Coll. of Human Ecology, Working Paper No. 02-21, 2002); Juliet Schor, *Time Crunch Among American Parents*, in *TAKING PARENTING PUBLIC: THE CASE FOR A NEW SOCIAL MOVEMENT* 83 (Sylvia Ann Hewlett et al. eds., 2002).

32. As testimony to the ubiquity of this phenomenon, a Lexis-Nexis search in the “News, All” database, using the search term “working mother” appearing within three words of “guilt” produced 646 results. See also O'Connor-Felman, *Human Capital*, *supra* note 18, at 1309-10 (discussing guilt and exhaustion).

33. See O'Connor-Felman, *Human Capital*, *supra* note 18, at 1287 (crediting BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963) with initiation of the movement).

34. See *supra* notes 19-22 and accompanying text.

35. This is a term also encompassing, in popular usage, various forms of political and other activism directed toward improving the position of women in society.

36. Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775, 780 (1990); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 617-18 (1990); see also Deborah L. Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 U. CIN. L. REV., 521, 523 (1987).

lurks, of course, behind overtly discriminatory laws,³⁷ but also is imposed, more subtly, through legal and social regimes based on principles that are not endorsed by those excluded from power.³⁸ Feminists seek to reveal both (1) that these principles are inherent in a variety of fields, including various fields of law, and (2) what the consequences of these principles are.³⁹ As a core part of this endeavor, feminists examine women's actual experiences, explore women's values, and assess the existing legal and social structures in terms of their congruence with those experiences and values. This type of analysis does not demand the assumption that the experiences and values of women diverge significantly from those of men, but it is driven by the possibility that such a divergence may exist.⁴⁰

As an integral part of their analytical process, feminist scholars make use of the concept of "gender," which is defined as the socially constructed, as opposed to biological, differences between being male and female.⁴¹ The term "gendered" sometimes is used to describe structures, analyses, etc., that are the outcome of gender. It may, for example, be said that corporate law is gendered because it predominantly is the product of men, constructed in, perhaps unknowing, reliance on their own experience of being male in society.⁴² As the following section reveals, the landscape of corporate law indeed is characterized by such socially-ascribed male characteristics as competitiveness, paternalism, and formal rationality.

37. See generally Alan Blanco, Comment, *Fetal Protection Programs under Title VII—Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 755 (1985).

38. See Gabaldon, *Lemonade Stand*, *supra* note 17, at 1389.

39. *Id.* at 1418.

40. One difficulty faced by any feminist analysis is attempting to articulate the values manifest in the experience of women; this is known as "essentializing." Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 4 (1995) [hereinafter Gabaldon, *Feminism, Fairness, and Fiduciary Duty*] (arguing that one feminist task is to articulate the values manifest in the experience of women, and to assess various existing legal and social structures for fit with these values). To focus on the values of women presupposes that those values will be common, and it tempts the analyst to assume that her own experience is an appropriate surrogate for the experience of all. *Id.* Critical race theorists usefully have identified this issue and illustrated its existence. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 603 (1990) (contending the theory that some women's experience as mothers should be asserted for all women is questionable); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989). Accepting the lesson of essentialism does, however, complement and refine the assertion that subjugation can come in different shapes and sizes. Thus, if the values of even some women identifiably diverge from those underlying a legal regime, it is a matter with which to be reckoned.

41. See, e.g., Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (giving a general discussion of "gendering"). For example, between the Industrial Revolution and the advent of the women's liberation movement, the popularly ascribed gender role of women was to remain at home, raising children (although, most certainly, some women, either as a matter of aspiration or necessity, did deviate). That gender role has now been questioned and has shifted for some segments of society.

42. See Theresa A. Gabaldon, *Corporate Conscience and the White Man's Burden*, 71 GEO. WASH. L. REV. 944, 945 (2002) (discussing outsider suspicion of the "white man" in shaping corporations, corporate law, and corporate law commentary).

B. Corporate Law and Shareholder Primacy

1. Corporate Stories

The stories of corporations and corporate law are as many and varied as the life stories of women. No matter the point one wishes to make, a story can be invoked. The stories that follow were specifically chosen, of course, to illustrate that corporate profit-seeking behavior deliberately seeks influence in child-driven markets.

Joe Camel

Once upon a time, a corporation in search of profit manufactured cigarettes. Men in charge learned that the corporation's products were addictive, which was good for the corporation and could be—and was—made even better by tinkering with the mix.⁴³ Unfortunately for the corporation, even addicted consumers had alternate sources of cigarettes,⁴⁴ so the company sought to build brand loyalty using a cartoon camel that was, for a time, as familiar to children as Mickey Mouse.⁴⁵ The men in charge cannot have overlooked the fact that the camel—let's call him Joe—drew the attention of those who one day became addicted juvenile smokers, “branded,” by reason of their attraction to Joe, for what these men in charge hoped would be their entire lives.⁴⁶

Michael Jordan

Once upon a time, a corporation in search of profit manufactured sneakers. Men in charge observed that children were insecure and impressionable and sought to be like their heroes. Paying a sports hero—like Michael Jordan—to wear the corporation's sneakers brought handsome returns, as underage consumers paid astounding premiums for footgear that cost relatively little to make.⁴⁷ Very few of these consumers became basketball stars, but some of them were killed for their sneakers, and many more had them stolen.⁴⁸

43. See generally *State v. Philip Morris, Inc.*, No. C1-94-8565, 1998 WL 134813 (Minn. Dist. Ct., Mar. 26, 1998).

44. See J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 891-892 (2004) (describing competition).

45. Paul Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 3 JAMA 3145, 3147 (1991).

46. See, e.g., Hymel, *supra* note 22, at 418; Michael A. McCann, *Economic Efficiency and Consumer Choice in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1182 (2004) (discussing the “branding” phenomenon generally).

47. For a discussion of the allegations that Nike employed third-world child-labor under sweatshop conditions, as well as Nike's later efforts to rehabilitate its image, see Meg Carter, *Ethical Business Practices Come into Fashion*, FINANCIAL TIMES (London), Apr. 19, 2005, at 14.

48. Cf., e.g., Avram Goldstein, *Police Seek Witnesses, Suspect in Slaying*, WASH. POST, Jan 25, 1998, at B03 (describing a killing for a jacket); Hymel, *supra* note 22, at 390 (commenting on effect of jealousy over clothing); Troy Y. Nelson, *If Clothes Make the Person, Do Uniforms Make the Student? Constitutional Free Speech Rights and Student Uniforms in Public Schools*, 118 EDUC. L. REP. 1, 3-4 (1997) (same, and including allusions to predictable violence).

*Doom*⁴⁹

Once upon a time, a corporation in search of profit manufactured video games. Men in charge learned that children become addicted to violence in their entertainment, even as they become desensitized to it.⁵⁰ Increasing the violence of the games seemed the logical solution. Corporate logic also dictated, of course, that the new, more violent games—like *Doom*, which is based on a video exercise used by the Marines to desensitize recruits to the taking of human life—still be marketed to children. Seventy percent of video games rated “M” for “mature audiences” are currently marketed to children under the age of seventeen.⁵¹

The Point

The not-so-subtle point is that corporations make no attempt to integrate parental judgments in their own decision making.⁵² They are in business to make money, not to watch out for the best interests of children, psychic or otherwise. The argument that corporations do not act *in loco parentis* is further substantiated by the proliferation of sugary cereals and other junk food, as well as by the deluge of advertising marketing them to children.⁵³

2. Official Stories

A great deal—in fact, way too much—has been written and said on the subject of corporate purpose.⁵⁴ The debate about corporate purpose largely revolves around whose interests corporate directors primarily should serve.⁵⁵ Decades of interest in the subject have produced two fairly mainstream approaches, set out below in order both of chronology and general acceptance.

a. The Contractarians: The Givens and the Goals of Shareholder Primacy

One school of thought describes the corporation as a “nexus of contracts” among capital providers, managers, employees, and others, all of whom conduct

49. *Doom* is a “point and shoot” video game, more fully described in Scott Whittier, *School Shootings: Are Video Game Manufacturers Doomed to Tort Liability?*, 17 ENT. & SPORTS LAW 11 (2000).

50. See Tara C. Campbell, Comment, *Did Video Games Train the School Shooters to Kill?: Determining Whether Wisconsin Courts Should Impose Negligence or Strict Liability in a Lawsuit Against the Video Game Manufacturers*, 84 MARQ. L. REV. 811, 819-22 (2001) [hereinafter Campbell, *School Shooters*].

51. *Id.* at 818 (citing CNN Talkback Live: *Is Hollywood Marketing Sex and Violence to our Kids?* (CNN television broadcast, Sept. 14, 2000)); Woodhouse, *supra* note 18, at 117.

52. Cf. Angela J. Campbell, *Ads2Kids.com: Should Government Regulate Advertising to Children on the World Wide Web?*, 33 GONZ. L. REV. 311, 341-43 (1997-1998) [hereinafter Campbell, *Ads2Kids*] (developing argument for skepticism about corporation’s self-imposed efforts in this regard); Woodhouse, *supra* note 18, at 115 (describing failure of voluntary controls by corporate providers of video games, films and CDs).

53. See generally Beales, *supra* note 44, at 834-78 (describing advertising of fast food); McCann, *supra* note 46, at 1181-82 (same).

54. Steven M.H. Wallman, *Understanding the Purpose of a Corporation: An Introduction*, 24 J. CORP. L. 807-09 (1999) (reflecting on corporate purpose).

55. *Id.* at 809-11.

themselves in a manner that is rationally self-interested.⁵⁶ Adherents to this school, sometimes known as “contractarians,” characterize the “best,” or “most efficient,” corporate law as providing the “best,” or “most efficient” set of default contract rules.⁵⁷ These are the rules that contractarians have determined the parties would negotiate for themselves most frequently, but which still may be negotiated around at the parties’ behest.⁵⁸

The rules generally endorsed by contractarians reflect the assumption that managers are agents for shareholders.⁵⁹ Limiting the duties of the board of directors to serving shareholder interests is considered the single best method of limiting managerial opportunism and shirking, owing to the relative efficiency of monitoring by a single class of beneficiaries.⁶⁰ The board therefore is regarded as responsible for maximizing the residual value of the firm remaining after non-shareholder claimants are satisfied.⁶¹ This easily translates to the twin assertions that the goal of the corporation is to make money for its shareholders⁶² and that the interests of shareholders are to be preferred over those of others with interests in the firm.⁶³ The resulting template for corporate law thus is known as the “shareholder primacy” model.⁶⁴

b. The Progressives and Fellow Travelers

During the 1990s, a group of corporate law scholars launched an attack on the neoclassical economic analysis just described.⁶⁵ The attack focused on the relationship between management and shareholders and quickly rejected the notion of shareholder primacy.⁶⁶ Corporate “progressives” generally endorse an expansion of the goals of the corporation and the duties of management to

56. Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 306-07 (1976) (discussing the corporation as a nexus of principal-agent contracts); see also FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 17 (1991) [hereinafter EASTERBROOK & FISCHEL, *ECONOMIC STRUCTURE*] (discussing the corporate contract); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 770 (1989) (characterizing the corporation as a nexus of contracts).

57. See EASTERBROOK & FISCHEL, *ECONOMIC STRUCTURE*, *supra* note 56, at 7-8.

58. *Id.* at 17.

59. See *id.* at 4, 91.

60. *Id.* at 35-39.

61. See Lynn A. Stout, *Bad and Not So Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1193 (2002) (discussing stockholders as residual claimants of the corporation).

62. EASTERBROOK & FISCHEL, *ECONOMIC STRUCTURE*, *supra* note 56, at 35-39.

63. *Id.* at 90-94.

64. David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1005-09 (2000) (discussing shareholder primacy and managerial shirking).

65. David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1, 16-22 (Lawrence Mitchell ed., 1995) [hereinafter Millon, *Communitarianism*].

66. See generally Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33; Jensen & Meckling, *supra* note 56, at 306 (arguing in support of shareholder primacy); Millon, *Communitarianism*, *supra* note 65, at 9-11; Lyman Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713, 1714 (1993) (contending the number of people that view shareholder primacy as the default norm is decreasing).

include responsibility to other constituents,⁶⁷ frequently arguing for the recognition of enforceable fiduciary duties running from directors to groups such as creditors and employees.⁶⁸ Progressives also have proposed methods of increasing the board's discretion to recognize non-shareholder interests⁶⁹ by extending the terms for which members of the board are elected and adopting statutory safe harbors for situations where board members may consider the interests of non-shareholder constituencies.⁷⁰

Two *au courant* schools of corporate analysis sometimes are identified with the progressive movement. The first is the "team production" approach.⁷¹ The second is "behavioral economics."⁷² Both speak the language of neoclassical economics and, although they divergently realign some of its basic assumptions, they derive similar, "progressive" conclusions.

"Team production" scholars contend that the board of directors should be understood as an independent "mediating hierarch" among the various constituents of a corporation; in their view, the constituents are those with "team specific" inputs.⁷³ The board is charged both with employing the inputs of financiers, workers, communities, etc., to maximize the value of the firm and with allocating resulting profits fairly among the inputting groups.⁷⁴ In this model, the interests of shareholders are not to be preferred, except in somewhat unremarkable procedural ways, such as the ability to elect directors and to bring derivative actions on behalf of the corporation.⁷⁵ The long-standing acceptance of corporate philanthropy is invoked as evidence of the model's descriptive power.⁷⁶

The second recently popularized approach to corporate law is "behavioral economics," which uses empirical studies of human behavior to reassess and

67. See, e.g., Millon, *Communitarianism*, *supra* note 65, at 1; Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587 (1997).

68. See Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165, 1178 (1990) (arguing that fiduciary rights should be extended to corporate bondholders); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1235 (1991) (arguing that fiduciary duties should extend to displaced workers) [hereinafter O'Connor, *Displaced Workers*].

69. See Lawrence E. Mitchell, *A Theoretical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 581-82 (1992).

70. LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* 97-118 (2001) [hereinafter MITCHELL, *CORPORATE IRRESPONSIBILITY*].

71. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). Note, however, that the adherents of this model specifically disavow identification as "progressives." *Id.* at 253-54.

72. See, e.g., Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002); Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

73. Blair & Stout, *supra* note 71, at 250.

74. *Id.* at 250-51.

75. *Id.* at 313-15.

76. See Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27 (1998) (defending director's contributions to corporate charities through the team production model).

revamp some of the assumptions of neoclassical economic analysis.⁷⁷ For purposes of this article, some of the most important insights of this method involve the role of altruism in economic behavior. Numerous studies document that human beings do act in a manner that is moderately altruistic rather than classically self-interested.⁷⁸ This means that the outcomes hypothetically bargained for by those involved in the behavioral economist's corporate nexus of contracts could be quite different from those hypothetically achieved as a matter of neoclassical economic analysis. Notably, shareholders might prefer that directors should have discretion to compromise the strict financial interests of the shareholders.⁷⁹ One might hope that this would be the case in situations where shareholders are aware that corporations are exploiting children's vulnerability as consumers.

C. Who's Watching the Children?: An Analysis of the Consequences and Cause of Child-Driven Markets

The consequences to children of corporate decision-making can be illustrated in a variety of ways, from anecdotes that reveal the impact on individual children, to statistical evidence that demonstrates the effects on children as a group. Although the following somewhat subverts the usual ordering by placing consequence before logical proof of cause, it does so for a reason: the effects of corporate stimulation of, and pandering to, the tastes of underage consumers are life-shaping and sometimes life-threatening. Only if the reader sees the devastating effects of the problem will he or she be truly open to an investigation of what its causes are.

1. Children's Stories

The West Paducah Shooter

On a dismal day in the recent past, a fourteen-year-old boy entered his high school and opened fire.⁸⁰ Although the boy had never before shot a handgun, his marksmanship was uncanny: eight shots fired in three seconds hit eight people in either the head or the torso. Experts later expressed the opinion that the only way to account for his proficiency was his hours of experience playing violent video games.⁸¹

77. Greenfield, *supra* note 72, at 588 (“[Behavioral law and economics] insights may prove to weaken conventional corporate law theory sufficiently so that much of it will have to be reconsidered and replaced.”); see e.g., Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with the Law*, 2002 COLUM. BUS. L. REV. 71 (2002); Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135 (2002).

78. Greenfield, *supra* note 72, at 628.

79. *Cf. id.* at 633-40 (discussing significance of behavioral incentives to share and cooperate for the conduct of directors, without addressing shareholder preference).

80. See Campbell, *School Shooters*, *supra* note 50, at 813-15.

81. See generally Bobby Ross, Jr., *Violence: Who's to Blame? Society Looks at the Media, Entertainment Sources*, SUNDAY OKLAHOMAN, Dec. 26, 1999; cf. Bonnie B. Phillips, *Virtual Violence or Virtual Apprenticeship: Justification for the Recognition of a Violent Video Game Exception to the Scope of*

The Big Mac Attack

Ashley Pelman was fourteen years old, 4'10" tall, and weighed 170 pounds. Jazlyn Bradly was nineteen, 5'6", and 270 pounds.⁸² These two morbidly obese teenagers brought suit against McDonald's Corporation, making various claims about the promotion and manufacture of McDonald's products. Among other things, they alleged that they had been misled about the nutritional value of the McDonald's products they had consumed. Their law suit, described as "quixotic," was dismissed for failing to state a claim upon which relief could be granted.⁸³ Their lack of a legal claim, however, did not make the teenagers any healthier, happier, or lighter.

The Bling-Bling King

My son lives in one of the wealthiest counties in America. He watches almost no television. His base school has very few minorities. Two things are matters of gospel to him. He is convinced that he must speak fluent "ghetto" to be popular with his peers, and he is POSITIVE that he must own every video gaming device and game owned by any of his circle of friends. He nags, wheedles, cajoles, does "mega-beg" (involving actual prostration), makes promises about grades and chores, and, more often than I like to admit, gets his way. He owns several games rated "T" for "teen"; moreover, he admits to sometimes watching his friends play games rated "M." This is the young video-gamers' equivalent of smoking without inhaling.

The Point

The point of these anecdotes, once again, is not very subtle. Commerce has invaded and shaped the lives of children. Examples abound, both close to home and further afield.

2. Another Numbers Story

Whoever it is who may be charged with the day-to-day monitoring of individual children's physical needs, it is clear that children as a group are being very closely watched by corporate America - and for very good reasons. First, children comprise a gigantic market. Second, they are highly susceptible to suggestion and manipulation. Both of these assertions are documented below; other interesting facts are thrown in for good measure.

Fact: Children between the ages of four and twelve engage in over \$24 billion of direct consumer purchasing each year.⁸⁴ Their preferences are said to affect an

First Amendment Rights of Minors, 36 IND. L. REV. 1385 (2003) (generally discussing relationship of video gaming and violence).

82. Benjamin Weiser, *Big Macs Can Make You Fat? No Kidding, a Judge Rules*, N.Y. Times, Jan. 23, 2003, at B3.

83. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 517-18, 533 (S.D.N.Y. 2003). For a more thorough discussion, see McCann, *supra* note 46, at 1163 (using the "quixotic" characterization).

84. See James U. McNeal, *Tapping the Three Kids' Markets*, AMERICAN DEMOGRAPHICS, Apr. 1998, at 36.

additional \$300 billion of annual consumer transactions.⁸⁵ When the influence of older children also is taken into account, the purchasing power of the childish market truly is monstrous.⁸⁶

Fact: Children are more trusting than adults, and they tend to view advertisements as advice from a friend.⁸⁷ Children under five generally cannot distinguish between commercials and programming (including news programming),⁸⁸ children under eight generally cannot understand that commercials are designed to persuade them to make purchases.⁸⁹

Fact: The average child views more than forty thousand commercials a year.⁹⁰

Fact: Children are more prone to take risks and value short-term over long-term consequences than any other age group.⁹¹

Fact: Fifty percent of children have televisions in their bedrooms.⁹²

Fact: Children spend, on average, twenty-eight hours a week watching television;⁹³ “mass-mediated story tellers reach them on the average of more than seven hours a day”⁹⁴

Fact: Television viewing, video gaming, and computer gaming are correlated with weight gain.⁹⁵

Fact: Experts believe that television viewing is a prime explanation for increasing attention deficit disorders⁹⁶ and has a negative correlation with school performance.⁹⁷

Fact: Advertisers attempt to establish brand loyalty in young children.⁹⁸

85. See Hymel, *supra* note 22, at 405.

86. One 1992 study estimated 1992 spending by teenagers at \$93 billion. *Id.*

87. Campbell, *Ads2Kids*, *supra* note 52, at 320 (citing Petition of Action for Children’s Television for Rulemaking, Children’s Television Report and Policy Statement, 50 FCC 2d 1, 11, 16 (1974) *aff’d*, Action for Children’s Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (1974 Policy Statement)).

88. *Id.*

89. *Id.*

90. See Woodhouse, *supra* note 18, at 102.

91. See Barbara A. Atwood, *The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 657 (2003).

92. Woodhouse, *supra* note 18, at 106.

93. AM. MED. ASS’N, PHYSICIAN GUIDE TO MEDIA VIOLENCE 8 (1996), available at <http://www.ama-assn.org/ama1/pub/upload/mm/386/mediaviolence.pdf>.

94. ROY F. FOX, HARVESTING MINDS: HOW TV COMMERCIALS CONTROL KIDS, at xii (1996).

95. Cara B. Ebbeling et al., *Childhood Obesity: Public-Health Crisis, Common Sense Cure*, 360 LANCET 473, 475 (2002), available at <http://www.commercialalert.org/childhoodobesity.pdf>; Steven L. Gortmaker et al., *Television Viewing as a Cause of Increasing Obesity Among Children in the United States, 1986-1990*, 150 ARCHIVES PEDIATRICS & ADOLESCENT MED. 356 (1996).

96. Dimitri A Christakis et al., *Early Television Exposure and Subsequent Attentional Problems in Children*, 113 PEDIATRICS 708, 710 (2004).

97. Woodhouse, *supra* note 18, at 107.

Fact: Fast food companies dedicate most of their promotional budgets to targeting children.⁹⁹

Fact: Advertisers spend more than \$24 billion a year on youth marketing.¹⁰⁰

Fact: Experts believe that playing video games involves “stimulus addiction,” leading players to crave increasing levels of stimulation, which can be satisfied through increasing violence.¹⁰¹

Fact: Experts believe that violent video games increase short and long-term aggressive tendencies.¹⁰²

3. Rhetoric and Definitions

The billions spent by children spring directly from the seeds of the billions invested in advertising to the youth market. Some of the statistics recited above have been referred to by others as children’s “purchasing power.” It is the contention of this article that children’s “purchasing power” is an oxymoron. Doing as one is told, whether by Mommy, Daddy, Joe Cool, or Michael Jordan, is not exercising a form of power. Doing the telling, if one is not consciously attempting to act in the best interest of the child, is a form of exploitation.¹⁰³

This article uses the term “children’s manipulable preferences” to describe those desires of children that are subject to commercial exploitation—that is subject to stimulation by profit-seeking manipulation, whether by advertisement, endorsement, deliberate addiction, or whatever. Thus, advertising sugary breakfast cereal on television shows watched by children is an attempt to exploit children’s manipulable preferences. Paying a sports figure to wear clothing of a type marketed to children is an attempt to exploit children’s manipulable preferences. Deliberately increasing the violence of video games marketed to children to stimulate the appetites jaded by the last escalation is an attempt to exploit children’s manipulable preferences. Imprecise and impressionistic as the basic concept may be for purposes of discussion, it may be honed for purposes of action. Further discussion will occur in Part III; honing for purposes of action will be one of the tasks of Part IV.

98. See, e.g., MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 25 (2002); Jane E. Brody, *Schools Teach 3 C’s: Candy, Cookies, and Chips*, N.Y. TIMES, Sept. 24, 2002, at F7.

99. Marlene Arnold Nicholson, *McLibel: A Case Study in British Defamation Law*, 18 WIS. INT’L L.J. 1, 139 (2000).

100. Woodhouse, *supra* note 18, at 102.

101. See Campbell, *School Shooters*, *supra* note 50, at 819-22.

102. See Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCH. 772, 778 (2000); Kaveri Subrahmanyam et al., *New Forms of Electronic Media: The Impact of Interactive Games and the Internet on Cognition, Socialization, and Behavior*, in HANDBOOK OF CHILDREN AND THE MEDIA 73 (Dorothy G. Singer & Jerome L. Singer eds., 2001); but see *Chasing the Dream*, *supra* note 10 (contending that there is no long-term effect).

103. Cf. Hymel, *supra* note 22, at 409 (describing research on methods of manipulation).

Joe here:

To reiterate, gentlemen and lady: Your job, which is to make money for shareholders, dovetails perfectly with the vital American need to give children something to spend their money on, as well as a tangible way for American parents to express their love. After all, how else are they going to have time to do it?

III. A + B = C

Section II provided background on the three phenomena discussed in the Introduction: first, that there has been a change in the position of women in society since the middle of the last century; second, that the widely accepted goal of the corporation is to make money for its shareholders; and third, that children buy or influence the buying of a tremendous amount of stuff, some of which is not particularly good for them. Without a doubt, these phenomena are temporally linked. It remains to this Section to establish that some other relationship may exist, that the relationship is a problematic one, and that it is particularly problematic for women.

A. Corporate Law: Problem? What Problem?

1. Contractarians

Contractarians generally have tended to deal in abstractions,¹⁰⁴ and, presumably, if asked (or, more likely, forced), would address the three phenomena discussed above in the following manner: if women's personal utility is maximized by entering the paying work force, they will do so. If the availability of more workers creates an excess supply, wages will decline until equilibrium is reached. If rational workers do not exit the workforce, it means there is no excess supply. Thus, the workers are being utilized. Because more workers now are being utilized than ever before, it means that the economy is waving its big invisible hand to produce more goods and services, which are being consumed by persons rationally valuing them in amounts sufficient to justify worker utilization. A linkage between women in the workplace, an increase in production, and an increase in consumer demand thus is logical. The source of the demand cannot be problematic, owing to the assumptions of the method. The role of corporate management simply is to identify demands and utilize workers to fulfill those demands in such a way as to maximize the return to those who contribute non-human capital to the process.

Contractarians do acknowledge the existence of certain externalities, like pollution, and other market imperfections that they believe should be addressed by laws external to the corporation.¹⁰⁵ Presumably, if they became convinced that irrational consumption choices were being made, it would be a matter for external law to resolve. From a realistic standpoint (and as further discussed in Part IV) this is unlikely to occur. Passing laws on ratings and censoring and

104. See *supra* notes 56-64 and accompanying text; Gabaldon, *Lemonade Stand*, *supra* note 17, at 1402-13.

105. See Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1271 (1982).

limiting advertising to children simply has not been very successful.¹⁰⁶ Among other things, attempts generally have foundered on the shoals of arguments about what parents themselves can and should do on behalf of their children,¹⁰⁷ and then there's always that troublesome First Amendment.¹⁰⁸ Moreover, since the market provided by children's manipulable preferences is so vast, corporations have strong incentives both to oppose regulations of this sort and to seek to subvert them.

2. Progressives and Fellow Travelers

Your garden variety corporate progressive is a person of liberal good will, who more-or-less normatively endorses the notion of corporate responsibility.¹⁰⁹ Some progressives have already suggested that corporations should attend to the needs of children as the nation's future human capital. The proposed methods of doing so involve parental work weeks, flex-time, and the like.¹¹⁰ Corporate progressives have not yet focused specifically on exploitation of children's manipulable preferences or its possible link to shareholder primacy, but the odds are good that they one day will endorse of the concern expressed in this article. The mechanism for addressing that concern might well take the form of enhanced directorial discretion to look beyond shareholder interest and, by extension, to look beyond the bottom line.¹¹¹ However, due in part to the general lack of diversity on America's boards of directors, this might be a solution that is less than ideal.¹¹²

Team production scholars focus on the relationship between the board and those with "team specific" inputs.¹¹³ Because consumers' cash or credit are not specifically dedicated to a particular corporation, they would not typically be seen as part of the team whose interests are mediated by the board.¹¹⁴ An argument that the interests of children whose preferences are subject to exploitation have no real choice as to where their inputs are directed might,

106. See Lee J. Munger, Comment, *Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Campaign*, 3 CONN. PUB. INT. L.J. 456, 475-76 (2004), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1016&context=uconn/cpilj>; Woodhouse, *supra* note 18, at 86-88; see also Beales, *supra* note 44 (discussing subject generally).

107. See, e.g., Beales, *supra* note 44, at 880 ("The proposal, in reality, is designed to protect children from the weaknesses of their parents—and the parents from the wailing insistence of their children." (quoting Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22 (describing Federal Trade Commission rulemaking, later negated by Congress, limiting advertising to children))); Woodhouse, *supra* note 18, at 86-88.

108. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (finding the Communications Decency Act of 1996 an unconstitutional infringement of adults' First Amendment rights, notwithstanding compelling state interest in protecting children); see also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 489 (1996) (holding that truthful, non-deceptive commercial advertising is protected by First Amendment). For a general discussion of First Amendment considerations in this context, see Beales, *supra* note 44, at 883-88.

109. See *supra* notes 65-70 and accompanying text.

110. See generally O'Connor-Felman, *Human Capital*, *supra* note 18 (detailing proposals).

111. See *supra* notes 67-69 and accompanying text.

112. See *infra* note 160 and accompanying text.

113. See *supra* notes 71-81 and accompanying text.

114. See *supra* notes 77-81 and accompanying text.

however, make some headway. Moreover, since team production scholars point to corporate philanthropy as one of the achievements of boards operating pursuant to the model, they presumably would believe avoidance of exploitation to be a type of philanthropy appropriately within the board's discretion.

Behavioral economics, of course, attempts to examine economic functioning in light of real-life human nature.¹¹⁵ Although the approach does not appear to have contemplated the problem of exploitation of children's manipulable preferences, there seems to be no reason its adherents would be reluctant to do so, and it certainly does have the tools ready to hand. Examining the motivations and biases of those many, parents included, who willingly lend themselves to the exploitive process—perhaps even while privately regretting the results—might be quite a fruitful endeavor.

B. Feminism and Corporate Law

There have been few applications of feminist analysis to corporate law,¹¹⁶ although feminist descriptions of the effects of capitalism and neoclassical economics are voluminous.¹¹⁷ In recognizing the relevance of feminist analysis to corporate law, the critical first step is to remind ourselves of the various guises of inequality. Although few overtly discriminatory laws can be identified in the field of corporate law, inequalities inhere in its gendered creation and application.¹¹⁸

Some feminist explorations of corporate law have reflected an effort to identify and apply a set of values based on women's shared experiences.¹¹⁹ These values are often said to include compassion and caring, both of which may or may not be the product of centuries of oppression.¹²⁰ Some feminists nonetheless accept these values as intuitively comfortable and, more importantly, potentially beneficial to society.¹²¹ The analytic process chosen to

115. See *supra* notes 77-79 and accompanying text.

116. See Kellye Y. Testy, *Case Studies in Conservative and Progressive Legal Orders: Capitalism and Freedom. For Whom? Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87 (2004) (generally calling for an increase); Gabaldon, *Lemonade Stand*, *supra* note 17, at 1413-14 (describing scarcity of applications of feminism in corporate law in early 1990s).

117. See, e.g., CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM (Zillah Eisenstein ed., 1979); MARILYN WARING, IF WOMEN COUNTED: NEW FEMINIST ECONOMICS (1988).

118. Gabaldon, *Lemonade Stand*, *supra* note 17, at 1389.

119. Marion G. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1186-87 (1991) (explaining relational feminism); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 13-42 (1988) [hereinafter West, *Jurisprudence and Gender*] (also addressing relational feminism).

120. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 15-16 (1988); West, *Jurisprudence and Gender*, *supra* note 119, at 20-28; see also NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); but see, e.g., Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education*, or "The Rem-Crits Go to Law School," 38 J. LEGAL EDUC. 61, 72 nn.54-76 (1988); Joan W. Scott, *Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33 (1988).

121. See CHODOROW, *supra* note 120; CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); NEL NODDINGS, CARING: A FEMINIST APPROACH TO ETHICS AND MORAL EDUCATION (1984).

effectuate these values¹²² requires, of course, the grounding in women's experience central to feminist method in general.¹²³ This grounding demands examination of the actual context in which particular issues are presented.¹²⁴ Contextualization is deemed vital both because it arouses empathy and because it reveals situational differences that can and should be dealt with by case-specific accommodations.¹²⁵ Rules that are either manufactured or applied in the abstract, therefore, are regarded as likely to be somewhere between merely unreliable and outright oppressive.¹²⁶

1. A Feminist View of Shareholder Primacy and Limited Liability

According to corporate law's official story, it is designed to facilitate capital agglomeration by efficiently substituting management by the board of directors for the individual involvement of shareholders.¹²⁷ In order to convince shareholders to relinquish control over the use of their capital they are offered both limited liability¹²⁸ and a system in which the managers legally are charged with preferring shareholder interests.

The feminist fly in the ointment, however, is that this model of corporate law is about permitting shareholders to benefit from risks imposed on others, and about artificially distancing individuals from the real-life effects of the enterprises in which they invest, thus decreasing their sense of personal responsibility. It is a world in which shareholders need never be actively involved in the actions of the businesses operated for their ostensible benefit. In the case of exploitation of children's manipulable preferences, it is a world in which a group of grown-ups legally is prevented from assuming adult responsibility for prospective harms inflicted on children.

Increasing involvement in corporate decision-making by institutional investors or increasing availability of socially conscious investment alternatives does not provide an answer to the problem.¹²⁹ In fact, increasing interest by institutional investors has arguably contributed to enhancing the emphasis that

122. Many of these methods have been developed by or in conjunction with other feminist approaches. See, e.g., Dorothy E. Smith, *Women's Perspective as a Radical Critique of Sociology*, in FEMINISM AND METHODOLOGY (Sandra Harding ed., 1987).

123. See Crain, *supra* note 119, at 1186-87.

124. See, e.g., Bender, *supra* note 120, at 10-11; Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

125. Gabaldon, *Feminism, Fairness and Fiduciary Duty*, *supra* note 40, at 1.

126. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849 (1990) (discussing recognition of oppression).

127. See *supra* notes 56-64 and accompanying text.

128. For more general discussions of limited liability, see Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985) [hereinafter Easterbrook & Fischel, *Limited Liability*]; Gabaldon, *Lemonade Stand*, *supra* note 17; Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991) [hereinafter Ribstein, *Limited Liability*].

129. See David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151, 190 (2004) (quantifying portfolios screened for purposes of social responsibility investment as in excess of \$2.15 trillion); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1287 (1999) (describing "dramatic" increase).

corporate management places on short-term shareholder value.¹³⁰ Moreover, although the availability of socially conscious investment funds at first glance seems to be an unmitigated good, it also may constitute just enough in the way of a pressure valve to keep more wide-spread change from occurring. In any event, the proof is in the pudding. At the same time these trends have manifested themselves, exploitation of children's manipulable preferences has increased. This temporal coincidence does not demonstrate cause and effect, but it surely establishes that institutional investors are not meaningfully addressing the welfare of children as consumers.

2. A Feminist View of "Internal Affairs"

Corporate law is, more or less by definition, a way of regulating the "internal affairs" of the corporate entity¹³¹ by adjusting the interests of historically identified corporate constituencies.¹³² This paradigm is limited with respect to its ability to determine inside interests other than the common denominator of profit maximization. Moreover, since corporate law focuses on "internal affairs," any attempt to integrate the interests of outsiders seems uncomfortably retrofit.¹³³ Feminists seeking either a broader definition of cognizable shareholder concerns or attention to non-shareholder interests will find the entire concept of internal affairs unduly constraining.

While the emphasis that corporate law places on "internal affairs" may suggest that the a feminist solution to the problem of exploitation of children's manipulable preferences must be a matter of external law—that is, a matter of regulation imposed on advertising and other activities—there also exists another possibility. The corporate law paradigm may be tweaked either by invoking the meaningful expression of shareholder interest on specific matters involving children's manipulable preferences or by redefining the concept of permissible corporate profitability. Both of these methods are further addressed in Part IV.

C. A Practical Analysis

Toward the end of the twentieth century, issuers and thoughtful observers realized that, perverse as it might seem, stock price sometimes could be maximized by engaging in businesses without a proven track record and without a link to past earnings—in other words, without a predictable income stream.¹³⁴ This strategy avoided placing a limit on the upside potential of stock

130. Robert W. Hamilton, *Corporate Governance in America 1950-2000: Major Changes But Uncertain Benefits*, 25 J. CORP. L. 349 (2000); cf. Franklin A. Gevurtz, *Getting Real about Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645 (2002) (analyzing trends).

131. See, e.g., Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480, 1480 (2002).

132. For a general discussion, see William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385 (1990) (discussing historic identification and matters related to corporate constituencies).

133. See, e.g., *id.*; MITCHELL, CORPORATE IRRESPONSIBILITY, *supra* note 70, at 104-105.

134. For a general discussion of irrational stock pricing during the late twentieth century, see ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* (2002). For a discussion of the possibility of regulating such pricing, see Theresa A. Gabaldon, *John Law, with a Tulip, in the South Seas: Gambling and the Regulation of Euphoric Market Transactions*, 26 J. CORP. L. 225 (2001).

price, thus permitting a form of stock speculation that would have been completely unjustifiable had projected earnings been expected to have linear continuity with those of the past. These businesses tended to be novel, to involve rapid product innovation or to be reliant on irrational consumer preferences. Computer hardware, software, game-ware, and other entertainment devices fit the bill perfectly, as did availability of internet services. In order to stay unpredictable, rapid development of services and products—and thus rapid obsolescence of older products—became a necessity. As a result, a great deal of change occurred in the identified areas of opportunity—areas, not incidentally, in which a great deal of consumption was driven by children's manipulable preferences.

The migration of women into the workplace and the collapse of that brief but idealized interlude of separate spheres and protected childhood¹³⁵ coincided with, and very arguably accelerated, the dramatic technological advances described above. These technological advances permitted the rapid development of new products, as well as the proliferation of ways to market them, but did not give rise to any realistic way for parents to control their consumption by children.¹³⁶ As a result, women have, through workplace participation, contributed to the problem of exploitation of children's manipulable preferences. At home, however, the power of women, like that of men, to address the issue is severely limited.

One hazards a guess—in fact, one knows from common sense as well as from studies (with numbers and everything)—that many of the objects of children's manipulable preferences are not what parents, left to their own devices, would choose for their children.¹³⁷ At the same time, they are not objects that parents realistically can deny. First, parents who are often less interested in video games and less technically adept than their offspring, may not fully comprehend the attributes of the merchandise in question are. Second, they do not feel they have time or energy to seek alternatives. Third, they may feel trapped by the problem of the commons,¹³⁸ reasoning that, if they invest in rigorous monitoring of their own children's consumption, but others do not, the "spill-over" effects on the monitored children are unavoidable.¹³⁹ The only thing that may be achieved in the process is intense parent-child hostility,¹⁴⁰ feelings of parental failure,¹⁴¹ and perhaps some genuine social adjustment issues for the

135. See generally *supra* notes 17-86.

136. See Campbell, *Ads2Kids*, *supra* note 52, at 340 (describing the futility of screening devices).

137. See Hymel, *supra* note 22, at 388.

138. The "tragedy of the commons" problem arises when the benefits of an activity do not accrue solely to the actor. See, e.g., Paul A. Samuelson, *Pitfalls in the Analysis of Public Goods*, 10 J.L. & ECON. 199 (1967).

139. See Woodhouse, *supra* note 18, at 106 (noting that "to control the relentless flow of media influences, a parent would have to remove the child from peer influences and from mainstream social institutions").

140. See Hymel, *supra* note 22, at 411 (describing "undermining" of authority); Munger, *supra* note 106, at 478-479 (describing parent-child transactions and referring to "assaults on parental authority").

141. See Hymel, *supra* note 22, at 389 (describing psychic effects on low income families).

child who feels “different” from his friends.¹⁴² Finally, parents may be driven by their guilt over self-perceived neglect of their children to make purchases to substitute for attention.¹⁴³

D. Exploitation of Children’s Manipulable Preferences: A Gendered Issue

Feminist analysis decodes gendered corporate law’s shareholder-preferring but disempowering norms. It recognizes that permitting the investment of resources with limited liability for their use is a form of moral hazard—an abdication of responsibility. It also willingly exposes corporate law’s formal, but flawed, underlying assumptions about rationality in the marketplace. When experience is invoked, it becomes perfectly clear that assuming parental supervision of children’s purchases is very much like, the old joke about a can opener.¹⁴⁴ Feminist invocation of experience tells us of harried women working “second shifts” at home. It also describes observations of children gaining weight, and of children clamoring for, and being obsessed with, technology, sex, and violence. It does not prove a “but-for” connection, but it tells us how we feel. Irrational or not, we feel guilty. It is not unrealistic to suspect that those who feel guiltiest may be more easily mobilized than those whose pangs are less intense.

Thus, there are several reasons why exploitation of children’s manipulable preferences may fairly be regarded as a gendered issue. First, it may be the consequence of a male—constructed corporate law. Second, exploitation of children’s manipulable preferences may be a particular problem for women because we have developed the analytic tools to identify it. Third, and most obviously, it is a particular problem for women because society has convinced us to feel that it is.

And Now, More from Joe:

Gentlemen and Lady, there’s just a little more to cover. There are people out there who want to mess up this sweet little deal. They’re suggesting ways to interfere with our ability to give kids the things we want them to want. Here are some things to watch out for. (But don’t worry too much just yet.)

142. *Id.* at 410.

143. See generally Allison Pugh, *From Compensation to Childhood Wonder: Why Parents Buy* (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 39, 2002), available at <http://wfnetwork.bc.edu/berkeley/papers/39.pdf> (discussing parental motivations); Allison Pugh, *When is a Doll More than a Doll? Selling Toys as Reassurance for Maternal and Class Anxiety* (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 28, 2001), available at <http://wfnetwork.bc.edu/berkeley/papers/28.pdf> (also discussing parental motivations).

144. A short-form version of the joke goes something like this. Three men are stranded on a desert island: a lawyer, an accountant, and an economist. The only food they have among them is a can of tuna fish. The lawyer and accountant exhaust themselves looking for rocks or coconuts with which to pound the can open. The economist watches, laughing. In frustration, the lawyer shouts, “Okay, if you’re so smart, you open it.” The economist smugly says, “It’s simple. First, you assume a can opener.”

IV. SOLUTIONS

This article is not meant to suggest that women can or should return to the exclusive bosoms of their families. The realizations set forth do mean, however, that anyone willing to be informed by feminist method and experience can and should take heed of the phenomenon of children's manipulable preferences, and act to solve the problem as best they can. As stated above, confronting the problem at home, where childcare largely has been relegated as traditional women's work, is not the best that can be done. Individual fingers in a collective dike comprise a plausible strategy only if the dike has not already been breached. The situation is too far gone, and the beast must be confronted where it lives.

A. The Best Shot

The beast lives in corporate profit. It could be fully contained only through containing its profitability. If corporations simply were precluded from profiting from the exploitation of children's manipulable preferences, the world of childhood soon would become a far different place—one with far less electronic violence, far fewer celebrity-endorsed items of apparel, and no Happy Meals. This proposal, however, presents several difficulties.

The first and largest difficulty, which simply must be ignored for purposes of continued discussion, is political feasibility.¹⁴⁵ Those who have gained the most from exploitation of children's manipulable preferences would mobilize quickly and throw so much money into lobbying and the like that the proposal surely would die aborning. Exposure of the proposal to public view nonetheless might have some useful effect on public opinion and might further discussion.

To have any significant effect, though, the proposal must be a coherent one, and herein lies the second group of difficulties—those of articulation. How does one rigorously define "children's manipulable preferences," "exploitation," or "profit"? Furthermore, how can profitability be limited? What penalty can there be for breaching the proposed rule? Upon whom would such penalty be imposed? Matters of definition will be discussed below before the issue of general formulation is addressed.

Thus far, this article has used the term "children's manipulable preferences" simply to describe those preferences of children that are subject to manipulation.¹⁴⁶ For purposes of action, the concept must be further refined. First, "children" must be defined. Reference to age is both convenient and usual, though inevitably both over- and under-inclusive. Let us say, however, that a "child" is anyone under the age of eighteen. Articulating which "preferences" are subject to manipulation is more of a challenge, unless one is willing to make the concept a self-proving one: That is, if someone is trying to manipulate a preference, let us assume that it is one that may be manipulated. If no one is trying to engage in manipulation, there is, after all, no problem to be addressed.

145. For a description of past lobbying efforts by, for example, the fast food industry, see McCann, *supra* note 46, at 1195-96.

146. See *supra* note 103 and accompanying text.

1. The Content of a Proposed Rule

An appropriate rule, then, might focus on preventing specific activities, known either as “manipulation” or “exploitation” with respect to those under the age of eighteen. Describing the *verboden* activities presents a genuine challenge. How might we capture the full range of product adulterations (such as nicotine and violence contents), celebrity endorsements, hypnotic and suggestive advertisements, and the like (and unlike)? Although it indeed would be difficult to provide an all-inclusive definition with enough clarity to be enforceable in any sense, it would not be particularly difficult or unreasonable to say that advertising directed to an audience composed largely of children is an attempt to manipulate that audience.¹⁴⁷

Consider, for a moment, then, the consequences of a rule that prohibits all advertising to children, but not the advertising to adults of children’s products. The first and most obvious consequence is that children would be less likely to be attracted to, and, indeed, less aware of certain products. The market for those products presumably would decline, as would the availability and development of products for that market. This is not, in truth, all that distressing. No one, after all, is marketing life-saving drugs on Nickelodeon. Of course, if advertising to children went away, so would Nickelodeon and, presumably, so would a lot of other children’s programming. If elimination of advertising to children led to overall decline in television viewing however, it more than arguably would be a good thing.¹⁴⁸

What would not be such a good thing, however, is the possible loss of jobs that could accompany the demise of Nickelodeon and other frivolous and even arguably harmful children’s products. This is regrettable (easy to say, since it is not law professorships we are talking about), and perhaps a dislocation better suffered in stages. This suggests a sunset approach to advertising to children, rather than anything like immediate prohibition.

Another possible approach would be to sunset the profitability of transactions involving certain products sold largely to or for children. Consider, next, a rule specifying that, over time, permitted profit levels on particular items would ratchet downward. The items would include clothing, fast food, and electronic entertainment devices marketed to children. Would such a rule mean that children would be naked, hungry, and bored? Presumably, this would depend on the profit level permitted.

2. The Format of a Proposed Rule

In any event, the dangers inherent in a rule directed either to prohibition of advertising or profitability may have some informational value for the choice of format. There are at least three ways in which any such rule generally might be cast. First, the specified activity (be it advertising or profit-taking) might be

147. See BRIAN WILCOX ET AL., REPORT OF THE APA TASK FORCE ON ADVERTISING TO CHILDREN, RECOMMENDATIONS 1-2 (2004), available at <http://www.apa.org/pi/cyf/advertisingandchildren.pdf> (discussing the proposal of the American Psychological Association to ban advertising directed at children under nine).

148. If, on the other hand, it led to viewing of adult programs, it would not be a good thing.

criminalized. Second, the activity generally might be made *ultra vires*¹⁴⁹ and thus placed beyond the power of corporations. Third, specified acts might be made to require the approval of the shareholders of the corporation.

a. From Without: Criminalization

Criminalization of specified conduct is a proposal for reform from “outside” corporate law. It utilizes a format that is easily understood because of its familiarity to the populace at large. Whenever corporate conduct is criminalized, however, the issue of who is to be penalized presents itself. Should the targets of prosecution be corporate entities or real people? In either case, what showings should be made necessary with respect to state of mind? Problems with vagueness and First Amendment issues also could take on excruciating proportions.¹⁵⁰ It seems, moreover, to be a very large hammer that most legislators would be reluctant to swing, particularly in light of anticipated opposition by interested parties. Based on past history in the context of attempts to eliminate advertising to children,¹⁵¹ criminalization is the least promising of the three approaches posited.

b. From Within

i. Ultra Vires

Another approach, this one from within corporate law’s standard taxonomy, would be to make advertising or profiting from children’s manipulable preference an *ultra vires* act, or one that is beyond the corporation’s legal powers. This is an interesting thought experiment. Saying that an act is beyond a corporation’s legal powers does not make the act impossible, however, since the people animating the corporate structure are still quite capable of engaging in it. This means that there would have to be mechanisms for deterring those individuals—injunctions, monetary penalties or the like. Even if these mechanisms operated imperfectly, the approach might have significant symbolic value and do quite a bit to shape corporate behavior. It is, again, however, a very large hammer that would be difficult to employ.

ii. Shareholder Approval

By contrast, requiring shareholder approval of certain acts seems almost politically palatable, constitutionally superior (at least to the route of criminalization), and eminently achievable. There are a variety of ways a shareholder approval requirement might be cast. For instance, publicly-held corporations could be required to prepare reports on products marketed to and for children, detailing both advertising expenditures and providing general

149. For an overview of the *ultra vires* doctrine and its continuing utility, see Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reform International Law Norms)*, 87 VA. L. REV. 1279 (2001); see also Katie J. Thoennes, Comment, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLIN L. REV. 203 (2005) (providing historical overview).

150. See *supra* note 108 and accompanying text.

151. See *supra* note 106 and accompanying text.

product descriptions. These reports could be posted on the corporate web site.¹⁵² Any shareholder wishing to call for a vote at the next annual meeting on any practice or expenditure thus exposed and representing more than a defined *de minimis* amount then could be entitled to do so. The vote of the shareholders even could be made binding (rather than merely advisory).

From the standpoint of those concerned with exploitation issues, the greatest benefit of such a requirement would be sensitizing shareholders (and consequently board members) to the fact that the issue exists. Its most significant effect might be to shed sunlight on child-driven markets. It also is possible that if shareholders were specifically given the right to vote on, say, the use of icons such as Joe Camel, they just might say “no.” Even institutional investors generally pressing for improved profitability might incline toward social responsibility if the sunlight is sufficiently intense.

B. Existing Tools

Although reform along the lines alluded to above may be a worthy goal, many feminists willingly recognize that real life is not perfect, and that the desire for more sweeping changes should not stand in the way of incremental reform. The tools that are practicably accessible should not be ignored. These include the conscientious attempt to consider the exploitation issue oneself and the conscientious attempt to bring it to the attention of others. In considering the utility of those implements, it is useful to contemplate their availability to rank-and-file workers, members of management, and shareholders.

1. Workers

Contractarian literature essentially assumes that workers *and* the corporations that employ them have equal bargaining power.¹⁵³ Progressive literature emphatically diverges from this assumption;¹⁵⁴ experience surely suggests that the progressives are closer to the mark. Relative disempowerment, however, is not complete disempowerment. Simple day-to-day mindfulness of, and comment on, the issue of the exploitation of children’s manipulable preferences may have some useful effect.

This is true notwithstanding the inevitability that some voices will be heard more clearly than others. In this regard, it is interesting to note speculations that women, who are accustomed to their role as workplace outsiders, generally are more willing than men to act as whistle blowers and call attention within and

152. See Monsma & Buckley, *supra* note 129, at 200 (describing posting of reports on environmental and social practices by Fortune 500 and other companies).

153. See, e.g., Easterbrook & Fischel, *Limited Liability*, *supra* note 128, at 104 (characterizing employees as “voluntary creditors” and stating that “[t]he compensation they demand will be a function of the risks they face”). Even where the bargaining is labeled “quasi-voluntary” and is conceded to be hypothetical, such bargaining is regarded as normatively desirable. See Ribstein, *Limited Liability*, *supra* note 128, at 129-130; but see Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1079, 1120-21 (1991) (characterizing as “involuntary” those creditors entering contracts without substantial awareness of relevant risks).

154. See generally O’Connor, *Displaced Workers*, *supra* note 68 (describing progressive worker disempowerment).

without corporations to situations meriting redress.¹⁵⁵ One can imagine that women who are sensitized to the exploitation issue and who also feel responsible for contributing to the problem through their personal and professional behavior it might seek to cast beams of light on the subject.

2. Management

Managers, including for purposes of this discussion members of the board of directors, generally are motivated by the mainstream mantra of maximizing shareholder value.¹⁵⁶ As such, they presumably bear primary blame for the exploitation of children's manipulable preferences. It would be well for managers to become sensitized to the issue, as well as to become more aware of the discretion that management actually possesses to engage in actions that do not maximize shareholder value. In this respect, the business judgment rule confers common law leeway;¹⁵⁷ corporate constituency statutes specifically permitting the consideration of non-shareholder interests go even further.¹⁵⁸

Obviously, the real-life competitive pressures experienced by corporate management thus far seem to have outweighed the theoretical utility of these tools. It is possible that additional sensitization to the issue of exploitation might have a useful effect, and it once again is interesting to speculate whether women, whose roles in management are increasing, might do anything differently than men. There is evidence suggesting that "token" women¹⁵⁹ in management are unlikely to effect meaningful reform, because they are likely to assume, indeed are likely already to have assumed, the attitudes of the majority.¹⁶⁰ It is, in any event, indisputable that the high-achieving women who make their way into management are much less likely to have children than either their male peers or female rank-and-file.¹⁶¹ As a result, the context of their lives might render them relatively more interested in issues other than those presented by children's manipulable preferences.

155. See, e.g., Judy B. Rosener, *Why Are Women More Likely to Reveal Corporate Scandals?*, PR NEWswire (U.S.), May 16, 2005; but see Paige Wiser, *Can Women Keep Secrets? What if Woodward and Bernstein Weren't Men?*, CHI. SUN-TIMES, June 6, 2005, at 58 (referring to studies indicating that women are not more likely to reveal secrets than men).

156. For a helpful discussion of the extralegal forces prompting corporate boards to observe a shareholder primacy norm, see Gevurtz, *supra* note 130, at 651-53.

157. This is conceded even by contractarians. See EASTERBROOK & FISCHER, *ECONOMIC STRUCTURE*, *supra* note 56, at 93. See generally, Charles Hansen, Comment, *The ALI Corporate Governance Project: Of the Duty of Due Care and the Business Judgment Rule*, 41 Bus. Law. 1237 (1986) (describing various attempts to articulate the business judgment rule).

158. See MITCHELL, *CORPORATE IRRESPONSIBILITY*, *supra* note 70, at 104-05.

159. "Token" women are those chosen to achieve superficial, rather than meaningful, diversity goals. See generally *supra* note 2.

160. For a discussion of the co-option process, see John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 13 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

161. See O'Connor-Felman, *Human Capital*, *supra* note 18, at 1349; SYLVIA ANN HEWLETT, *PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* (2002) (indicating that forty-nine percent of women who earn \$100,000 or more were still childless after age forty, and many regretted it).

3. Shareholders

Shareholders do have choices about alternative investment vehicles; it is arguable that they might be sensitized to “vote with their feet” against corporate decisions that smell of exploitation. Individual shareholders, however, do not have limitless time to investigate and act on their findings about corporate behavior, especially since they may feel that their decision to withdraw their investments will at best, have only a marginal impact on corporate decision making. Despite this, we can invoke the homely aphorism that “every little bit helps.” We also can note the slow but steady growth of social responsibility funds,¹⁶² which one day might add the exploitation of children’s manipulable preferences to the list of activities for which such funds screen.

There are, in addition, two other tools available to the relatively energetic shareholder. The first of these is derivative litigation. This is litigation brought by a shareholder on the corporation’s behalf, typically against members of corporate management for actions taken in violation of their various fiduciary duties.¹⁶³ Skipping lightly over the demand and other procedural impediments to bringing suits of this type brings us to the crux of difficulty. To avoid frivolity, there must be a credible argument that actions exploiting children’s manipulable preferences violate some duty to the corporation. It seems unlikely that a court would hold that they do, given that the “quixotic” lawsuits brought against corporations by obese consumers and grieving survivors of those killed in rampages have thus far not succeeded. The latitude afforded management by the business judgment rule is simply so broad that most management decisions are unassailable.

A more promising tool is the possible use of shareholder proposals. Although the shareholders of public corporations do not, in fact, have the power to preclude corporate engagement in specific activities, exploitive or otherwise,¹⁶⁴ they do have the power to adopt “advisory” resolutions informing management of their wishes.¹⁶⁵ These resolutions arguably have a shaping effect on corporate conduct.¹⁶⁶ Moreover, in recent years, changes in position by the Securities and Exchange Commission have enhanced the practical ability of shareholders to have motions relating to issues of social concern considered,

162. See *supra* note 129 and accompanying text.

163. See generally Tom Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355, 387 (1999) (discussing derivative litigation); Theresa A. Gabaldon, *Free Riders and the Greedy Gadfly: Examining Aspects of Shareholder Litigation as an Exercise in Integrating Ethical Regulation and Laws of General Applicability*, 73 MINN. L. REV. 425, 433 (1988) (also discussing derivative litigation).

164. See *supra* Part IV-A for a proposal which would grant shareholders the power to preclude corporate engagement in specific activities.

165. For description of the shareholder proposal mechanism and its possible uses to improve working conditions and thus the lives of workers’ children, see O’Connor-Felman, *Human Capital*, *supra* note 18, at 1329-30, 1339-41; see also Kevin Healy & Jeffrey M. Tapick, *Climate Change: It’s Not Just a Policy Issue for Corporate Counsel - It’s a Legal Problem*, 29 COLUM. J. ENVTL. L. 89, 105-06 (2004) (describing increasing use of shareholder proposals to address environmental issues); Monsma & Buckley, *supra* note 129, at 190-91 (also describing increasing use of shareholder proposals to address environmental issues).

166. See *supra* note 162; John M. Holcomb, *Sarbanes-Oxley Act, Related Legal Issues, and Global Comparisons*, 32 DENV. J. INT’L L. & POL’Y 175, 177 (2004).

notwithstanding their involvement in the ordinary business of the corporation.¹⁶⁷ With some attention to presentation, motions relating to the exploitation of children presumably would fit the bill.

Joe's conclusion:

In summary, gentlemen and lady, any corporate board that isn't giving children exactly what they want is missing the boat, and risking the high dudgeon of its shareholders, none of whom seem to be noticing that the company is producing things they might not want their own children to have. (But you know what they say about consistency and hobgoblins!) In any event, I know by this time I'm singing to the choir. Any questions?

V. CONCLUSION

Children have not been body-snatched from their parents, but they have been mind-snatched. Saying that the women's liberation movement and corporate America are complicit is a nice turn of phrase, but far too inflammatory and value-laden. Suffice it, instead, to say that the perfect storm of parental time crunch, technological advances, increased workforce participation, and corporate profit-seeking behavior have combined to put artificially aroused and exaggerated desires of children behind the wheel of an out-of-control marketplace which feeds back into those aroused and exaggerated desires. Simply ignoring the problem will not make it go away.

This article takes the position that the issue of the exploitation of children's manipulable preferences must be raised and examined. As part of this process, it is important to call on the experience of actual human beings and to recount real stories.¹⁶⁸ Empathy must be generated and attention must be paid. It is speculation to indicate that the empathy and attention of women might more easily be attracted than that of men. Nonetheless, feminist method demands, with respect to this issue as with respect to all issues, focus on the actual experience of women in the workplace and at home.

Idealized portrayals of the life of children in earlier decades frequently place those children in the context of warm and loving families, constantly available to provide support in making the "right" decisions, in bringing up children in the straight and true. Perhaps Darby and his friends did indeed enjoy parental counterweight to the nascent advertising attempts to influence their consumption. Perhaps not.

In any event, the mothers of America have gone to work. If not Darby's, then Michael Levy's or the New Boy's. If not your children's, then my son's. Whether or not the precedent imagery was correct, it is indisputable that the mothers who peopled that imagery have less time to spend in the home. It is just as indisputable that they feel guilty about the amount of attention they are

167. See Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735 (2003) (discussing progress and impediments to progress).

168. See Robert L. Palmer, *When Law Fails: Ethics, Commerce, and Tales of Value*, 2 S. CAL. INTERDISC. L.J. 245 (1993) (discussing social value of storytelling).

able to give to their children. This may be part of the permanent human condition, although one hopes that it is not. It is, nonetheless, a reason to be concerned with, and to pay attention to, the exploitation of children's manipulable preferences.

Joe's last word:

Next month, our topic will be "Children in Third-World Countries: Not Yet Giving Their All."