

# CAPITALISM AND FREEDOM—FOR WHOM?: FEMINIST LEGAL THEORY AND PROGRESSIVE CORPORATE LAW

KELLYE Y. TESTY\*

A widespread academic view is that the public corporation represents the natural selection of the fittest organizational adaption to the economies of scale, difficulties of agency costs, and problems of technology. . . . [T]he natural selection analogues are incomplete. . . . [P]olitics created the fragmented Berle-Means corporation . . . every bit as much as did natural laws of economy and technology. The Berle-Means corporation . . . is an adaptation, not a necessity.<sup>1</sup>

Every economic decision and institution must be judged in light of whether it protects or undermines the dignity of the human person.<sup>2</sup>

## I

### INTRODUCTION

In early 2001, two corporate law scholars together boldly pronounced the “end of history” for corporate law.<sup>3</sup> To their minds, the dominance of the shareholder-centered, neoclassical economic model of corporate governance had so far eclipsed all other models that there was nothing more to be said on the subject. While that claim may have been an easier one to make before September 11, 2001,<sup>4</sup> it became increasingly implausible with the now-notorious collapse in late 2001 of the Enron Corporation. As 2002 followed with additional, alarming revelations of widespread corporate

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\* Associate Dean for Academic Affairs and Faculty Director of the Center on Corporations, Law & Society at Seattle University School of Law.

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1. MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 286-87 (1994).

2. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY ix (1986).

3. Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 454 (2001).

4. See Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud and September 11, 2001*, 76 TUL. L. REV. 1579, 1580 (2002) (“The terrorists had launched a direct attack on the American system. Their actions expressed not only disregard for human life, but also disdain for the foundations of American government, law, and our capitalist methods of production, distribution, and exchange.”).

fraud and other malfeasance,<sup>5</sup> ushering in passage of the Sarbanes-Oxley corporate governance reform legislation,<sup>6</sup> it became clear that a new chapter in the history of corporate law had indeed begun.

But what will be the storyline in this new chapter? This key juncture in corporate law and governance renders this conference's exploration of progressive and conservative versions of legal ordering a particularly timely one. Though the death announcement for the history of corporate law is now revealed as premature, the announcer's underlying premise—the hegemony of U.S.-style shareholder-centered corporate governance—was right on target.

Beginning at least in the 1980s, the version of corporate law and governance prevailing in the U.S. (as well as widely exported to other nations) was a radically privatized one, treating the corporation as a contractual arrangement for maximizing short-term share price in a laissez faire global marketplace.<sup>7</sup> Though many robust and varied social movements, many of which were bolstered by the 1999 WTO protests in Seattle,<sup>8</sup> have been and are engaged in challenging this hegemony from many angles,<sup>9</sup> few have found their way into corporate law reform. That is not to say, however, that there are no progressive legal critiques from which to draw. For some time a diverse minority of corporate law scholars has been calling for increased attention to issues of corporate accountability to a wide variety of corporate stakeholders and to public interest concerns.<sup>10</sup> Although those entreaties have not met with direct success in legal

5. *E.g.*, Editorial, *The Corporate Scandals, Cleaning Up*, N.Y. TIMES, July 10, 2002, at A20; Alison Mitchell, *Corporate Conduct: Congressional Memo; A New (Election Year) Vigilance on Corporations*, N.Y. TIMES, July 11, 2002, at C1; Richard W. Stevenson & Richard A. Opiel, Jr., *Corporate Conduct: The Over-view; Fed Chief Blames Corporate Greed; House Revises Bill*, N.Y. TIMES, July 17, 2002, at A1.

6. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

7. *E.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993).

8. For commentary on WTO protests, *see, e.g.*, John Birmingham, *Voices of Dissent Won't Destroy Us—They Can Only Make Us Stronger*, SYDNEY MORNING HERALD, Nov. 18, 2002, at 15; Hugh Dellios, *Anti-WTO Protests Erupt; Thousands March on Mexico Meeting over Global Trade*, CHICAGO TRIBUNE, September 11, 2003, at 3; Clare Garner, *WTO Protest: Who are the Protesters?*, THE INDEPENDENT (London), Dec 2, 1999, at 5; Andrew Gumbel, *WTO Protest: The Apathy Generation Finally Has a Reason to be Angry*, THE INDEPENDENT (London), December 2, 1999, at 5; Dave McIntyre, *Officials Spin Seattle Protests for Political Advantage*, DEUTSCHE-PRESSE-AGENTUR, December 2, 1999; Kim Murphy, *Campaign 2000; Protesters are Wide Awake in Seattle—And Headed for L.A.; The Environmental Activists who Inspired Street Marches During Last Year's World Trade Organization Talks are Gearing Up for the Democratic Convention*, L.A. TIMES, August 6, 2000, at A3; Jim Redden, *WTO Protests Seek Justice for All*, CANBERRA TIMES, Dec 4, 1999, at C5; Ravina Shandasani, *Activists Stage Third WTO Protest in a Week; Global Network Wants Meetings with Delegates to Mexico*, SOUTH CHINA MORNING POST LTD. (Hong Kong) September 15, 2003, at 3; Editorial, *Trade protests*, SOUTH CHINA MORNING POST LTD. (Hong Kong) Dec. 2, 1999, at 20; *WTO Protest Turns Ugly; Montreal Cops Make 100 Arrests*, TORONTO STAR, July 29, 2003, at 17.

9. *E.g.*, DEFYING CORPORATIONS, *DEFINING DEMOCRACY: A BOOK OF HISTORY AND STRATEGY* (Dean Ritz ed., 2001); THOMAS FRANK, *ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY* (2000); DAVID C. KORTEN, *THE POST-CORPORATE WORLD* (1999) [hereinafter, KORTEN, *POST-CORPORATE WORLD*]; DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (2d ed. 2001) [hereinafter KORTEN, *WHEN CORPORATIONS RULE*]; DAVID SCIULLI, *CORPORATE POWER IN CIVIL SOCIETY* (2001).

10. *E.g.*, *PROGRESSIVE CORPORATE LAW* (Lawrence E. Mitchell ed., 1995); LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* (2002); Kent Greenfield, *September 11 and the End of History for Corporate Law*, 76 TUL. L. REV. 1409 (2002); Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002);

arenas, the voices have been increasing in both numbers and in theoretical sophistication.<sup>11</sup> A key question, then, for this new chapter in corporate law is whether the confluence of the mounting extra-legal critiques, the emerging progressive approach to corporate law, and the Enron-led rupture of confidence in corporate stewardship will ripen into meaningful reform or lapse into “business as usual.”

To explore this urgent question, this essay proceeds in three parts. It first provides an overview of the dominant conception of corporate law and the emerging progressive assessments of that narrative. It then offers the lens of feminist legal theory as a tool to further analyze corporate law, detailing the central components of feminist analysis and surveying the few feminist inroads made thus far into corporate law and governance. The essay’s final section argues that a progressive theory of corporate law must also be a feminist theory, urges a more explicit alliance between the progressive and feminist corporate law projects, and describes several additional substantive directions that a feminist, progressive view of corporate law should take.

Not only is the unification of progressive and feminist theories important for gains in the political might that will be required to move the progressive project out of the law reviews and into the law, but it is important for a more substantive reason as well. Thus far, the progressive corporate law project’s most glaring omission is its failure to articulate normative values against which corporate law and policy might be judged, and thus to offer a positive prescription in addition to its critical assessments. Feminist theory fills that gap, helping to describe what corporate law should become, and thus strengthens the progressive project precisely at its weakest link.

## II

### COMPETING VIEWS OF CORPORATE LAW

A nascent progressive critique of the dominant corporate law paradigm is beginning to emerge in the United States and Canada to challenge the shareholder centered model that holds sway domestically and that is being widely exported to emerging nations.<sup>12</sup> In the realm of corporate law, unlike perhaps other systems of legal ordering, a progressive vision is at an embryonic stage. Thus far, the progressive version of corporate law consists more of critique than it does positive prescription. In order to examine that critique and its potential for substantive reform, this section begins with an outline of the key pillars of the dominant model.

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Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001); Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002).

11. See *infra* notes 28-47 and accompanying text.

12. See, e.g., Stephen M. Bainbridge, *The Globalization of Corporate and Securities Law in the Twenty-First Century: Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT’L LAW. 45 (2002); John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641 (1999) (identifying the constraints on convergence in corporate governance); Franklin A. Gevurtz, *The Globalization of Corporate and Securities Law: An Introduction to a Symposium, and an Essay on the Need for a Little Humility When Exporting One’s Corporate Law*, 16 TRANSNAT’L LAW. 1 (Fall 2002); Mary O’Sullivan, *Corporate Governance and Globalization*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 153 (July 2000); Jeswald W. Salacuse, *Corporate Governance, Culture and Convergence: Corporations American Style or With a European Touch?*, 9 L. & BUS. REV. AM. 33 (2003).

### A. The Dominant Model

The dominant model of corporate law in the United States stems from its underlying conception of the nature of the firm. Known as contractarianism, the firm is viewed as a nexus of contracts rather than as an entity.<sup>13</sup> That is, it is viewed as an aggregate of various inputs acting together to produce goods and services.<sup>14</sup> The “firm” is a legal fiction representing the set of implicit and explicit contractual relationships between and among participants, including employees, shareholders, creditors, and managers.<sup>15</sup> Although the label might suggest otherwise, “contract” is not used in its traditional meaning. Rather, it refers to any system that creates, modifies, or transfers assets.<sup>16</sup>

Under this view of the firm, state corporate law is relegated to enabling the explicit and implicit bargains that comprise the firm.<sup>17</sup> Serving as an off-the-rack standard form contract, it allows participants efficiency gains as they need only vary those provisions that do not suit them.<sup>18</sup> Law is thus not mandatory, as it might be commonly assumed, but is instead a series of default rules that can be either accepted or bargained around as suits the participants in the firm.

At least since Berle and Means’s classic exposition in the 1930s,<sup>19</sup> to the extent that corporate law has a substantive thrust, it is aimed at solving agency problems.<sup>20</sup> Created by the separation of ownership (shareholders) from control (managers and directors) in the public corporation, agency issues include managers who might run the corporation incompetently or in their self-interest rather than in the shareholders’ best interests. Moreover, agency issues also concern the free rider and other collective-action impediments to widely dispersed shareholders’ abilities to hold management’s feet to the fire on their own.<sup>21</sup> Accordingly, in order to address these agency issues, corporate law’s role is to assure that the corporation is indeed run in the interests of its

13. *E.g.*, William Bratton, *The ‘Nexus of Contracts’ Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 410 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) (firm is a “nexus for a set of contracting relationships among individuals”); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989) (advocating the “nexus of contracts” theory of the firm). *But see* Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990) (suggesting that the use of the term “contract” to explain relationships within firms is metaphorical and troublesome); Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449 (1989) (arguing that the “nexus of contracts” approach suffers from ambiguity that limits its usefulness).

14. *E.g.*, Bratton, *supra* note 13 at 420; Kornhauser, *supra* note 13, at 1451.

15. Bratton, *supra* note 13, at 420.

16. *Id.* at 417-18.

17. *See generally* EASTERBROOK & FISCHEL, *supra* note 7 (discussing enabling view of corporate law); *see also* Easterbrook & Fischel, *supra* note 13, at 1451-53.

18. *See generally* EASTERBROOK & FISCHEL, *supra* note 17.

19. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (3d ed. 1991).

20. *See generally* ROBERT C. CLARK, *CORPORATE LAW* §§ 4.1-4.2, at 141-54 (3d ed. 1986) (explaining that the agency problem that confronts corporate officers and directors stems from their fiduciary duties to the corporation and the shareholders); Jensen & Meckling, *supra* note 14, at 305 (providing a seminal analysis of agency costs and the theory of the firm).

21. CLARK, *supra* note 20.

shareholders, leading to what many commentators refer to as the shareholder primacy norm in corporate law.<sup>22</sup>

Shareholder primacy vests the shareholders, however, with ultimate monitoring authority. Thus, the directors are charged first and foremost with protecting the shareholders' interests. As the firm's residual claimant, the shareholder is thus encouraged to detect and punish shirking by the other constituents in order to enhance the residual claim. Thus, shareholder wealth maximization becomes the board of directors' polestar.<sup>23</sup>

The board of directors is charged with managing the corporate enterprise. All powers and duties reside in the Board as a whole.<sup>24</sup> Because it is charged with managing the enterprise, and because it is elected by shareholders, the Board is said to owe fiduciary duties to the shareholders, who "own" the corporation and elect the directors. These duties are usually characterized as the twin duties of care and loyalty, in addition to the obligation of good faith.<sup>25</sup>

The duty of care can be likened to the duty to not be negligent in managing the corporation. Although formally described as the requirement that the director must employ that degree of care that a reasonably prudent person would employ in similar circumstances, the dominant version of corporate law has rendered the duty of care a largely procedural construct rather than one with substantive bite.<sup>26</sup> The duty of loyalty can be likened to the duty to not be "selfish," including the duty to not divert corporate opportunities for personal benefit or to engage in transactions where the director has a conflict of interest. The reach of both duties, but particularly the duty of care, is significantly lessened in practice, in which directors enjoy substantial protections from liability for breach of duty, including the business judgment rule, indemnification and insurance, exculpatory provisions in the articles of incorporation, good faith reliance on expert advice, and insurance contracts.<sup>27</sup>

## B. Progressive Corporate Law

Like many discourses, particularly emergent ones, progressive corporate law is not amenable to easy definition. At this juncture, however, it is fair to say that what arguably unites progressive corporate law scholars is the concern they share over concentration and anti-democratic uses of corporate power, both domestically and globally. More specifically, these scholars are motivated by deep concerns over corporate illegality and immorality;<sup>28</sup> increasing wealth disparities that undermine economic democracy both domestically and globally;<sup>29</sup> concentrations of corporate power and

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22. *Id.*

23. *Id.*

24. *E.g.*, Model Bus. Corp. Act, § 8 (1984).

25. *E.g.*, *id.*

26. *E.g.*, *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

27. Model Bus. Corp. Act § 8 (1984).

28. *E.g.*, Lawrence E. Mitchell & Theresa A. Gabaldon, *Socio-Economics and Corporate Law Symposium: The New Corporate Social Responsibility: If I Only Had a Heart: or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645 (2002).

29. Testy, *supra* note 10, at 1244.

corporate influence in political processes that undermine political democracy;<sup>30</sup> and environmental degradation and other externalities visited upon workers, consumers, and communities.<sup>31</sup>

Rather than focus exclusively on potential solutions to these issues that lie outside of what is traditionally characterized as “corporate” law, as earlier corporate social responsibility advocates primarily did,<sup>32</sup> progressive corporate law scholars view the dominant model of corporate law itself as a large part of the problem.<sup>33</sup> Accordingly, the work of progressive corporate law scholars has thus far zeroed in on some of the fundamental tenets of corporate law, especially ones on which the dominant, shareholder-centered conception of corporate law rests.<sup>34</sup>

Specifically, in contrast to the contractarian view of the firm, many progressive corporate law scholars view the corporation as an (at least) quasi-public entity.<sup>35</sup> Given its public dimensions, these scholars suggest that, like other public institutions, the corporation should be operated and regulated in accordance with the public interest. In this view, the corporation is somewhat more than the sum of its parts, and individuals acting within the corporate structure cannot be assumed to act as individuals do outside such a structure.<sup>36</sup> Moreover, law has a much more substantive job to do. Rather than enable private bargaining, law constrains and compels the corporation to serve the public interest, not simply the shareholders’ interests.

Thus, progressive corporate law scholars resist the hegemony of shareholder primacy.<sup>37</sup> In its place, they posit a web of stakeholders, each of which has an interest in the affairs of the corporation, and each of whom should be considered in managerial decisionmaking.<sup>38</sup> In addition to shareholders, stakeholders variously include workers, creditors, the community, and society as a whole.<sup>39</sup> For progressive corporate law scholars, norms of long-term enterprise wealth-maximization and fair divisions of corporate rents predominate over short-term, shareholder wealth-maximization goals.<sup>40</sup> Thus, rather than be beholden to one constituent, corporate boards and managers are seen more as trustees for the entity and for the society in which that entity is situated.

Progressive corporate law scholars have not yet reached consensus on issues concerning the role, duties, and composition of the board of directors, though significant energy has been directed toward its appraisal.<sup>41</sup> Some issues presently under explora-

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30. *Id.* at 1238-47.

31. *See* MITCHELL, *supra* note 10.

32. *See* Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1212-16 (2002).

33. *Id.* at 1217-25.

34. *See generally* PROGRESSIVE CORPORATE LAW, *supra* note 10.

35. *See* MITCHELL, *supra* note 10.

36. *Id.*

37. *E.g.*, Testy, *supra* note 10, at 1230-40.

38. Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823 (Fall 2003).

39. *Id.*

40. *Id.*

41. *See, e.g.*, sources cited in note 10, *supra*.

tion include: (a) whether the board is more properly seen as a “mediating hierarchy” under a Team Production Model of the firm;<sup>42</sup> (b) whether “outside” directors enhance corporate decisionmaking, and what it means to be an “outside” director;<sup>43</sup> and (c) what the proper contours of the duties of care and loyalty should be in order to constrain managerial self-interest without overly deterring entrepreneurship and beneficial risk taking.<sup>44</sup>

Though the contours of the progressive corporate law critique are still emerging, it is also important at this juncture to make clear what progressive corporate law is not. Though often mistakenly categorized as such, progressive corporate law is not a rejection of market economies. Instead, properly regulated markets are viewed by most progressive corporate law scholars as a superior means of resource allocation than are bureaucratic governments of nation-states.<sup>45</sup> Thus, progressive corporate law is not anti-market. Similarly, neither is it anti-corporate, though again it is often misjudged as such, particularly by those who, for political gain, would reject out of hand any critique of the corporation as inherently “anti-capitalist,” even un-American.<sup>46</sup> Progressive corporate law scholars recognize positive benefits of the corporate form, being far more concerned with dangers perceived in large-scale corporations—particularly multi-nationals—than in smaller, more closely held entities.<sup>47</sup> It is thus not the corporate form per se that concerns progressive corporate law scholars; rather, it is particular incantations of that form and its effects upon the firm’s many constituents.

### III

#### FEMINIST LEGAL THEORY AND CORPORATE LAW AND GOVERNANCE

##### A. Feminist Legal Theory: A Brief Overview

Feminist legal theory is a rich and diverse approach to law and society, containing many different voices and strands of analysis. Those various theories frequently have been delineated, compared, and contrasted elsewhere;<sup>48</sup> that task will not be repeated

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42. The Team Production Model was developed by Margaret Blair and Lynn Stout. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). That model is garnering increasing attention from Progressive Corporate Law scholars. See, e.g., Testy, *supra* note 10, at 1232-35; see also discussion *infra* notes 105-110 (explaining the Team Production Model).

43. R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829 (Winter 2003); *NYSE Board of Directors Approves New Corporate Governance and Disclosure Standards*, 9 L. & BUS. REV. AM. 63 (Winter 2003); *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 54 MERCER L. REV. 789 (Winter 2003).

44. E.g., Kelly Y. Testy, *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GA L. REV. 1025 (2000), at 1039-42; Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389 (2002).

45. PROGRESSIVE CORPORATE LAW, *supra* note 10; Branson, *supra* note 32.

46. PROGRESSIVE CORPORATE LAW, *supra* note 10.

47. *Id.*

48. See, E.g., VISIBLE WOMEN: ESSAYS ON FEMINIST LEGAL THEORY (Susan James & Stephanie Palmer eds., 2002); Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20-29 (1991); Gary Lawson, *Feminist Legal Theories*, 18 HARV. J.L. & PUB. POL’Y 325 (1995); Lanae Holbrook, *Justice Barkett’s Feminist*

here for that and other more substantive reasons. Central among them is that in many instances the demarcations are not clear ones, nor are they the only ones possible to identify. Further, many writers move quite fluidly between several of the various theoretical strands. Though many of these strands of feminist theory developed at different times, and indeed on some occasions in opposition to one another, feminist legal theory is best appreciated as encompassing all of these contributions. Eschewing as it does any claim to a unitary or totalizing theory, feminist legal theory celebrates its many strands and is a richer theoretical approach to law for the multiple perspectives it brings to diverse issues.

As it has evolved, what unifies feminist legal thought is that it centers on an analysis of the use and distribution power, seeking to articulate both a normative vision of equality and human flourishing for society as well as a critique of structures of subordination, particularly for women, that impede those values.<sup>49</sup> One of the goals of a feminist approach to law is the elimination of gender-based classifications in order to promote both formal and substantive equality.<sup>50</sup> Another primary aim is to understand and value women's differences, whether biologically or culturally based, and to insist that those differences be accepted by law and society rather than used to discount women.<sup>51</sup> Stemming from psychologist Carol Gilligan's work on moral reasoning,<sup>52</sup> feminists have deployed an "ethic of care" to re-envision law so that it takes account

*Jurisprudence*, 46 U. MIAMI L. REV. 1161 (1992); Anne-Marie Leath Storey, *An Analysis of the Doctrines and Goals of Feminist Legal Theory and Their Constitutional Implications*, 19 VT. L. REV. 137 (1994).

49. See, e.g., KATHARINE T. BARTLETT ET AL, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (3d ed. 2002); KIMBERLÉ CRENSHAW, *CRITICAL RACE THEORY* (1995); ANGELA Y. DAVIS, *WOMEN, RACE, & CLASS* (1983); *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Rosanne Kennedy eds., 1991); MARTHA ALBERTSON FINEMAN, *FEMINISM & LEGAL THEORY* (1996); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHERINE T. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1991); MARI J. MATSUDA ET AL, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); *PROPERTY: LAND OWNERSHIP AND USE* (Joan Williams ed., 4th ed., 1997); ROBIN L. WEST, *JURISPRUDENCE AND GENDER* (1993); ROBIN L. WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2002); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331-87 (1988); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, & Self Sufficiency*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 13 (2000); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* (D. Kelly Wiesberg ed., 1993); Joan Williams, *Toward A Reconstructive Feminism: Reconstructing The Relationship Of Market Work And Family Work*, 19 N. ILL. U. L. REV. 89 (1998).

50. See MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 1-3 (1999).

51. AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES (Mary Jeanne Larrabee ed., 1993); GILLIGAN, *supra* note 49; VIRGINIA HELD, *FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS* (1993); SELMA SEVENHUIJSEN, *CITIZENSHIP AND THE ETHICS OF CARE: FEMINIST CONSIDERATIONS ON JUSTICE, MORALITY AND POLITICS* (Liz Savage, trans., 1998); *JUSTICE AND CARE: ESSENTIAL READINGS IN FEMINIST ETHICS* (Virginia Held ed., 1995); *THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY* (Eva Feder Kittay & Ellen K. Feder eds., 2003); JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993).

52. GILLIGAN, *supra* note 49.



of women's ways of knowing and being, privileging the values of care and connection.<sup>53</sup>

Furthermore, as feminist legal theory has progressed, it has increasingly focused on power relationships, group-based oppression, and systemic subordination.<sup>54</sup> Drawing on post-modernism,<sup>55</sup> feminist legal theory uses an "anti-essentialist" critique to reject concepts of fixed women's identities, recognizing in this way the differences among and between women, including race, sexuality, and class.<sup>56</sup> Because one of its core methodologies is consciousness raising,<sup>57</sup> feminist legal theory encourages many voices, even divergent ones.

Feminist legal theory has played a vital role in improving the lives of women, as well as in enhancing societal flourishing more generally.<sup>58</sup> Many examples abound, including increased opportunities in education, employment, sports, politics, and other realms of public and private life; increased condemnation of and restrictions on sexual harassment in education and employment and on domestic violence in intimate relationships; and increased freedom surrounding the sexual and reproductive aspects of life.<sup>59</sup>

## B. Feminist Inroads into Corporate Law: A Brief History

Despite its successes in many areas, feminist legal theory has had little direct relationship to another area of increasing influence on all of our lives: the modern (and in-

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53. CHAMALLAS, *supra* note 50, at 62-70.

54. *See, e.g.*, BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (2d ed. 2000); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Crenshaw, *Mapping the Margins, supra* note 50, at 1267-69; Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) (including intersectionality works); Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002); Berta Esperanza Hernández Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1991); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 640 (1997); Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673, 687 (2000); Peter Kwan, *Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1264 (1997); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 57-66 (1995); Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996); Adrien Katherine Wing, *Violence and State Accountability: Critical Race Feminism*, 1 GEO. J. GENDER & LAW 95 (1999).

55. *E.g.*, THOMAS DOCHERTY, *POSTMODERNISM* (1992); *FEMINISM/POSTMODERNISM* (Linda J. Nicholson ed. 1990).

56. *See* FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); CHAMALLAS, *supra* note 50, at 86-94.

57. *See id.*, at 13, 135.

58. *E.g.*, BARTLETT ET AL., *supra* note 49.

59. *Id.*

creasingly global) corporation. To appreciate the present state of the feminist critique of corporate law and governance, a brief survey of the modern historical progression of feminist legal thought relating to corporate law is helpful.

In the 1970s, a wave of “socialist feminism” attempted to combine a critique of production with a critique of reproduction and to make clear that patriarchy and capitalism were interlocking and mutually reinforcing power systems.<sup>60</sup> Like other socialist critiques, this one failed to hold sway. Today, labeling oneself as a “socialist” anything, much less a “socialist feminist,” is more likely to draw laughter than anything else.<sup>61</sup> Moreover, the trust in government that once led to a trust in non-market systems has certainly waned, and in response an interest in exploring improvements in market systems has ascended to displace other models.<sup>62</sup>

Outside of the socialist critique of capitalism, one of the earliest efforts to apply feminist theory to corporate law came in 1985.<sup>63</sup> Kathleen Lahey and Sarah Salter’s creative start in applying feminist insights to the corporation surveyed liberal, socialist and radical feminism in concluding that it was the latter perspective that promised the most powerful critique of corporate law—though it was both aided and foreshadowed by the earlier liberal and socialist literature.<sup>64</sup> In their now almost twenty-year-old work, the materials that Lahey and Salter had to draw upon were sparse. Lahey and Salter turned to the only literature they could find on women and the corporation, first drawing upon “corporate survival manuals” for women that were prompted by the feminist formal equality gains that opened the doors of corporate workspaces to women.<sup>65</sup> Notably, they also relied upon the early work of Rosabeth Moss Kanter, which drew on both feminist principles of empowerment as well as on models of utopian communities to critique the fragmenting effects of hierarchical organizational forms.<sup>66</sup> Today, Ms. Kanter is a chaired professor in the Harvard Business School, and a successful consultant to and director of many corporations.<sup>67</sup>

Not coincidentally, what is most striking about the twenty years that have elapsed since Lahey and Salter’s article is how sparse the literature still remains. This may come as a surprise to many, but not likely to Lahey and Salter. In closing they urged that “it is now time for feminist lawyers to begin to tell how the processes and ethics of corporate law contribute directly and indirectly to the domination of women.”<sup>68</sup>

60. *E.g.*, CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM (Zillah R. Eisenstein ed., 1979).

61. Robert Heilbroner, *The Triumph of Capitalism*, THE NEW YORKER, January 23, 1989, at 98.

62. *E.g.*, KORTEN, POST-CORPORATE WORLD, *supra* note 9; KORTEN, WHEN CORPORATIONS RULE, *supra* note 9.

63. Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985).

64. *Id.* at 544.

65. *See id.* at 546-47 & nn. 8-9.

66. *Id.* at 547-49.

67. *See* Professor Kanter’s biography, current research, and publications at Harvard Business School’s website at [http://dor.hbs.edu/fi\\_redirect.jhtml?facInfo=bio&facEmlD=rkanter](http://dor.hbs.edu/fi_redirect.jhtml?facInfo=bio&facEmlD=rkanter) (last visited January 15, 2004). *See also* ROSABETH M. KANTER THE CHANGE MASTERS: INNOVATION FOR PRODUCTIVITY IN THE AMERICAN CORPORATION (1983); ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION (1993); ROSABETH M. KANTER *The Good Corporation and How to Get It*, 96 BUS. & SOC. REV. 7 (1996).

68. Lahey & Salter, *supra* note 63, at 572.

However, they also cautioned that the “prospects for writing that will show different scholarly perspectives and challenge the dominant, implicit perspective depend upon the existence (and publication) of scholars who belong to groups that have been so socially marginalized that they have not fully internalized the terms of the discourse of bureaucratic capitalism.”<sup>69</sup> As the authors no doubt would have predicted, there are still few published professors at Harvard Business School (or other elite law or business schools for that matter) who can fill those sensible shoes.

Substantively, Lahey and Salter’s early analysis critiques corporate hierarchy and corporate ethics more than it critiques law per se. Describing corporate structure as “masculist,”<sup>70</sup> they fault it for disempowering individuals by separating them from one another through hierarchy and specialization, and from themselves through required separations between elements of personal and professional life.<sup>71</sup> The co-authors also urge that not only is the structure of the corporation problematic, but so is the ethics, needing enhanced attention to the values of care and connection to replace the values of separation and abstraction.<sup>72</sup>

To put it mildly, Lahey and Salter’s provocative article did not set off a wave of legal change or even a wave of other feminists taking up the research charge the co-authors had urged. It was not until 1992—seven years after the Lahey and Salter article—that an American corporate law scholar ventured directly into the discourse of feminism and corporate law. Theresa Gabaldon’s *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*,<sup>73</sup> was the first article to do so. To be sure, many feminists had written on topics critical of market ideology and related to business and corporate law, including Catherine MacKinnon’s ground-breaking work on the sexual harassment of working women.<sup>74</sup> But until Gabaldon, no feminist scholar had addressed corporate law or one of its central tenets directly.

Gabaldon’s article discusses the concept of limited liability<sup>75</sup> as well as many feminist theoretical approaches<sup>76</sup> at some length, though in the end it does not recommend repeal of limited liability for corporate shareholders. Deferring to concerns over “capital flight” unless there was world-wide adoption of unlimited liability,<sup>77</sup> as well

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69. *Id.* at 569 (discussing Wendy Brown, *Challenging Bureaucracy*, 2 WOMEN’S REVIEW OF BOOKS 16 (1984) (book review)).

70. *Id.* at 543.

71. *Id.* at 553-57.

72. *Id.* at 570.

73. Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders* 46 VAND. L. REV. 1387 (1992).

74. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, FEMINIST THEORY]. For other early works on subjects closely related to the activities of corporations and the effects of markets on women’s lives, see, e.g., Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

75. Gabaldon, *supra* note 73, at 1394-1413.

76. *Id.* at 1413-24.

77. *Id.* at 1447.

as practical concerns with implementation,<sup>78</sup> Gabaldon instead argues for shareholder empowerment and enhanced insurance requirements for business enterprises.<sup>79</sup>

Though Gabaldon did not ultimately recommend a change in limited liability based upon feminist insights, her article established that corporate law's major structures might look very different through a feminist lens and that the questions asked by feminism were ones worth asking in the context of corporate law.

### C. Feminist Legal Theory and Corporate Law Today

Since Gabaldon's *Lemonade Stand* article, assessments of corporate law that are either self-labeled as feminist, or that can reasonably be construed as such, have begun to gather steam. Over the past five years, a nascent conversation applying feminist insights to corporate and business law has emerged in the legal academy, and momentum seems to be gaining. Gabaldon has continued to make forays into this field,<sup>80</sup> as have a handful of other scholars, including Ronnie Cohen,<sup>81</sup> Janis Sarra,<sup>82</sup> Cheryl Wade,<sup>83</sup> Faith Kahn,<sup>84</sup> Marleen O'Connor,<sup>85</sup> and this writer.<sup>86</sup>

These scholars' feminist insights into corporate law divide into three key points. The first is a challenge to shareholder primacy and an argument that corporate decisionmaking should consider a wider array of constituents without the hierarchy of the shareholder primacy model.<sup>87</sup> The second is a critique of the shortcomings of existing fiduciary duty law, and an argument that feminist insights into concepts of care and connection can and should give increased substantive content to director and officer duties.<sup>88</sup> The third argument is more wide ranging but through different tacks is at its core a critique of concentrations of undemocratic corporate power together with an argument that to the extent that power works hardships on individuals in society, those hardships fall disproportionately on women (especially third-world women).<sup>89</sup>

These critiques bear a remarkable similarity to the progressive critique of corporate law. The feminist project has the potential to expand the extant progressive cri-

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78. *Id.* at 1448.

79. *Id.* at 1448-54.

80. Theresa A. Gabaldon, *The Assumptions About Relationships Reflected in the Federal Securities Laws*, 17 WIS. WOMEN'S L.J. 215 (2002); Theresa A. Gabaldon, *Corporate Conscience and the White Man's Burden*, 70 GEO. WASH. L. REV. 944 (2002) [hereinafter Gabaldon *White Man's Burden*]; Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1 (1995).

81. Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up from the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1 (1994).

82. Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457 (Fall/Winter 2002).

83. Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213 (2003).

84. Faith Stevelman Kahn, *Legislatures, Courts and the SEC: Reflections on Silence and Power in Corporate and Securities Law*, 41 N.Y.L. SCH. L. REV. 1107 (1997).

85. Marleen A. O'Connor, *THE ENRON BOARD: THE PERILS OF GROUPTHINK*, 71 U. CIN. L. REV. 1233 (2003).

86. Testy, *supra* note 44.

87. *E.g.*, Gabaldon, *White Man's Burden*, *supra* note 80.

88. *E.g.*, Testy, *supra* note 44, at 1039-42.

89. *E.g.*, Cohen, *supra* note 81; Sarra, *supra* note 82; Testy, *supra* note 44.

tique, however, by articulating normative values that can and should give content to a new vision of corporate law and governance. At its best, feminism has never been content with method for method's sake, nor with betterment only for persons born biologically female.<sup>90</sup> Instead, at its best, feminism has been directed toward articulating a normative vision of the relationship between life and law, one that prescribes a moral vision for social ordering, based upon the principles of equality and human flourishing.<sup>91</sup> As a result, the progressive corporate law project can cure its remarked-upon<sup>92</sup> failure to articulate an alternative substantive vision and criteria for evaluation by uniting with the emerging feminist vision of corporate law and governance.

#### IV

##### UNITING FEMINIST LEGAL THEORY AND PROGRESSIVE CORPORATE LAW

As the progressive corporate law project moves forward, a first key step then, is a more explicit unification with the feminist corporate law scholars, making clear that a progressive vision of corporate law is a feminist vision. Because both of these corporate law discourses are in embryonic stages, however, there is much more left to do to synthesize a feminist, progressive analysis of corporate law and governance. Moreover, given the current state of intellectual and political disruption caused by the widespread post-Enron disclosures of corporate wrongdoing, the time is ripe for progress to be made in this field.

At present, disclosures of widespread corporate fraud and accounting irregularities have shaken confidence in markets and placed the financial security of many pensioners and retirees into question.<sup>93</sup> Moreover, globalization continues to propel American-style corporate practices around the world, often into societies that lack many of the extra-corporate institutional safeguards that somewhat soften capitalism's harsh side.<sup>94</sup> More often than not, that harsh side falls disproportionately on women.<sup>95</sup> And despite continued celebrations of capitalism's global triumph, societal wealth dispari-

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90. CHAMALLAS, *supra* note 50, at 9-21; CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

91. CHAMALLAS, *supra* note 50, at 9-21.

92. For the most recent critique on this basis see Mitu Gulati, *What are Larry's Criteria for Good Corporate Law?*, 70 GEO. WASH. L. REV. 886 (2002).

93. Sherri Day, *Enron's Fallout Dampens Stock Prices*, N.Y. Times, February 10, 2002 § 3, at 17.

94. See, e.g., The World Bank's Transition Newsletter, at <http://www.worldbank.org/transitionnewsletter> (last visited January 15, 2004); The World Bank's Policy Research Working Papers: Abstracts; Transition Economies website, at <http://www.worldbank.org/html/dec/Publications/Workpapers/tranecon.html> (last visited January 15, 2004); The World Bank, *Transition—The First Ten Years: Analysis and Lessons for Eastern Europe and the Former Soviet Union* (2001), at [http://lnweb18.worldbank.org/ECA/eca.nsf/Attachments/Transition1/\\$file/complete.pdf](http://lnweb18.worldbank.org/ECA/eca.nsf/Attachments/Transition1/$file/complete.pdf) (last visited November 3, 2004).

95. Natacha David, *Women and the Economy*, Education International, at <http://www.ei-ie.org/pub/english/epbwo-eco.htm> (last visited January 15, 2004); *FWCW Platform for Action: Women and the Economy*, The United Nations Fourth World Conference on Women, 1995, at <http://www.un.org/womenwatch/daw/beijing/platform/economy.htm> (last visited January 15, 2004); Peter F. Orazem and Milan Vodopivec, *Male-Female Differences in Labor Market Outcomes during the Early Transition to Market: The Case of Estonia and Slovenia*, The World Bank's Policy Research Working Papers, at <http://www.worldbank.org/html/dec/Publications/Workpapers/wps2000series/wps2087/wps2087.pdf> (last visited January 15, 2004).

ties and environmental degradation continue to deepen for most of the world's population.<sup>96</sup> Thus, the time is ripe to consider more seriously whether feminist legal theory might bolster the progressive corporate law project by providing an enhanced normative and methodological framework for re-envisioning and restructuring the role and place of the modern corporation in society.

To begin the project of connecting these two discourses, this section will suggest three categories of pursuit for the progressive corporate law project, all of which rely on key feminist values: nurturing connectedness, attending to context, and furthering equality and human flourishing.

#### A. Connectedness

Feminism is a discourse that privileges the value of connection.<sup>97</sup> One area of inquiry that progressives need to take up immediately is whether further academic linkages, particularly interdisciplinary ones, can be made to advance the progressive project of reform. To some extent, this is already occurring: Martha Fineman, one of the most renowned feminist legal scholars,<sup>98</sup> is foremost among academics inculcating cross-disciplinary inquiries. Her Feminism and Legal Theory workshops seek to bridge prior divides between areas of legal inquiry—as well as between disciplines—and a significant amount of promising work is emerging from those workshops.<sup>99</sup> For instance, Devon Carbado and Mitu Gulati have recently linked law and economics and critical race theory—heretofore seen as oppositional discourses—in order to more deeply probe the complicated dynamics of workplace discrimination.<sup>100</sup>

There are additional interdisciplinary connections to be made as well, many of which I have written about elsewhere,<sup>101</sup> so only a few important ones are highlighted here. As noted at the outset of this essay, a well-developed critique of corporations is emerging outside of law, stemming from concerns that corporate activity increases

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96. Renu Khator, *Ethical Implications of World Trade on the Environment of Developing Countries*, 31 J. OF SOC. PHIL. 465 (2000) (presented at the AmFiTan Development Ethics Conference, Dar-Es-Salaam, Tanzania, February 8-11, 2000); *Environmental Focus Series: The Mexican Market, Final Report*, Office of Energy, Environment, and Technology, U.S. Agency for International Development, at <http://www.weea.org/USAID%20Reports/Documents/Mexican%20Market.pdf> (last visited October 27, 2004); The Project on Human Development, Boston University, at [http://humandevdevelopment.bu.edu/dev\\_indicators/view.cfm?header\\_id=21#Age/Gender\\_87](http://humandevdevelopment.bu.edu/dev_indicators/view.cfm?header_id=21#Age/Gender_87) (last visited January 15, 2004).

97. CHAMALLAS, *supra* note 50, at 62-67.

98. *See, e.g.*, AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991); FEMINISM, MEDIA AND THE LAW (Martha Albertson Fineman & Marhta T. McClusky eds., 1997); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); MARTHA ALBERTSON FINEMAN & TERENCE DAUGHERTY, FEMINISM CONFRONTS HOMO ECONOMICUS (ECONOMIC MAN) (forthcoming 2005); MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); MARTHA ALBERTSON FINEMAN & ROXANNE MYKITIUK, THE PUBLIC NATURE OF PRIVATE VIOLENCE (1994); MOTHERS IN LAW: FEMINISM AND THE LEGAL REGULATION OF MOTHERHOOD (Martha Albertson Fineman & Isabel Karpin eds., 1995).

99. *See generally* Emory School of Law Feminism and Legal Theory Workshop, at <http://www.law.emory.edu/flt/> (last visited January 12, 2004).

100. Devon Carbado & Mike Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (book review).

101. *See* Testy, *supra* note 10.

concentrations of wealth, undermines democracy, and relegates much of the world's population to increasing states of deprivation.<sup>102</sup> The progressive corporate law project needs a deeper and more explicit connection with this extra-legal field. Further, in the field of economics, critiques of the dominant neo-classical model are maturing, and include feminist<sup>103</sup> and socio-economic<sup>104</sup> analyses that promise substantial contributions to the progressive corporate law project. Even within the field of law itself, linkages are under-explored. The progressive corporate law project should connect to progressive work in the fields of labor, environmental, pension and benefits, tax, banking, international law, and human rights within law, as well as working across disciplinary boundaries.

The difficult issues raised by the current configurations of corporate power, both domestically and globally, are interdisciplinary ones. Accordingly, they will demand interdisciplinary solutions. Because progressive corporate law scholars understand economic and business institutions, they are particularly well suited to be of aid in this cross-disciplinary analysis of globalization and concentrations of corporate power. Many critiques of corporate power have traditionally come from fields with little experience in or connection to the worlds of business, finance and economics. The complex global institutions, including the World Bank, the International Monetary Fund, the WTO, and all of the complex global agreements that concern multi-national business activity must enter the discourse of progressive corporate law scholars. Those, too, are the connections that need to be explored as this project continues to mature and become increasingly effective.

## B. Context

Feminism also values attention to context, eschewing abstract rules and disembodied analyses. Thus, in addition to attention to connection, the progressive corporate law project would be furthered by enhanced attention to context. Attention to context can provide important critical insights for the progressive corporate law project, as well as provide a platform for the next stage of articulating a normative vision of corporate law from that critique. Here, opportunities abound for fruitful inquiry and evaluation. In brief outline, those include inquiring into matters such as the nature of the firm, types of corporations and demographics of their constituents, and the nature of markets and forms of capitalism.

### 1. Nature of the Firm

In an effort to address concerns over shareholder primacy, Professors Margaret Blair and Lynn Stout recently have developed an alternative model of corporate law

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102. See, e.g., ALTERNATIVES TO ECONOMIC GLOBALIZATION (2002); CHARLES DERBER, CORPORATION NATION (1998); RALPH ESTES, TYRANNY OF THE BOTTOM LINE (1996); ARIANNA HUFFINGTON, PIGS AT THE TROUGH (2003); MARJORIE KELLY, THE DIVINE RIGHT OF CAPITAL (2001); KORTEN, POST-CORPORATE WORLD, *supra* note 9; KORTEN, WHEN CORPORATIONS RULE, *supra* note 9.

103. See generally FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN (Marianne A. Ferber & Julie A. Nelson eds., 2003).

104. See LYNNE DALLAS, LAW AND PUBLIC POLICY: A SOCIO-ECONOMIC APPROACH (forthcoming 2004).

and theory that they label the Team Production Model (TPM).<sup>105</sup> Attention to context can provide an important progressive critique of this alternative model. Before turning to that critique, this section first provides a brief overview of the model's attributes.

As its name implies, TPM conceptualizes corporate participants—including managers, shareholders, employees, creditors, and local communities—as a team.<sup>106</sup> The team forms because the members perceive that each will obtain more from the cooperative endeavor than from individual action,<sup>107</sup> leaving, however, the difficult question of how the spoils of that team effort will be divided. Blair and Stout solve that pie-division difficulty by vesting allocational authority in a third party, which they view as the board of directors of the corporation.<sup>108</sup> Accordingly, rather than view directors as beholden to shareholders, TPM sees directors as beholden to the “team.” Blair and Stout present TPM as both a better description of current corporate governance and as a superior normative theory of what corporate governance should be once unyoked from slavish devotion to shareholder interests.

Because the theory has been developed by two women (still more of a novelty in corporate law circles than should be the case), and because it is presently the only well-developed alternative to the shareholder primacy model of the corporation, there is a risk that it will be seen as a progressive model, which it is not. As David Millon has written in a critique of TPM on both descriptive and normative grounds, allocation becomes “a matter of power rather than principle.”<sup>109</sup> In a corporate governance model that allocates resources according to who can strike the best bargain with the board, it is clear that bargaining power will be determinative of outcome. In any bargaining context, it is the person with the power of exit who enjoys the upper hand. Because of liquid trading markets, the power to walk away from the bargaining table is a power shareholders, not workers or communities, enjoy in the public corporation. Shareholders again come out on top, which becomes shareholder primacy in practice if not in theory. Thus, a contextual view of TPM reveals it to be one more way to reinscribe existing power relations rather than to disrupt them.

Moreover, the model leaves in place the “nexus of contracts” view of the firm, a disembodied and abstract view that fails again to exhibit the sensitivity to context that feminism privileges. One of feminism's key insights has been a discomfort with abstraction, which invites dominant constructs to define the norm. For feminism, theory built without context is at best hollow and at worst dangerous, because the hollowness is likely to be filled by norms of privilege. For example, when no race is specified, that silence codes as white; when no sex is specified, that silence codes as male. Thus, contractarianism's hypothetical bargainer, with no race, no gender, no class, no

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105. Blair & Stout, *supra* note 42, at 265-76 (1999); *see also* Symposium, *Team Production in Business Organizations*, 24 J. CORP. L. 743 (1999) (reprinting Blair and Stout's article in the Virginia Law Review and including several responsive commentaries).

106. Blair & Stout, *supra* note 42, at 250, 253.

107. *See id.* at 264-71.

108. *Id.* at 271.

109. David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001 *passim* (2000).



sexual orientation—in short no social location—fails to address the power disparities that flow from structural societal inequalities. From a feminist view of corporate law, the social location, or context, of each bargainer is highly salient.

## 2. Demographics

A related line of context-based analysis into the corporation would be to pay more attention to the demographics of the various corporate constituents, including the shareholders, managers, other workers, consumers, and board members. This attention to demographics might take a number of directions. For instance, were a demographic analysis to reveal that shareholders as a group are disproportionately white, this would further complicate an emphasis on shareholder primacy as the leading model of corporate law because it would exacerbate racial inequality. Conversely, shareholder primacy might be of lesser concern to progressive corporate law adherents if it were shown that shareholder demographics were such that an emphasis on shareholder rights was tantamount to improving structural inequalities based on race and/or gender. In short, progressive corporate law with a feminist lens needs to know “who is whom” before deciding on reforms that alter power arrangements.

Similar demographic attention needs to be paid to the composition of corporate management and boards which by all accounts remain predominately white, male institutions. Significantly more research and analysis needs to be conducted to determine the reasons for this state of inequality, as well as whether and how the social location of the decisionmakers affects the substance of the decisions being made.

As decisionmaking processes are probed, attention to context will also mean that it should be part of the progressive corporate law project to look within the corporation to probe decisionmaking at all levels of the enterprise. Thus far, corporate law scholars have focused primary attention on decisionmaking by the board. But the board is not a day-to-day decisionmaking entity in the firm—the managers and other employees do far more of that. Thus, contextual dynamics at those levels must also be interrogated, particularly when results, such as workplace discrimination, are discordant with progressive values.

## 3. Types of Corporations

A third line of context-based analysis would require more attention to what is meant when the “corporation” is critiqued. As noted earlier, it is not all corporations that progressive corporate law finds problematic; closely held corporations present very different issues than multi-nationals, for instance. Thus, greater care should be taken to attend to context by being more exact in spelling out the kinds of corporate contexts that create problems for a progressive vision. This line of analysis will not only enrich the project substantively, but it will also insulate it from some categorical dismissals as being entirely “anti-corporate.” This latter point is an important one. One of the central contributions of the progressive corporate law project is its refusal to look only outside the corporation and corporate law for solutions to excesses of corporate power. Thus, attention to the specific contexts in which corporate power is discordant with progressive values will assure that the more nuanced contributions of progressive corporate law will not be lost in arguments over “anti-corporate” rhetoric.

#### 4. Separating Markets from Capitalism

A related area of focus for the progressive project is the difference between markets and capitalism, and between different versions of markets and capitalism. Too often, critiques of one are subsumed in the other, and the words are used as if they are monolithic and self-defining terms. Outside of the legal context, David Korten has argued persuasively that though “the Siren known as capitalism wraps herself in the cloak of markets, democracy, and universal prosperity, she is the mortal enemy of all three.”<sup>110</sup> Moreover, another recent work by two financial economists, Luigi Zingales and Raghuram Rajan, takes issue with the present “anti-market” brand of capitalism prevailing at this time in the United States.<sup>111</sup> These directions are promising ones for the progressive corporate law project, allowing it to be more clear about its normative commitments to markets and their democratizing potential.<sup>112</sup>

As above, this, too, is an important point to assure that progressive corporate law is not misperceived. Progressive corporate law scholars seek to optimize the social benefits from market forms of social organization rather than seek to eliminate reliance on markets in wholesale favor of other systems. Moreover, showing attention to context, progressive corporate scholars would do well to make more explicit that, depending upon the society, the balance between reliance on markets and other systems (*e.g.*, government) might vary. A country with a well-developed and efficiently functioning legal system, for instance, can afford more thorough reliance upon markets than a system in which opportunistic market participants are not properly constrained by law. In sum, for the progressive corporate law scholar, systems of social organization such as markets and government are not seen as stark choices, but as allies that work together in different calibrations depending on the context in which they are situated.

#### C. Commitment to Equality and Human Flourishing

Progressive corporate law is at a crossroads. On the one hand, it has gained momentum in providing a critique of the dominant paradigm of corporate law, being particularly aided recently by widespread public distrust of corporate officials. What progressive corporate law has not yet succeeded in doing, however, is gaining consensus on a set of values against which reforms can be measured, though some inroads have been made in that effort. Thus, moving from deconstruction to reconstruction of corporate law will require articulation of and a commitment to values and principles. Feminism provides those values—commitments to substantive equality and human flourishing. The more difficult question is whether progressive corporate law scholars will commit to them.

Though a strong ideology states otherwise, there is little evidence that the current state of capitalism is having a positive impact on most human beings on the planet. Indeed, there is much evidence to the contrary as wealth disparity deepens and indi-

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110. KORTEN, POST-CORPORATE WORLD, *supra* note 9, at 37-38.

111. RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY (2003).

112. *See generally* KORTEN, POST-CORPORATE WORLD, *supra* note 9, at 37-63.

viduals, families, and communities are left in varying states of deprivation.<sup>113</sup> True, those with resources are gaining more. But those without are still without, in some cases more so than ever before. Thus, a real commitment to equality and human flourishing would have to ask for far more change in corporate law and policy than has thus far been suggested. No more can the project be content with leaving all structure in place and tinkering only with questions such as board composition, the nature of the firm, and arguments for recognizing a broader corporate constituency. Instead, reforms such as the following, briefly outlined here, would need to be considered.

### 1. Public/Private Dichotomy

The firm's classic characterization as "private"—or as a site for private ordering—cannot withstand a feminist analysis. "If the most private also most affects society as a whole, the separation between public and private collapses as anything other than potent ideology."<sup>114</sup> The trope of the private in corporate law has functioned much like it has in family law: hiding a house of abuse. Lurking behind it is not only maintenance of structural inequalities such as racism and sexism, but also, more broadly, the engines of wealth disparity. A key project for progressive corporate law is to expose this misleading fiction of the private and to dismantle it.

### 2. Limited Liability

Limited liability is an odd concept in a feminist analysis. The idea that one can escape personal responsibility for harms caused to others is as contrary to feminist norms as it is to most every other area of legal doctrine and theory. This concept, which is granted by state power, must be further examined for its costs and benefits. At a minimum, it should be restored to its original use, protecting individual shareholders—human beings. Today, limited liability is more often used to protect a corporate shareholder within a long chain of subsidiaries, most of which function as "divisions" more than as separate entities. This triumph of form over substance offends feminist, progressive values and sanctions excessive risk taking because there is only the potential for upside gain in risky activities.<sup>115</sup> The corporation can be insulated from liability; even its shareholders ultimately stand to profit if the risky venture succeeds.

While strong policy reasons may support limited liability for individual shareholders, a very different context arises when the shareholder is another corporation that already enjoys limited liability itself. Thus, rather than the present "one-size-fits-all" doctrines of alter ego and piercing the corporate veil, it is vital to tailor the law to account for these varying contexts. Here, both legislative and judicial solutions are possible. One possibility would be to revive prior law that prohibited one corporation from owning stock in another. To the extent it is the scale and complexity of large

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113. See, e.g., *supra* footnotes 95 to 97 and accompanying text.

114. MACKINNON, *FEMINIST THEORY*, *supra* note 74, at 192.

115. For a more sophisticated approach to liability in corporate groups, which prioritizes economic substance over mere form, see Philip Blumberg's extensive and promising work on enterprise liability. E.g., PHILLIP I. BLUMBERG & KURT A. STRASSER, *THE LAW OF CORPORATE GROUPS* (2002).

corporate enterprises that creates a lack of accountability, this legal change has substantial potential to ameliorate that daunting concern. Another possibility is statutory or judicial action to change the alter ego and “piercing the corporate veil” doctrines to permit more liberal access to the corporation and its assets. Corporations are currently permitted it to hide behind a series of subsidiaries. Indeed, currently many subsidiaries have no assets to satisfy creditors, nor is a creditor even aware that he is dealing with anything other than the parent corporation—making practical details, such as service of process, rather difficult.

### 3. Board of Directors’ Duties and Composition

Directors’ duties of care and loyalty must be redefined in state corporate law statutes to carry more substantive clout and must not be subject to amelioration in corporate charters or other contractual arrangements. It is stunning that words that hold so much promise have meant so little. The dominant conception of directors’ duties looks rather much like the traditional conceptions of a father’s parenting role: sitting in an easy chair, feet up, martini in hand, and glad that no one is telling him that there is any trouble in the house. Duties of care and loyalty need to move from a fatherly configuration to a motherly one. Loyalty would mean more what Judge Cardozo (demonstrating that feminist values are not confined to biological females) thought it meant: “the punctilio of an honor the most sensitive.”<sup>116</sup> Care would mean more what the settlement decision in *In Re Caremark International Inc. Derivative Litigation*<sup>117</sup> suggests: proactive, searching for trouble in order to prevent it or cure it rather than sitting back and hoping not to hear of any.<sup>118</sup>

The composition of the board of directors is one issue garnering significant attention in post-Enron discussions of corporate governance reform. Progressive corporate law scholars should join that discourse, pushing for reforms that are more than simply cosmetic, especially with regard to the composition of the board. For instance, boards should be primarily (not equally, or by simple majority) outside, independent directors. Furthermore, definitions of independence should be rigorous ones, and no credence should be given to claims that there are not enough good outside directors to go around, a claim that is laughable given the vast amount of talent in this country currently un- or under-employed.

### 4. Corporate Personhood

Though a vigorous debate regarding corporate personhood is mounting outside of the legal academy, progressive corporate law scholars have skirted this issue. The question whether a corporation should enjoy rights, such as due process and free speech, that a human is entitled to under our system of law is one that progressive corporate law scholars need to delve into in earnest. Grappling with the historical development of that concept will reveal the corporation more fully as the contingent so-

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116. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928) (“not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of the marketplace”).

117. *In re Caremark Int. Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

118. *Id.* at 968.

cial institution it is, rather than a natural or inevitable entity. The greater the understanding of the historical, social, and political contingency of the corporation, the greater the ability to see opportunities for change. Because progressive corporate law scholars understand many of the intricacies of corporate law, it is important that they add their voices to debates about corporate personhood.

### 5. Corporations and the Political Processes

In the United States, government is supposed to be of the people, by the people, and for the people, not the corporation. Again, a growing number of voices outside corporate law argue that corporations should be prohibited from participating in the political process, and progressive corporate law scholars should be part of that chorus. People should write laws that corporations obey, not vice versa. Campaign contributions and lobbying expenditures, whether direct or indirect, should be illegal, not tax deductible. Corporate officers and board members, while surely free to engage in the political process as individuals, should not be permitted to act in their corporate capacities in the political process, including fundraising.<sup>119</sup>

## V

### CONCLUSION

Sustained commitment to feminist values will require courage in addition to connections, context, and commitment. Some of the questions will not be easy ones to ask; indeed, assuming success in reform, some of the changes may not be easy ones to accept. For instance, were some of the changes suggested above implemented, the normative commitments to equality might hit particularly close to home when their effects reach academia. The ranks of progressive corporate law scholars, like other legal academics, are an elite group. Power and privilege are not easily released, though some of that will be asked if the progressive project is to reach its transformative potential.

Feminism is a rich theoretical and practical discipline on which to draw to further the progressive corporate law project. One of feminism's key insights has been that the "personal is political." For the individuals and communities who suffer from corporate malfeasance—from the worker with no work, to the pensioner with no pension, to the ill with no health care, and to the village with no clean water—the harms are indeed both personal and political. But their political nature is as much cause for celebration as for despair. Because they are political, they are also unnecessary and changeable.

Progressive corporate law has the potential to realign corporate activity and market economies with human (and thus societal) benefit. The present state of disruption in our economy is a key moment: with disruption comes the opportunity for change. Markets, properly regulated, are unquestionably a more liberating form of social organization than state control. And economic freedom is unquestionably a necessary precondition to any broader notion of freedom in this interconnected society of the 21<sup>st</sup>

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119. See KORTEN, *WHEN CORPORATIONS RULE*, *supra* note 9, at 266-67.

Century. Our progressive task is to make sure that our brand of capitalism leads to freedom—freedom not just for some, but for all.