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Abstract

Corporate law scholarship is dominated by traditional (masculist) forms of inquiry that ignore the sources and consequences of corporatism and effectively support the business corporation as a situs of male domination. Professors Lahey and Salter suggest that a challenge to the dominant perspective must come from groups, such as women, that have been socially marginalized and have not therefore fully internalized the terms of the discourse of bureaucratic capitalism. Only when female legal scholars actively study and promote feminist values such as participation, decentralization, and power sharing will a serious challenge to the patriarchal mentality of the business world be possible.

CORPORATE LAW IN LEGAL THEORY AND LEGAL SCHOLARSHIP: FROM CLASSICISM TO FEMINISM

BY KATHLEEN A. LAHEY* AND SARAH W. SALTER**

Corporate law scholarship is dominated by traditional (masculist) forms of inquiry that ignore the sources and consequences of corporatism and effectively support the business corporation as a situs of male domination. Professors Lahey and Salter suggest that a challenge to the dominant perspective must come from groups, such as women, that have been socially marginalized and have not therefore fully internalized the terms of the discourse of bureaucratic capitalism. Only when female legal scholars actively study and promote feminist values such as participation, decentralization, and power sharing will a serious challenge to the patriarchal mentality of the business world be possible.

I. INTRODUCTION

There are some connections between feminist inquiries into corporatism and (masculist¹) legal scholarship on corporations. Even more interesting, however, are the gaps or divergences between the two approaches to the area. It is in these connections and gaps that we have found the most challenging ideas for future work.

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Daniel Boen, Law Library, University of Windsor, assisted us in collecting many of the materials that we discuss in this paper. We received generous assistance in developing and clarifying the ideas in this paper from members of the corporate law study group at the 1985 Feminist Critical Legal Studies Conference, Newton, Mass.; in addition, Judy Greenberg has provided ongoing support and feedback in this process. A note on citation form: because part of our thesis is that gender matters, even in relation to corporate law scholarship, we have rejected the tradition of abbreviating first names, and instead have spelled out all first names in full (when they have been available to us).

¹ There are several terms that can be used to refer to nonfeminist work. Some radical feminists use the term 'malestream' to emphasize that nonfeminist work is usually written by men, and that men have a virtual monopoly on 'mainstream' thought. Other radical feminists have begun to use the concept of 'masculist' (or 'masculinist') to communicate the same point. We have decided to use 'masculist' in this essay because it more effectively enables the reader to think of gender-female people as being 'masculist' when they have resisted feminist analyses and (remain) committed to malestream projects, issues, or methodologies. This choice should not be seen as an attempt to distance ourselves from the alleged essentialism of radical feminism; rather it should be interpreted to draw attention to women's complicity and acquiescence (sometimes willing, sometimes not) in male privilege and hegemony. At this particular point in history, 'masculist' may be somewhat under-inclusive, if it is read as excluding gender-female people, but it is probably not seriously over-inclusive as regards to gender-male people.

The format of this paper is fairly simple. In Part II, we first review the literature on women and corporations; this is a short exercise because women scholars did not really start talking about corporations as a feminist issue until 1977. This literature reflects three of the main tendencies of feminist thought: liberal feminism, socialist feminism, and radical feminism. We argue that the radical feminist perspective offers the most powerful critique of corporate law, but that this approach was foreshadowed by the other two perspectives, and is clearly aided by the earlier literature. In Part III, we review the development of Canadian legal scholarship on corporate and securities law by employing a theoretical paradigm that places classical legal thought in tension with realist legal thought. This paradigm provides an explanatory basis for talking about contemporary modes of scholarship as being either reconstructed classicisms (tinged with the realist experience) or oppositional.² The discussion in Part III of the paper discloses the rather limited and fairly recent impact that realist, or even reconstructed classical thought, has had on corporate law scholarship, and the virtual nonexistence of scholarly work that reflects an oppositional approach. However, there are a few works in the reconstruction and oppositional modes, which begin to touch on the issues raised by the feminist analysis and, as well, demonstrate where the gaps between feminist and male stream approaches are located. The fourth section of this paper describes some of those gaps and connections and suggests directions for future work.

II. FEMINIST CRITIQUES OF THE CORPORATION

The types of concerns that contemporary feminists have raised in relation to corporations have been fairly typical of the main strands of political theory that have developed over the last twenty years. Liberal feminist analysis of corporations has tended to focus on the constraints and opportunities that organizational structures generate for individuals, especially for women. Predictably, this kind of analysis is preoccupied with changing those aspects of organizational structure that affect constraints and opportunities, while being less concerned with the legal or political implications of those organizational features. Socialist feminist (and Marxist feminist) analysis of the corporation has followed the masculist critique of corporatism. The corporate form as a legal and

² This descriptive framework is based loosely on Elizabeth Mensch, "The History of Mainstream Legal Thought" in David Kairys, ed., *The Politics of Law: A Progressive Critique* (1982) 18. It turned out to be easier to relate this framework to the legal literature than other frameworks that have been suggested for this symposium, perhaps because scholars who are working in this area are still having a difficult time breaking free from purely doctrinal methodologies and inquiring into the determinants of public policy.

administrative structure is treated as an invariable 'given' in socialist feminist thought, and most theorists have focused on the cultural consequences of the market-based culture of corporate capitalism — alienation, the devaluation of women's non-waged and waged work, the role of the family (and of women) in corporate capitalism, and the appropriation of women's reproductive labour. These are important issues in feminist thought, but they do not directly confront the role of the legal system in creating the corporate entity as a unique institution, and the result is a literature that largely fails to explore the social consequences of the form.

Although the liberal feminist and socialist feminist literature on women and corporations constitutes a major contribution to scholarship, it is only in recent radical feminist writing that we find attempts to directly confront the sources as well as the consequences of corporatism. This theoretical work combines feminist methodology with political analysis to uncover some basic perceptions about the nature of corporations in western industrialized societies. It is therefore to this passage of radical feminist literature that this essay looks in developing a feminist critique of Canadian legal scholarship on corporate law, and inferentially, of corporate law itself.

A. *Liberal Feminism*

Although contemporary feminists have almost always had a theory of how social and productive³ organizations should be structured, this theory was usually found in practice (*praxis*) rather than in writing. Moreover, its *praxis* has tended to be restricted to situations in which women have been free to make their own arrangements. Almost by definition, feminist theories about organizations have been found in the *praxis* of alternative feminist institutions such as collectives, cooperatives, alternative families, and feminist communities.⁴ Except to the extent that these alternative institutions have involved men who themselves have

³ The limitations of the language have defeated us here: all social or cultural institutions 'produce' something; that is their very function. Some institutions produce material things, like food, clothing, shelter, and so on; these are generally thought of as 'productive' or 'economic' institutions. We need a word for 'productive' that connotes material production but does not by exclusion devalue other types of cultural production. What is this word? In the meantime, we will use 'productive'.

⁴ See, for example, the feminist processes and educational institutions chronicled in Charlotte Bunch & Sandra Pollack, eds., *Learning Our Way: Essays in Feminist Education* (1983) at 114-68. These essays are particularly useful in drawing out the organizational implications of different tendencies in feminist thought, and in illustrating the differing weights that liberal, radical, and other feminists place on (dynamic) organizational processes, as contrasted with (static and idealized) organizational forms.

a committed alternative lifestyle, there has been little interface between feminist organizational *praxis* and male-dominated institutions like business corporations.⁵

1. 'How to succeed' guidebooks

At the same time that feminists were developing alternative institutions, other self-identified feminists were joining (or at least coming to a feminist consciousness within) male-defined and male-dominated institutions, and were developing a written body of theory about their experiences. Not surprisingly, this literature, which began to appear in about 1975 or 1976, was concerned with 'how to succeed' in male-dominated institutions, especially in the business corporations of the productive sector of the monetized economy. Books like *The Managerial Woman*⁶ concentrated on the psychological and sociological profiles of women who 'had made it' in the traditional business environment, and advised other women how to rise above their gender differences in competing for management jobs. According to this type of analysis, factors like birth order, family composition, and early relationships were seen as the cause of differential types of achievements among the women executives in their sample. Women were counselled to rise above their sex class (and presumably above their birth order, and so forth) by accepting the fact of their gender difference and taking specific steps to deal with its effects on their career options. Thus women are advised to decide whether they *really* want to succeed, to be very specific in career planning, to find a senior helper (the 'mentor' strategy), and to be active and risk-taking instead of being reactive and security conscious.⁷

Works like *The Managerial Woman* do perform the valuable function of explaining to women (and to interested men), in a specific and contextualized analysis, not only why women should not discount themselves, but also how to make fairly detailed plans for advancement. However, this approach is seriously flawed, for it puts most of the responsibility on women to change themselves in order to fit into pre-existing modes of organization, while paying very little attention to whether those types of changes are good for women, whether the so-called executive role is good for people in general, and whether the

⁵ For example, some feminist lawyers have had to struggle with practical questions like how to register a collective or a steering committee — both of which are non-hierarchical forms of management — as the 'officers' of business corporation, without giving in to the expedient of having people act as officers for the sole purpose of registration.

⁶ Margaret Hennig & Anne Jardin, *The Managerial Woman* (1977).

⁷ *Ibid.* at 157-62.

institutional features that supposedly call for those kinds of personal initiatives are optimally designed. This same criticism can be made of most of the 'how to succeed' books that have been published by liberal feminists (and by their sympathizers) since the mid-1970s.⁸ However, even the more scholarly studies of this genre fail to move much beyond the 'individual model for change' that one can see being promoted in the corporate survival manuals.⁹ Thus, it is not surprising that only tentative suggestions for organizational change are found even in the best of the scholarly literature on women and corporations.

2. Seeds of a structural critique

The most influential of the scholarly survival manuals is Rosabeth Moss Kanter's book on the effect that organizational structures have on individual behaviour,¹⁰ in which she critiques the "individual models of change" and offers some suggestions for structural change to overcome the limits of the individual model. Although Kanter has become increasingly absorbed with the personnel problems of mainstream corporations like IBM and Digital, her early work contains some promising (but not fully developed) elements of a feminist theory of organizations. Her critique of the individual model of change verges on the radical; she argues that "repair programs" for women perpetuate the basic problem: they allow managers to rationalize their discrimination against women; they ignore the similarities between women and men as well as the differences between various women; they treat people as being pro-

⁸ Most of the writing that falls into this category is unabashedly concerned with women's survival in business corporations: see, for example, Barbara Boricha-Kovack, *Power and Love: How to Work for Success and Still Care for Others* (1982); Sylvia Senter, *Women at Work: A Psychologist's Secrets to Getting Ahead in Business* (1982); Dean Peskin, *Womaning: Overcoming Male Dominance on Executive Row* (1981); Mary Welch, *Networking: The Great New Way for Women to Get Ahead* (1981); Sharie Crain, *Taking Stock: A Woman's Guide to Corporate Success* (1977); Betty Harragon, *Games Mother Never Taught You: Corporate Gamesmanship [sic] for Women* (1977); Cf. Elizabeth Gregg MacGibbon, *Manners in Business* (1936).

⁹ See, for example, Agnes Missirian, *The Corporate Connection: Why Executive Women Need Mentors to Reach the Top* (1982); Barbara Forisha & Barbara Goldman, eds., *Outsiders on the Inside: Women and Organizations* (1981); Cynthia Epstein & Rose Coser, eds., *Access to Power: Cross-National Studies of Women and Elites* (1981); Rosabeth Moss Kanter, *The Tale of "O": On Being Different in an Organization* (1980); Ruth Halcomb, *Women Making It: Patterns and Profiles of Success* (1981); Bette Stead, ed., *Women in Management* (1978); Caroline Bird, *Enterprising Women* (1976); Eli Ginsberg & Alice Yohalem, *Corporate Lib: Women's Challenge to Management* (1973); Roslyn Willett, "Working in a Man's World: The Woman Executive" in V. Gornick & B. Moran, eds., *Women in Sexist Society: Studies in Power and Powerlessness* (1979). We are indebted to Dan Tarullo's bibliography on women and law for assistance in collecting the references in this note and note 8.

¹⁰ Rosabeth Moss Kanter, *Men and Women of the Corporation* (1977).

grammed by their gender, with men being cast in the role of villains; they absolve the system itself of responsibility for manufacturing the psychology of its workers; and they pit gender groups against each other instead of focusing on structural changes.¹¹ In Kanter's analysis, characteristics that other researchers have described as "sex differences" in workplace behaviour are really the result of individual responses either to structural conditions, or to one's place in the organization. The core of her program for change, which is influenced by her research on successful alternative and utopian communities, is her conclusion that the use of hierarchical organizational structures results in the fragmentation of groups, and that fragmentation in turn generates dichotomy, competition, blocked opportunities, powerlessness, and nonproductive adaptive behaviour.¹²

From the seeds of this structural critique, Kanter develops the alternative organizational pattern that has become the basis of her successful consulting business. The main elements of this pattern are decentralizing decision-making processes, reversing the bureaucratization of modern management and administrative structures, flattening hierarchies, distributing formal authority more widely, improving communication and access to knowledge at all levels, and increasing participation by all types of workers.¹³ Her rationale for these structural changes is largely based on feminist principles of empowerment, which stress the importance of increased individual autonomy and discretion within the institution.¹⁴

Although Kanter's insights contain the seeds of a radical feminist critique of corporate and securities law, she actually stops well short of that critique in two important respects. First, she is primarily concerned with the problem of integrating women into male-dominated business corporations, not with changing corporations so that they become places where present women can become more fully involved.¹⁵ Second, she concludes that mere organizational change itself is not an adequate solution to women's problems in corporations, for the whole structure of the monetized economy continues to produce large corporations, which

¹¹ *Ibid.* at 262-64.

¹² *Ibid.* at 264, 266.

¹³ *Ibid.* at 273, 276.

¹⁴ *Ibid.* at 277.

¹⁵ This enterprise appears to have been a failure; Kanter reports that corporate management is even more exclusively male than it was seven years ago, for few women in earlier management training programs seem to have achieved management positions. See Susan McHenry, "Rosabeth Moss Kanter" (January 1985) 13:7 *Ms.* 62 at 108. The term 'present women' suggests that the category 'woman' will exhibit different characteristics in (future) different types of organizations.

in turn produce problems of size, hierarchy, organizationally-induced 'sex differences', and so on.¹⁶ As a specialist in the relationships between organizational structures and human behaviours, Kanter does not develop a critique of the economic and legal determinants of corporate size and market behaviour. Yet the seeds are there for a more thoroughgoing and radical critique, for Kanter has made crucial links between gender and organizational structure that have been ignored in other feminist work of its era.

B. *Socialist Feminism*

While liberal feminist analysis focuses its critique of the corporation on the effects of corporate structure on the women (and men) who work in those institutions, or on how those women can 'get ahead' more effectively, socialist feminist analysis is more concerned with the effect of corporatism on the larger culture, and on the role of women as workers in that culture. In the latter analysis, the business corporation as such is certainly discussed directly, but it also takes on a nearly symbolic significance in the development of a socialist critique of capitalism that takes account of gender. This observation is not meant as a criticism of the socialist feminist treatment of business corporations but rather is made merely to emphasize that a literature that treats the dominance of business corporations as a given cannot be expected to disclose a definitive discussion of the legal structure of corporations. A brief look at one of the leading socialist feminist discussions of corporatism in Canada will illustrate this point.

Dorothy Smith's paper on corporate capitalism¹⁷ parallels Kanter's liberal feminist critique insofar as Smith argues that the way production is organized — through the institutions known as corporations and families — determines the social roles of women. Smith argues that the rise of capitalism has not only alienated workers from their labour, but also separated consumption from production, families from the productive economy, and reproduction from the resulting public sphere. This analysis echoes Kanter's themes of fragmentation and hierarchy, for the very functions of human existence are split up between the home and the market, and ranked in a hierarchical manner that devalues and oppresses some people along both class and gender lines. The end result, of course,

¹⁶ *Supra*, note 10 at 285.

¹⁷ Dorothy Smith, "Women, the Family and Corporate Capitalism" in Marylee Stephenson, ed., *Women in Canada* (1977) 17.

is gender and class determinations of human behaviour, which behaviour is then interpreted as being natural to women and men. For example, instrumental behaviour that is associated with productive group activity becomes associated with the male personality because men tend to dominate these types of activities, while expressive behaviour associated with sustaining family relations becomes associated with the female personality because women perform the expressive function in a gender-determined and fragmented system of production.¹⁸

1. Structural critique

Unlike Kanter's critique of the role of the corporation, which is really limited to a discussion of fragmentation and hierarchy as being key features of organizations, Dorothy Smith develops a detailed critique of the legal structure of the corporation in order to discover just how corporate capitalism (unlike the earlier form of entrepreneurial capitalism) mediates social behaviour. Dorothy Smith starts with Berle and Means's notion of the business corporation as a form of property relations, in which corporate ownership replaces private ownership, and with Baran and Sweezy's understanding of the economic process of monopoly capital as an economic and an *ethical* end. She then speculates that the business corporation is an artificial individual that appropriates not only labour and surplus value, but also the human capacity for individual action.¹⁹ In what we consider to be a key passage in the feminist literature on corporate personality, Dorothy Smith writes:

The subordination of the individual at the managerial level to the corporation as enterprise, introduces a crucial mediating term in the relation between class and economic enterprise, that of authority. In relation to its individual actors the corporate enterprise is constituted as a system of authorizations by which individual actions are appropriated to the enterprise. What *he* does becomes *its* act.²⁰

Smith ties this appropriation to the legal concept of agency, which permits one individual to possess or own (in a legal sense) the acts of others. Since this appropriation affects managers, as distinct from workers, not only is the manager's labour controlled and appropriated, but the manager's entire personality, capacity for action, judgment, and authority is appropriated by the enterprise form. Building on Weber's analysis of bureaucratic authority, Smith concludes that an individual's office now *confers* authority that was originally referable to the ownership of private property, and in the individual's *exercise* of that authority, the corporation

¹⁸ *Ibid.* at 20.

¹⁹ *Ibid.* at 23-24.

²⁰ *Ibid.* at 24.

now reappropriates that authority.²¹ The modern business corporation was developed to serve as an agent or instrumentality for individual owners of private property, but it is now individual managers of the corporation who have become *its* agents and instrumentalities.

Smith's concept of agency or reversed instrumentalism carries with it the potential for a searching critique of corporate law itself, for the notion of agency or instrumentalism immediately raises the question of where the corporation finds the ethical and commercial standards that it imposes on the judgment and energies of its managers. Part of this source is the positive law of business corporations: an individual manager's actions belong to the manager only to the extent that the manager occupies an executive position, and those actions are at all times determined by legal ideas about loyalty, attentiveness, competence, judgment, and honesty in dealings with other managers, shareholders, regulators, workers, and consumers. This is a complex version of Marxian appropriation of labour, and it is useful in clarifying the relationship between legal norms and corporate structure. However, one must ask whether this analysis can be described as 'feminist'. In Smith's hands it is, for she uses it to demonstrate how women's productive and reproductive labour is appropriated by corporate capitalism, and to explain just where the market and family economies, for both working class and middle class women, fit into the process of the appropriation of human *existence* by artificial entities. Even without having drawn those connections, she must be considered to have entered into a feminist critique of the content of corporate law itself by drawing attention to the connections between instrumentalism in the practices of male domination and the constitution of the business corporation.

2. Women as workers

It is in her application of the reversed instrumentalism model to women's labour that Smith is most obviously writing from a feminist perspective. This portion of her argument will be summarized briefly in order to give some idea of this application, which tends to take her discussion away from the legal structure of the business corporation and toward a cultural critique of the effects of its structure. Yet, the notion of reversed instrumentalism also plays a role in this aspect of her critique.

Having theorized that corporate capitalism appropriates (predominantly) male workers in distinct ways that correlate to class, Smith then

²¹ *Ibid.* at 25.

examines the effect of that appropriation on their families, and on the women in those families. In contrast to the involvement of the elite ruling and managing class, only the labour of working class men is appropriated by corporations. Thus, the corporation can be considered to appropriate only the *labour* of working class women, insofar as the family functions as the place where labourers are stored during 'leisure' hours, and where they are serviced, maintained, fed, cleaned, solaced, motivated, and reproduced.²² However, the corporation appropriates the entire family of middle class managers, for as Smith concludes, the corporate structure requires that managers subordinate themselves and their so-called private interests to the corporation's goals, objectives, day to day practices, and ethics. As the moral status of the manager becomes central to a particular person's acceptability as a manager, "the middle-class family becomes directed toward creating and sustaining that moral status."²³ Thus the entire middle class family becomes charged with the enactment of the moral order that is produced by the corporation, and the middle class woman becomes responsible for 'managing' this moral order in a way that mirrors her spouse's agency within the corporate structure.²⁴ This aspect of Smith's analysis brilliantly extends Marxist feminist analysis of women's non-waged labour,²⁵ for the 'products' of middle class women's labour — the home, the children, the 'lifestyle' — are all seen as images of the corporate moral order, and are not determined by human needs as concrete or knowable as replenishing labour power.²⁶

Smith's analysis is a breakthrough in many ways, but it is a theoretical work that makes no attempt to answer two questions that a feminist legal scholar would then ask: What *are* the values of the moral order that is enforced by corporate capitalism through its manager-agents, both women and men? Exactly what role does the legal system play in this enforcement? The second question is clearly within the realm of the legal scholar.²⁷ The first question is answered by Smith only by implication, leaving further exploration to radical feminist analysis. However, it is interesting to note some of the values that characterize the moral order that has been developed and sustained by corporate capitalism: the

²² *Ibid.* at 22.

²³ *Ibid.* at 32-33.

²⁴ *Ibid.* at 33.

²⁵ See, for example, Mariarosa Dalla Costa & Selma James, *The Power of Women and the Subversion of the Community* (1972).

²⁶ See *supra*, note 17 at 33-44 for the details of this analysis of the role of middle class women, and of the other members of the family. Her contribution is unique, both in its class analysis, and in her insistence on tracing the effects of fragmented ownership out to the culture in which the fragmentation occurs.

²⁷ The question of malestream scholarship and enforcement is dealt with in Part III.

legitimacy of agency and instrumentalism; appropriation of personality (as well as of labour power); externality; commodification of human existence; hierarchical arrangements; 'dead end' products such as consumption-as-display (and not just for aesthetic purposes); image-keeping as work; trivialization of survival tasks; role as identity; wholeness as dysfunction (or even as deviance); achievement as success; respect for authority; and service for love.²⁸

C. *Radical Feminism*

Taken together, the liberal and socialist feminist critiques of the corporate entity in contemporary culture give a lot of insight into the effects of this form of social and economic organization on the individual behaviour of corporate managers as workers, on the function of women in the family and in the workplace, and on the very choices of objectives that are made by economic actors. Radical feminist literature on the corporation adds two further dimensions to this analysis: it explores the reasons behind the development of the corporate form in the first place and the role that it plays in serving the needs of liberal and capitalist patriarchy. Furthermore, it has generated a theoretical basis for the development of alternative forms that reflect the organizational principles of radical feminism. Both of these issues are surveyed briefly to conclude this review of the contributions of feminist thought to corporate legal scholarship.

1. Fragmentation and bureaucratization

The theme of fragmentation runs through all feminist critiques of the corporation. For Kanter, fragmentation results from hierarchical structure, competition, and organizationally induced sex differences, while for Smith, it arises (for middle class managers) when human activity and personality are separated from sources of ethical influence. Smith comes very close to seeing corporate capitalism as a complete social system; she traces the ethos of corporatism through most aspects of middle class existence. Yet this is still not a complete picture, for Smith almost completely exempts the working classes from her analysis, and completely ignores the unemployed or underemployed.

²⁸ See, generally, *supra*, note 17 at 33-44; see also Sarah Salter, "Extended Identity: An Alternative Intuition of Justice" (New England School of Law) [unpublished]; Carol Gilligan, "Feminist Discourse, Moral Values and the Law — A Conversation" (1985) 34 *Buffalo L. Rev.* 11; Angela Miles, "Ideological Hegemony in Political Discourse: Women's Specificity and Equality" in Angela Miles & Geraldine Finn, eds., *Feminism in Canada* (1983) 213.

Kathleen Ferguson²⁹ goes beyond both Kanter and Smith in characterizing this as an age of bureaucracy, in which the bureaucratic mode of organization is “a *structure* and a *process* which adds up to the total social system of our age.” Ferguson is certainly in agreement with Smith when she contends that in the culture of bureaucratic capitalism — whether practiced by the business corporation or by the state — “certain social acts are established and maintained, certain social objects are valued, certain languages are spoken, certain types of behaviour are required, and certain motivations are encouraged.”³⁰ Her analysis surpasses Smith’s, however, when she concludes that bureaucratic discourse, which she sees as a refinement of liberal discourse, is the dominant discourse of our culture and, according to radical feminist theory, is also the distinctly male discourse of power.³¹

Ferguson makes the connection between the corporate form of organization and “the distinctly male discourse of power” by examining how bureaucratic organizations actually operate — through discipline and control.³² The notion of ‘control’ is the key in joining this analysis with discourses of power. Ferguson describes bureaucratic control as dependent on separation, isolation, and depersonalization, as well as depowerment of the individuals, knowledge, and activities that it organizes. Wendy Brown has written an evocative interpretation of Ferguson’s concept of bureaucracy:

Bureaucracy fragments whole knowledges, whole purposes, and whole human beings into disjunct and one-dimensional parts, each of which is rendered dependent upon bureaucratic organization for its existence *as* a fragment. Bureaucracy is an instrument of total power which also mystifies its power through an abstract, universal, “politically neutral” discourse of efficiency, rules, roles and procedures.³³

When described in these terms, it becomes apparent that the business corporation is the paradigm of modernist bureaucracy. Its very legal form is a fragmentation of the whole range of entrepreneurial activities and of human judgment. Its method is “neutral” rules and roles and its goal is efficiency and domination.

²⁹ Kathleen Ferguson, *The Feminist Case Against Bureaucracy* (1984).

³⁰ *Ibid.*

³¹ Wendy Brown, “Challenging Bureaucracy” (1984) 2 *Women’s Review of Books* 16, reviewing Kathleen Ferguson’s book.

³² Ferguson’s notion of ‘discipline’, as well as her concern with discourse and bureaucracy, is borrowed from Michel Foucault, a radical critic of the modern social order. Foucault himself, however, has borrowed heavily from radical feminism in many passages, so it is fair to say that feminist radical thought and masculinist radical thought have both made significant contributions to Ferguson’s analysis. See generally Michel Foucault, *The History of Sexuality* (1978).

³³ *Supra*, note 31 at 16.

For those who are inclined to the radical feminist perspective on contemporary culture, the business corporation is a perfection of the masculist vision of self — existence as property, separation of accountability and enjoyment, abstract rules as justice, domination as ownership.³⁴ The only irony in this scenario is the fact that the corporate legal form so perfects and depoliticizes domination that even human ‘managers’ (the human equivalents of the business corporation) have become the instruments and agents of the corporation, rather than the title-holders of its immense powers, which they had initially set out to be.

2. Alternative organizational principles

The radical feminist analysis of corporations, especially when read together with the liberal and socialist feminist critiques, certainly sets out the terms for a feminist critique of Canadian corporate law. Furthermore, it has generated a basis for developing an alternative approach to organizational structures.

It will be recalled that Kanter began her inquiry into the effects of organizational structure on individual behaviour because of her interest in alternative and utopian organizations. She made numerous suggestions for alternative forms of organization — decentralization, nonhierarchical leadership, individual responsibility and discretion, diversity of gender, ethnic and racial experiences in workers, job rotation, group co-operation, and access to system knowledge.³⁵ Notwithstanding that these are excellent suggestions, corporate behaviour over the last eight years has made it clear that organizations can adopt many of these techniques and still retain their essential character. Obviously, something is missing from Kanter’s formula. Radical feminists posit that the missing element is an ethical structure that is capable of challenging the moral order of the dominant discourse, and of uncovering the essentially patriarchal nature of the dominations upon which corporate culture depends.

³⁴ Compare this projection of the masculist vision of self with its counterweight — pornography. Also developed as both a vehicle for and an antidote to separation and domination, pornography returns to men that which they lost in projecting the corporatized self. See Kathleen Lahey, “Pornography and the Canadian Charter of Rights and Freedoms: Toward a Theory of Actual Gender Equality” (forthcoming, *New England L.J.*). Judy Greenberg has elaborated on the connection between corporate culture and pornography in drawing attention to the violent and heterosexual language that the law uses to describe relationships between the legal process and the corporate process (‘piercing the corporate veil’) and between owners and corporations (‘raping the corporation’). The fact that human males feel that it is urgent for them to dominate corporations seems apparent; that human males feel that they have to impute a female nature to corporations in order to facilitate that domination (or to reverse the reversed instrumentalism initially set up by the corporate form) seems to parallel other contemporary uses of pornography.

³⁵ *Supra*, note 10 at 278-79.

Ferguson has drawn on the work of psychoanalytic and moral feminism in identifying 'feminist' ethical values with which to challenge the ethics of corporatism. Her goal is nothing less than to help generate a "discourse of opposition" to the discourse of bureaucratic patriarchy. From Carol Gilligan she takes permission to speak of women's unique moral judgments and ethical consciousness,³⁶ which are in direct opposition to the masculinist sense of the actualization of the separate self as essence of the modern project. From Nancy Chodorow she receives the idea of autonomous individuality as the masculinist resolution of the loss of mothering that the male child experiences when he discovers his "otherness".³⁷ Ferguson's vision of an alternative discourse is thus founded upon both women's sense of identity through connection, and not through separation and fragmentation, and women's sense of justice as being achieved through an ethic of responsibility, and not through an ethic of rules, rights, and entitlements.

Ferguson's critique of corporatism as a form of fragmentation and bureaucratization, and her vision of alternative principles of organization based on ethics of care, responsibility, connection, and sharing, suggest several major tasks for the legal scholar. The first task is to reread the literature of corporate law, including not only primary sources but also scholarly commentary, in order to develop a more detailed understanding of the values and practices of the legal subculture of the business corporation, and its relationships to the bureaucratized culture that we live in now. This task will involve legal scholars not only in their roles as lawyers but also in their contextualizing interdisciplinary work as legal historians, sociologists, economists, and so on.

A second task is to retrieve and relearn the important feminist work that has already been done on alternative models for the organization of so-called productive activity. For example, Flora Tristan, a French radical feminist, developed the first proposal for syndicalist production in 1843, in which she outlined a plan for a worker's self-governing corporation.³⁸ Contemporary feminists have remained actively involved in this project, notwithstanding that little attention has been paid to the strictly legal aspects of alternative forms of organization.³⁹

³⁶ See Carol Gilligan, *In A Different Voice* (1981).

³⁷ See Nancy Chodorow, "Family Structure and Feminine Personality" in Michelle Rosaldo & Louise Lamphere, eds., *Woman, Culture, and Society* (1974) 43; see also Salter, *supra*, note 28, which draws connections between Chodorow's work and the institution of private property (although not to private property that takes the corporate form).

³⁸ Flora Tristan, *L'union Ouvrière* (1844).

³⁹ See, for example, Halina Zaleski, "Women in Production Co-operatives: Unique Problems — Special Benefits" (1982) 11 RFR/DRF 24. Research into the legal aspects of alternative organizations would be especially rewarding, for two types of information could be obtained: how is business association law being used to create new forms (when it is); and, when it is not, what types of informal arrangements are being made, how are they documented or otherwise recorded/managed, and what alternative forms of dispute resolution (if any) are being used to resolve ongoing problems?

A third task, which builds on the first two, is to begin rethinking the legal principles and judicial concepts that determine the moral order within which organization arrangements are now made. There should also be a conscious effort to develop a detailed feminist critique of corporate practices and corporate law that reveals its ongoing role in perpetuating patriarchal values and power relations. It is this last task that will draw feminist legal scholars into a critique of the practices and legal norms of present corporatist and bureaucratized culture.

III. MAINSTREAM CORPORATE LAW SCHOLARSHIP

One important aspect of these tasks is to understand what role Canadian legal scholarship has already played in the ongoing discourse of bureaucratic capitalism. This section of the paper samples the issues that corporate legal scholars have thought are important, and how they relate (or do not relate) to the analyses that were developed in Part II of this essay. This section also uses a theoretical approach, for there is a basic relationship between the types of legal theory (explicit or implicit) that are employed in a study and the types of material that are considered to be relevant to the study. This section of the essay places classical legal thought in a dialectical relationship with realist thought, and then views post-realist legal scholarship as a series of attempts to synthesize the classical and realist modes. These 'reconstructions' of the classical mode are not the only tendencies in corporate legal scholarship that are found in contemporary literature; they are complemented by the emergence of 'oppositional' schools of thought that are associated with the neo-Marxist, law and society, and law and economics movements.⁴⁰

A. *Classicism*

Canadian legal scholarship in the area of corporations and securities law is no exception to the general pattern of legal scholarship described in the SSHRC report.⁴¹ It is overwhelmingly doctrinal in the sense that

⁴⁰ *Supra*, note 2 at 18. This framework is useful because it draws attention away from the idealized classical and realist modes (neither of which can be perfectly realized) and places it on the nonidealized modes (reconstructed classicisms and oppositional modes) that fall along the continuum that connects the two idealized and polarized modes. Note how the theoretical approach used in this section of the paper differs from the approach used in section II. These differences are, we think, symptomatic of feminist and masculist thought more generally. For further exploration of this point see Kathleen Lahey, "... Until Women Themselves Have Told All They Have to Tell..." (1985) 23 *Osgoode Hall L.J.* 519.

⁴¹ Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, *Law and Learning* (Chair: H.W. Arthurs) (1983) at 78-83, 89.

cases and statutes are its primary material, and traditional noncontextual case analysis is its dominant method. Choice of topics and methods for scholarly examination appears to have generally been an unsystematized exercise of personal preferences. Predictably, there are gaps and imbalances in the body of commentary that has been published. Scholarly output has taken the form of articles and essays, rather than monographs or treatises. A disproportionately large amount of scholarly output in the area is published by civil law scholars in comparison to common lawyers.

The predominant mode of this scholarship falls into the classical (or doctrinal) tradition, in which cases and statutes are examined for principles that can be applied to new situations.⁴² An excellent example of how classical legal consciousness deals with legal materials is found in an article on the floating charge by one G.Curtis, published in 1941.⁴³ In an attempt to theorize and justify the law on floating charges (a type of secured obligation), Curtis clearly believed that autonomous law could come to the correct conclusions, without reference to any other features of the social system. As Curtis wrote:

[T]he development shows the capacity of our law to expand and to supply social controls of its own motion. The merits of judicial courage in the right places have never been better illustrated; indeed, "bold" was the characterization . . . of Lord MacNaughton in the *Tailby Case*.⁴⁴

This kind of analysis is typical of legal classicism, which treats law as an objective system of knowledge that is capable of providing answers to all questions about social and economic behaviour, and which is separate from other spheres of knowledge.

Although it is easy to be critical of classical legal consciousness, especially when it is viewed in an historical context, it is important to realize that it is still considered to be a perfectly legitimate style of discourse. For example, last year one William Moull published an article on business law and the implementation of the Canadian Charter of Rights, which treated autonomous law as being a sufficient theoretical

⁴² The styles of argument that are used in the classical tradition are those that are legitimated by custom and usage. The distinguishing characteristic of classical legal thought (or liberal legalism, as it is sometimes known) is its belief in a formal and autonomous legal order, in which legal doctrine is considered to reflect a coherent view of culture. Legal doctrine is believed to be politically, economically, and psychologically neutral, and legal reasoning is considered to be a process that will yield the 'correct' result. The classical view of legal reasoning is actually an idealized decision-making process, in which the 'law' on an issue is considered to be predictable and discoverable by anyone with a reasonable amount of legal skill. The 'facts' can be determined through appropriate evidentiary and procedural rules, and the 'right' answer can be determined by any fair and reasonable judge. See generally *supra*, note 2 at 19-23.

⁴³ G.F. Curtis, "The Theory of the Floating Charge" (1941-42) 4 U. Toronto L.J. 131.

⁴⁴ *Ibid.* at 150.

approach for deciding how the Charter ought to apply to corporations.⁴⁵ Moull's concern is to determine whether corporations can be considered to be 'persons' and whether administrative agencies, the Toronto Securities Exchange, and Crown corporations can be considered to be 'government'. Going no further than published legal doctrine on these issues, Moull has proposed a 'security of the person' argument in which he stretches the classical view of the function of the corporate entity (which he says is to hold property) to apply to the Charter. He concludes that to divest a corporation of 'property' without due process is to imperil the security of the person.⁴⁶ This analysis is typically classicist not only because it relies only on 'legal' knowledge to resolve social and economic problems, but also because bits of that 'knowledge' (for example, the judicial pronouncement that the purpose of the corporation is to hold property) are taken out of their original context and used in an ahistorical, noncontextual manner to produce new 'knowledge' (for example, the knowledge that the corporation is a 'person').

The classical legal tradition in Canada has not been impervious to its own limitations. As early as 1931, some legal scholars seemed to recognize the inadequacies of the classical perspective, and to doubt (at least implicitly) the omniscience of law. For example, in a treatise on Canadian corporate law, Franklin Wegenast tried to describe how 'the law' on corporate names might be ascertained. Admitting that the law on the point was not at all clear, he suggested the following procedure: (1) examine the reported decisions, (2) try to build a consistent theory, keeping in mind: (a) general principles of English corporate law on names, (b) Canadian statutory provisions, (c) the basic differences between chartered and registered companies, and (d) the relation of chartered companies to the courts and to the executive.⁴⁷ Even this extremely tentative attempt to take account of public policy would not be sufficient to eliminate the essential uncertainty of the law on this point, for Wegenast admitted that the theory that would reconcile the largest number of cases would be 'correct', but that its logical results would be 'untenable'.⁴⁸ In other passages, corporate legal scholars express a sense of the limitations of classical analysis; 'public policy' is not openly adopted as a better guide, but legal doctrine is described as "the stultifying strictures of

⁴⁵ William Moull, "Business Law Implications of the Canadian Charter of Rights and Freedoms" (1983-84) 8 Can. Bus. L.J. 449.

⁴⁶ *Ibid.* at 476.

⁴⁷ Franklin Wegenast, *The Law of Canadian Companies* (1931) at 119-20.

⁴⁸ *Ibid.* at 120.

common law consideration.”⁴⁹ Further, judicial reasoning is criticized for substituting “scholasticism for intelligible judicial interpretation,”⁵⁰ and use of settled but irrelevant judicial doctrine in interpreting new statutory provisions is described as “an unnecessary exercise which can divert the court’s attention from its primary duty.”⁵¹

These suggestions that pure classicism is somehow inadequate to the demands of corporate legal scholarship should not be read as anything more than just that, mere suggestions. Legal classicism still thrives in Canadian corporate legal scholarship. For example, writing in 1981, Edwin Kroft published a major article in which he closely examined the United States approach to minority squeeze outs. Kroft recounted the United States approach, which seeks to take serious account of socio-economic factors in deciding on what types of regulation might be appropriate responses to squeeze outs, but he concluded that such an analytic framework should not be adopted in Canada. His main reason for rejecting such a contextualized approach was that Canadian legal culture, acting autonomously and without reference to social or economic realities, has already resolved the particular problem that the United States analysis isolates: the lack of a meaningful market for minority shares in a squeeze out situation. Kroft argues that because Canadian corporate law provides an artificial market for minority shareholders in some situations of oppression, and despite the severe valuation problems that arise in that artificial market, legal culture need not even engage in an analysis of the social and economic context in which those legal provisions might operate.⁵² Law is omniscient, and Kroft is fully confident that legal norms are themselves capable of solving all policy problems without reference to any other systems of knowledge.

B. *Realism*

The realist tradition challenges the closed formalism of doctrinal analysis and argues that the study of law properly involves the study of the political, social, economic, and historical contexts that shape legal

⁴⁹ Terence Baines, “Company Liability for Preincorporation Contracts” (1958) 16 U. Toronto L.J. 31 at 37 (arguing that promises should be enforceable if they are made in the ordinary course of business).

⁵⁰ Stanley Beck, Comment (1974) 52 Can. Bar Rev. 589 at 593 (contending that legislative intent should be considered in interpreting a new statutory provision).

⁵¹ Joseph Chertkow, “Compulsory Acquisition of Shares under Section 199 of the Canada Business Corporations Act and Re Whitehorse Copper Mines Ltd.” (1982-83) 7 Can. Bus. L.J. 154 at 161.

⁵² Edwin Kroft, “Further Reflections on ‘Going Private’ — Towards a Rational Scheme of Regulating Minority Squeeze-out Transactions” (1981) 13 Ottawa L. Rev. 356 at 412-13.

culture.⁵³ Canadian legal scholars have had the opportunity to observe and comment on rapid and profound changes in the patterns of economic behaviour and political activity that directly comprise its context. An accelerating pace of change in technologies and in distributions of financial power and communications has made it far less profitable for businesses to be conceptualized as stable hierarchies, controlled by a formal, coherent set of rules giving some flexibility only to a few powerful persons at the top rank. Instead, “[I]t has become possible — necessary — to think of organizations as a metaphor for the agreements of many people to work more or less in concert.”⁵⁴ However, even when political recognition of such changes has compelled legal scholars to note that a major revision of corporation law or securities regulation has taken place, their comments focus on the specific provisions that have changed, rather than on the overall political patterns or on the fundamental theoretical issues.

Some commentary and law reform studies focus on statutory alternatives that would change procedures and outcomes. Here the emphasis is typically on the effect of wide alternative statutory provisions, some of which may be drawn from other jurisdictions.⁵⁵ There is little rigorous examination, analysis, or assessment of the evidence that is considered to support political, economic, or social policy arguments, nor is there any significant examination of the relevance of those arguments to the proposed reform.

There are numerous occasions when some comparative material is introduced, such as parallel provisions of provincial statutes and of provincial/federal or Canada/United Kingdom/United States statutes. Historical development of statutory treatment is also common. However, the level of comparative analysis applied to such material is confined to noting that differences exist, and speculating on the extent to which future courts will apply the same analysis as has been developed under the compared statute. There is almost no discussion of different economic, political, or other contextual factors that might support scholarly functions of insight and generalization. Where some discussion of geographic context is almost unavoidable, as in discussions comparing Canadian and United States securities law, all too often the writer is content merely

⁵³ Styles of argument in the literature of legal realism include comparative analysis of legal provisions by reference to their differing social contexts, empirical studies that use social science techniques to identify and assess the relations between law and context, and economic analyses of the impact of law.

⁵⁴ Rose Moss, *Book Review* (1984) 2 *Women's Review of Books* 6.

⁵⁵ Specific language alternatives and techniques of statutory construction are neglected in the classical tradition.

to note that the securities markets in the two countries are enormously different in terms of size and structure, without either describing specifics of contextual differences or developing arguments for their relevance. Similarly, comparisons of corporate law provisions do not take the details of jurisdictional context into account. For example, it would be relevant in comparing the rights and remedies that investors have against directors to observe that, in contrast to the United States, much investment in Canadian business is from foreign sources, and that Canadian statutes require that some directors be Canadian.

Despite the fact that the literature on the social and economic context of corporate and securities law in Canada has grown dramatically in the last fifteen years — through the efforts of Canadian scholars and as a spillover effect of original work by United States scholars — legal realism has had only a limited effect on the Canadian style of corporate legal scholarship. Legal realism in corporate law most nearly achieved perfection in 1974, in Stanley Beck's article on shareholder derivative actions.⁵⁶ Although the article employs traditional case analysis and statutory construction in discussing the topic, Beck makes extensive use of non-Canadian material (both United States and United Kingdom-Commonwealth sources are used), including information on the cultural contexts in which these materials have been developed. Beck grounds his discussion in a political context as well, questioning the accountability of large corporations to the population at large and the coherence of the law in structuring an appropriate mechanism for realizing that accountability.

Beck argues that the 'ballot box' approach to accountability is no longer adequate, since it reflects only shareholder interests and does not reflect the fact that large corporate bureaucracies have other important constituencies. Drawing on the earlier realist work of Berle and Means, Beck rejects the classical view that the corporation is an entity that exists in order to optimize profits for shareholders. He instead takes the position that the constituency of the corporation is the entire citizenry and that the shareholders are mere *rentiers* of capital. Thus, his goal is to devise new methods of corporate government or "new modalities of accountability" through which to respond to this new reality.

Even though Beck uses an historical analysis to support the thesis, it is the essential non-contextuality of this apparent historical analysis that eventually limits it. Having never examined whether the 'ballot box' concept of accountability actually served the 'old' reality appropriately, Beck's proposals for new modalities of accountability are not grounded

⁵⁶ Stanley Beck, "The Shareholders' Derivative Action" (1974) 52 Can. Bar Rev. 159.

in anything more concrete than seemingly utopian beliefs about how alternative methods of accountability might operate in a complex culture. Although he does take some economic factors into consideration, he does not draw on any non-legal material in imagining how appropriate alternative methods might best be structured, and he certainly does not conduct any research of his own into the issues that he raises. Wonderful though this article is (in comparison with classicist writing), it is flawed by Beck's confidence that the 'legal mind' is capable of autonomously perceiving all information that might be relevant to the design of laws — the belief that a legal scholar's intuitively received knowledge is superior to other types of information.

This criticism of Beck's article also makes it possible to illustrate a criticism of the SSHRC report. The SSHRC report appears to treat all legal writing that goes beyond mere manipulation of judicial and statutory doctrine — such as comparative, economic, and historical studies — as being equivalent to each other and as being adequate and superior alternative techniques for scholarship. We would disagree as to their adequacy (and probably as to their superiority as well). A noncontextual or ahistorical comparative study is not necessarily any better than a study which is noncontextual, ahistorical, and *noncomparative*, for the method of both merely boils down to reiterative and manipulative doctrinal discussion.⁵⁷

When would a study such as the Beck article leave the realm of doctrine and speculation as to the implications of knowledge, and enter the realm of 'scholarship' as defined in the SSHRC report? According to the report, it would enter the realm of 'scholarship' when the intuitions and speculations that are treated as knowledge in that article become the subject matter of as rigorous and searching a critique as is now associated with doctrinal manipulations. By arguing for greater contextuality in all possible forms, the report implicitly adopts a realist theory of legal scholarship. Empiricism and 'scholarly research' as routes to improving the product of legal research is a realist claim, albeit one that is rarely articulated in such a direct fashion.⁵⁸

Even though the Beck article falls into the category of speculative and provocative legal scholarship, it certainly does not stimulate scholarly

⁵⁷ Indeed, a noncontextual or ahistorical comparative study would be twice as bad as a noncontextual, ahistorical, and *noncomparative* study.

⁵⁸ See David Trubek, "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stan. L. Rev.* 575, who argues that the realist project cannot be completed until both empirical and political/theoretical approaches are used in legal research.

inquiry into the issue of corporate accountability. The article is required reading in some business associations courses, but it has not really had any effect on policy formation, which says quite a lot for the status of legal realism (and of legal scholarship) in Canada. Our survey of corporate legal scholarship has uncovered very little additional material that can even be considered to be 'realist', according to the terms of our working definition, and none of it tries to deal with Beck's speculations.

In the 'barely realist' category we would place historical and empirical studies that do have the advantage of contextualizing legal doctrine, but that fail to actualize the challenge of realism to confront the political content of legal doctrine. Canadian legal scholars have produced some excellent work in this barely realist category. Gerald McGuigan, an economic historian at the University of British Columbia, has explored the origins of the corporate form from an historical viewpoint, and has concluded that its historical origins are distinguishable from its legal origins as found in precedent.⁵⁹ He approaches a realist perception of the relationship between law and history when he speculates that "we search for some sort of historical continuity in the evolution of the legal concept of the corporate form [because] current legal definitions of the corporation . . . are foremost in our minds."⁶⁰ His conclusion challenges settled beliefs about the relationship between business practices and the function of law, for he is persuaded that forms of organization arise spontaneously at the behest of business people, and are *not* created "at the permission of law."

McGuigan stops short of discussing the legitimating function, and therefore the political function, that law must play in such a process, for not all intents and not all methods of achieving those intents have been granted the status of legality that corporate law confers. Although hinting at the types of factors that might account for the substantive content of corporate law, McGuigan does not explore them explicitly, nor does he develop his intuitive perception that lawyers have played *some* role in the articulation of substantive rules. When Richard Risk, a legal historian, attempted the same type of analysis of the origins of Canadian corporate law, he took even less notice of the non-legal determinants of corporate law norms. His article might be classifiable as barely realist because Risk at least attempts a comparative (Canada and United States) study, but the 'legal' history is largely just that —

⁵⁹ Gerald McGuigan, "The Emergence of the Unincorporated Company in Canada" (1964) 2 U.B.C.L. Rev. 31.

⁶⁰ *Ibid.* at 33.

a noncontextual discussion of statutory and case materials, combined with a touch of social history and some so-called 'empirical' work.⁶¹

Also in the barely realist category are studies that employ a more conventional empirical methodology to test assumptions upon which law reform proposals are based. While realism does admit of empiricism, these studies are in the 'barely' subcategory because they, like the historical studies, stop short of confronting the political content of their theses, as well as of the rules or proposals they are investigating. Thus Peter Williamson, in his empirical study of the securities industry for the Department of Consumer and Corporate Affairs, collects a large amount of data on the economics of the Canadian brokerage business, commission rates, securities-related activities of banks and trust companies, other institutions, and investors. He then contextualizes the data in Canadian-United States comparisons and draws 'policy implications' from his discussions.⁶² Yet this paper, despite the fact that it draws up specific recommendations, hardly touches upon the political context of its subject, and buries politics under a mountain of so-called objective data. This is inevitable in light of Williamson's position as a consultant to the government during the course of the study, but the very impossibility of overtly discussing the politics of law in law reform work raises a serious criticism of the function of the law reform process.

Other empirical work is relegated to the barely realist category not only because it appears to be oblivious to political context, but also because the empirical methodology itself has some suspect features. For example, one empirical study into insider trading consists of a review of other studies on the extent of insider trading in Canada and the United States, a survey of insiders' attitudes as to whether insider trading is a problem, and conclusions as to how the legal system should deal with that problem.⁶³ Not surprisingly, the largest number of respondents thought that the legal system was not important in eliminating insider trading, but rather, favoured civil or administrative penalties, instead of criminal penalties, for breach of the rules.⁶⁴ Other studies appear to use statistical data more out of a desire to buttress a pro-business stance, than a desire to pro-

⁶¹ It is interesting to see what passes for 'empirical' work in legal scholarship. In the Risk article, he investigated the subject matter of 150 judicial decisions relating to corporate law, and discovered that they could largely be classified into four categories: shareholder-creditor priorities, calls for subscribed capital, corporate capacity, and corporate seals.

⁶² Peter Williamson, "Canadian Financial Institutions" in Philip Anisman *et al.*, eds., *Proposals for a Securities Market Law for Canada: Background Papers* (1979) 719.

⁶³ Edward Rosenblum *et al.*, "Corporate and Investment Attitudes Towards Insider Trading in Canada" (1983-84) 8 Can. Bus. L.J. 485.

⁶⁴ *Ibid.* at 489.

duce new empirical data out of the disinterested curiosity that is thought to be the hallmark of scholarly inquiry.⁶⁵ One of the very few studies that combines an awareness of the realities of political context with empirical methodology is C. Ashley's study of interlocking directorates, in which he found that ninety-seven individuals who were directors of Canadian banks held 930 other directorships in other groups in every sector of the economy.⁶⁶ Is it mere accident that this study was conducted by a political scientist, and not by a lawyer?

C. *Reconstructors*

Reconstructed classicists are scholars who yearn for the simpler days of legal positivism, but who have been so affected by the legal realist movement that they can no longer deny the relevance of so-called public policy considerations in analyzing legal issues.⁶⁷ Within the realm of corporate legal scholarship, two forms of reconstructed classicism are found in the literature of corporate law. In one, economic positivism appears to supplant the *legal* positivism of classicism as the source of ultimate truth about corporate law. For example, a recent article published by the University of Toronto purports to settle the question of whether the principle of limited liability in corporate law should be continued and under what circumstances.⁶⁸ The issue is framed exclusively in terms of economic efficiency, with efficiency being analyzed by reference to allocation of resources, functioning of capital markets, and transaction,

⁶⁵ See, for example, Colin Goff & Charles Reasons, "Corporations in Canada: A Study of Crime and Punishment" (1976) 18 Crim. L.Q. 468 (argues against the use of economic data in anti-combines prosecutions because of its 'legalistic' bias).

⁶⁶ C.A. Ashley, "Concentration of Economic Power" (1957) 23 Can. J. Econ. & Pol. Sc. 105; this study was cited in John Porter, *The Vertical Mosaic* (1967) at 234-35.

⁶⁷ Mensch actually identifies a number of strands of reconstructor thought, such as public law reconstructors and private law reconstructors. The small number of articles and books that fall into these subcategories in the corporate and securities law area makes it meaningless to try to make such fine distinctions in this essay; only the general concept of reconstructed positivism will be used here. See *supra*, note 2 at 29-37.

The reconstructed classical tradition re-introduces positivist and determinist beliefs about truth, knowledge, and coherence. The theoretical styles of reconstructed classicism include a neo-liberal reliance on procedure to mediate pluralistic values that ultimately rests on natural law concepts of deep structures of equality rights and rationality; see Salter, *supra*, note 28 for a feminist critique of Ronald Dworkin's version of natural law. It also is manifested in the concepts of efficiency and distributional expectations applied in some economic analysis of law; see, for example, Richard Posner, *Economic Analysis of Law* (1977) at 185 for the view that morality equals efficiency. Reconstructor styles based in the social sciences involve theories "defined as statements concerning factual regularities, and method as techniques to validate theory by testing it against the facts." Trubek, *supra*, note 58 at 584; see, for example, David & Chava Nachmias, *Research Methods in the Social Sciences* (1981).

⁶⁸ Paul Halpern *et al.*, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 U. Toronto L.J. 117. The impetus for this study can be traced directly to the work of United States economic positivists such as Posner and Manne.

information, and related costs.⁶⁹ The authors conclude that limited liability is most efficient for large and widely held corporations, but that unlimited liability is more inefficient for small and closely held corporations, because they tend to exploit the moral hazards to investors that are associated with power imbalances.⁷⁰

John Howard's paper on securities regulation is less obviously an exercise in economic positivism than the Halpern study, but economic positivism it is.⁷¹ Purporting to survey alternative models for an appropriate regulatory market, Howard frames his inquiry in strictly economic terms by asserting that there are three basic government functions: allocation of resources, distribution of income, and economic stability (this last point is defined as efficient and non-inflationary exploitation of resource use). Looking only at these criteria, he then examines the economic function of the securities market in choosing the most appropriate regulatory model. While this approach certainly exhibits the realist sensitivity to context, the only relevant context in this study turns out to be neo-liberal economic theory, with economic criteria serving the same positivist function that legal doctrine served in the legal positivism of classicism.

The second type of reconstructed classicism that appears in Canadian corporate law scholarship is best characterized as 'rejection of contextuality'. These writers are almost neo-classical in their desire to work out the implications of autonomous law. They appear to be prevented from totally ignoring social and economic context only by the very terms of the discourse in which they are engaged. Such an approach was taken in Philip Siller's 1976 discussion of the effectiveness of government directors as a method of ensuring that corporate behaviour reflects public interest.⁷² With no attempt to look at political context beyond the vague notion that corporations may not always act in the public interest, and with no data upon which to base his assertions, Sillers 'concludes' that their legal duties as directors prevent government appointees from truly acting in the public interest. His alternative solution is to allow national political debate and open policy formation to run their course; both of these forces, he argues, will adequately guard the public interest.⁷³ Although Sillers does not completely ignore policy implications, he uses them

⁶⁹ *Ibid.* at 126.

⁷⁰ *Ibid.* at 147.

⁷¹ John Howard, "Securities Regulation: Structure and Process" in *supra*, note 62, 1607.

⁷² Phillip Siller, "'Taming' the Modern Corporation Through Government Directors" (1976) 34 U. Toronto Fac. L. Rev. 30.

⁷³ *Ibid.* at 39-40.

intuitively rather than empirically in producing his recommendations, and in this, he is certainly following the classical tradition.

D. *Oppositionalists*

In contrast to a positivist view of theory, in which beliefs about reality are presented as propositions about facts that can be verified by systematic observation, the oppositional modes of legal scholarship present theory as forms of reflective consciousness or self-understanding in existing social relations. They seek to demonstrate alternatives to the "dominant forms of self-understanding" in the culture,⁷⁴ and thus that theory is a political choice.⁷⁵

The few oppositionalist insights that have been discussed by Canadian corporate and securities scholars have thus far been marginal, if not tangential, and have relied on material developed by scholars in other disciplines. Gray E. Taylor in his comment on the Ontario Securities Commission⁷⁶ shows a basic level of awareness of the underlying political nature of institutional theories and frequently cites a leading multidisciplinary social science study published in a public administration journal.⁷⁷ Taylor, referring to the difficulty in identifying a unitary public interest rather than "the interest of some group which the decision-maker confuses with the public," first sets up a traditional legal solution, and then rejects it on the ground that the decisions to be made may be inherently political.⁷⁸ However, Taylor does not describe or examine relevant political alternatives as such. Indeed, he seems to attribute the pressure for regulation to improve market conditions, for example, to merely uninformed outsiders seeking "the sudden and absolute application of economic theory that might well be inappropriate in a country whose existence in some ways defies that very theory."⁷⁹ He does not go on to examine alternative

⁷⁴ A. Wellmer, quoted in *supra*, note 58 at 593.

⁷⁵ David Trubek considers that the oppositional scholarship of the critical legal studies movement is "the first time Post-Realist legal scholars have been able fully to accept the implications one must draw from Realism, namely that no clear line can be drawn between legal scholarship and politics." *Supra*, note 58 at 584. The styles of the oppositional mode in legal scholarship includes the law and society analyses of sociological elite accommodation phenomena, pragmatic marshalling of social science data as a strategic basis for incremental, intuitively attractive reform, and the neo-Marxist analysis of legal culture as a hegemonic phenomenon legitimating the interests of the dominant class.

⁷⁶ Gray E. Taylor, "Comments on the Mandate and Operation of the Ontario Securities Commission" (1978) 36 U. Toronto Fac. L. Rev. 1.

⁷⁷ G. Bruce Doern *et al.*, "The Structure and Behavior of Canadian Regulatory Boards and Commissions: Multidisciplinary Perspectives" (1975) 18 Can Pub. Admin. 189, cited in *ibid.* at notes 37, 108-12.

⁷⁸ *Supra*, note 76 at 40.

⁷⁹ *Ibid.* at 8.

economic theories, or their political foundations. Elsewhere, unlike most legal scholars who venture beyond doctrine, Taylor does not limit his comments to suggesting that there may be alternative economic theories based on political choice. However, he does mention the class background and bureaucratic culture of the regulators, and notes the phenomenon of elite accommodation.⁸⁰ At most, there is only what can be termed inchoate development of an oppositional mode in Canadian corporate and securities legal scholarship.

IV. CONNECTIONS AND GAPS: DIRECTIONS FOR FUTURE RESEARCH

The invisibility of contextual and theoretical influences in scholarly output reflects how completely corporate law scholars are submerged in the folklore, the ideology, or (most recently) the discourse of bureaucratic capitalism.⁸¹ That discourse is not confined to the 'magic words' necessary to demonstrate good business reasons for freezing out minority shareholders, to get government and judicial recognition of incorporation, or to obtain approval of new securities issues. Instead it is a whole system in which "certain social acts are established and maintained, certain social objects are valued, certain languages are spoken, certain types of behaviour are required and certain motivations are encouraged."⁸²

In looking to the prospects for legal scholarship, the dominance of the discourse of bureaucratic capitalism strongly suggests that we shall see much more of what we have seen already. The power of the reality principle,⁸³ as it is defined in that system is amply demonstrated in the continuing invisibility of reflectiveness, even in the very face of acknowledged political transformations of statutory patterns and with explicit use of comparative material. 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.⁸⁴ Women are one such group, some of whose members have in recent years been admitted to the fraternity of legal scholarship. Feminist theory generates challenging new perspectives for analysis of legal phenomena generally, even in the unlikely area of corporate law.

⁸⁰ *Ibid.* at 39.

⁸¹ *Supra*, note 31 at 16.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

Women academics sometimes admit that they feel a comfort in corporate law that is not available to them in other, more apparently personal, areas of law. The invisibility of women in capitalist discourses is a comfort, for women are only infrequently participants, as investors or (less frequently) as corporate officers. Issues of oppression and power relations arise only between rich white males; the whole drama of corporate law thus has an air of unreality, a sort of legal 'star wars'.

On reflection, however, it is apparent that the impacts of corporate cultures are not in fact marginal to the experiences of women. One central organizing principle in complex capitalist interaction is the isolation and separation of people from property and from the impact that their actions have on other people. Another theme is abstraction — human interactions that are focused on single, limited transactions, instead of taking place in full context, over time. Women can therefore begin to speculate on the development of a feminist critical mode that is organized around the values of contextuality, continuity, and holistic participation.⁸⁵

Women who are struggling to find connections between their feminist selves and the legal discourses of corporate capitalism are advised to resist easy identification with popular trends in thinking about progressive organization forms. The European movement toward worker participation in two-tier management structures⁸⁶ and the North American rush to accommodate worker buy-outs of failing corporations⁸⁷ superficially give expression to the ideals of participation, decentralization, power sharing, reintegration of ownership and labour — but they are certainly not feminist movements. Neither is the growing interest in the Japanese management

⁸⁵ One example is a reversal of the free transferability of shares. An advantage of 'lock-in' that even Keynes recognized was that it would make people very careful about their initial choices as shareholders. From the company's perspective, the concept of lock-in reverses (in the company's favour) the whole general concept that shareholders do not have a vested right to the enterprise, but rather can be bought out, at fair value. Fragments of existing corporate discourse have anticipated this theme. The quasi-partnership cases, the going-private controversies, and the noted reluctance of the judiciary to permit compulsory acquisition under the apparently liberal terms of modern corporate legislation, all touch on the theme of who has the power to treat shareholder interests as being permanently locked in.

⁸⁶ See Detlev Vagts, "Reforming the 'Modern' Corporation: Perspectives From the German" (1966) 80 Harv. L. Rev. 23 for basic information on this management/worker participation. See also, Detlev Vagts, "European Perspectives: A Forward" (1979) 30 Hastings L.J. 1413, and Clive Schmitthoff, "Social Responsibility in European Company Law" *ibid.* 1419.

⁸⁷ A profound shift in the underlying moral purpose of the corporation has already occurred with the trend toward incorporating worker buy outs of failing businesses as not for profit corporations. This trend creates opportunities to rethink the major and minor premises of corporate law, and could even reopen some of the basic questions under business corporation statutes. In the United States, both federal taxation and state not-for-profit corporate statutes are being amended to facilitate this use of those statutes; the 1985 Canadian budget has proposed income tax amendments to facilitate worker participation. It remains to be seen whether the 'workers' who become involved in management in these buy outs will be rich executives (the usual case) or line workers.

model, with its emphasis on worker security, continuity, and management responsibilities.⁸⁸ Each of these modifications on the traditional business corporation remains profoundly patriarchal in practice as well as in ethics. If feminists feel moved to explore these variants, it should be to discover how feminist and masculist versions of concepts like participation, flattening of hierarchies, and so on, differ from each other, and how cultural barriers presently operate to prevent feminists from realizing their goals on a scale that is large enough to seriously challenge the patriarchal mentality in the business world.⁸⁹ Patriarchal social orders have demonstrated themselves to be incredibly durable and capable of absorbing and co-opting all sorts of challenges to patriarchal hegemony.⁹⁰ Feminists have already started a revolution by withdrawing support from the patriarchal nuclear family; perhaps it can be completed by concentrating now on the other main *situs* of male domination — the business corporation.

The issues that women must confront in such a project will not be trivial ones. Since masculist corporate legal scholars have not taken the effect of male domination into account in explaining the rise of the corporate form,⁹¹ feminists should do some basic research on the relationship between patriarchal culture and the development of business corporations. Such a contextualizing project appears even more urgent in the face of the wholesale exportation of western patriarchal culture, corporatized ethics, instrumentalized business executives, and the whole mentality of capitalist exploitation, along with what are euphemistically referred to as 'technology transfers' in the 'development process'. Feminist economists have begun the project of describing just how early European

⁸⁸ Somewhat incredibly, we have seen popular discussions of the Japanese management model that draw strong connections with 'feminist' management principles, despite the fact that Japan is an intensely patriarchal culture. So strong is the expectation that women will marry at a young age that Japanese corporations simply do not provide for 'deviant' female employees. According to a Japanese observer, women employees who approach the age of thirty without voluntarily withdrawing from employment are routinely driven out of their jobs, a practice that severely marginalizes all women workers. Japanese women have only recently organized to challenge this practice.

⁸⁹ As Kanter's earlier work suggests, it will not be sufficient (although it will be necessary) for feminist researchers to develop detailed accounts of feminist forms of organization and their relationships to legal norms; researchers will also have to chronicle the ways in which the larger economic context affects feminist processes.

⁹⁰ See generally, Zillah Eisenstein, *The Radical Future of Liberal Feminism* (1981), which sets out an excellent foundation for such a project. Eisenstein surveys the major epochs in western patriarchal culture from the perspective of political theory. Given the political content of legal norms, this is a particularly useful starting point.

⁹¹ Compare Morton Horowitz, *The Legitimation of Corporations* (Harvard Law School, 1985) [unpublished].

development has contributed to the worldwide domination of women;⁹² 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.⁹³ As with the original Star Wars (which started out as an apparently benign fantasy, a diversion), what feminists had initially thought was just a silly (male) fancy of the corporate world might well turn out to be a truly dreadful reality that women ignore at their peril.

⁹² The leading work is Esther Boserup, *Women and Economic Development* (1970); it should be read together with Walter Rodney, *How Europe Underdeveloped Africa* (1972) (the classic work on the theory of economic underdevelopment and exploitation); and Oscar Lewis, *Five Families* (1959) (a dramatic account of Mexican underdevelopment/exploitation). A reading of Lillian Rubin, *Worlds of Pain* (1976) suggests that working class women in North America could also be considered to be 'underdeveloped' in the sense in which Rodney uses the term. For details on just what aspects of western industrialized culture are being transferred to lesser (technologically) developed countries, see any issue of *South* magazine.

⁹³ The sensible starting place for this undertaking is the law school classroom. A comprehensive rereading of corporate law which scrutinizes the values and practices of the legal subculture of business corporations and their relationships to patriarchal bureaucratized culture cannot/should not be carried out by isolated individuals. Of course, 'teaching' methods would also have to be changed, for this is not an 'issue' to which there are any 'answers'. Feminist pedagogy can make a significant contribution here, for the feminist emphasis on process in education (as elsewhere) has enabled feminist academics to learn how to relinquish the 'control' and 'authority' that unfortunately is such a characteristic of legal education in masculinist hands.

Cynthia Lichtenstein has suggested that law teachers can contribute significantly to a change in the consciousness of corporate culture simply by turning basic corporate concepts "on their heads." For example, she suggests that feminist academics can approach the topic of "duty of care" as an ongoing feature of enterprise relationships instead of as a "crisis concept." This is a crucial function, for feminist approaches will have little impact on the present culture until they can be operationalized in law and in business practice in light of the very real factors that will oppose that operationalization. Mary Joe Frug has developed a highly effective technique for this kind of teaching that combines the feminist process of consciousness raising with a supportive conversational format that she calls "reading cases as feminists." These kinds of openended processes will be needed to create the kinds of moments of knowing that we have envisioned in this essay.