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Taking It to the Streets: Putting Discourse Analysis to the Service of a Public Defender's Office

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TAKING THE PUNISHMENT OUT OF THE PROCESS: FROM SUBSTANTIVE CRIMINAL JUSTICE THROUGH PROCEDURAL JUSTICE TO RESTORATIVE JUSTICE

BRENDA SIMS BLACKWELL* AND CLARK D. CUNNINGHAM**

I

INTRODUCTION

A. “When Justice is a Crime”¹

On October 10, 2003, the daily legal newspaper for metropolitan Atlanta carried a front page story about twenty-four people arrested in September for alleged traffic violations. They had spent anywhere from three to twelve days in jail without seeing a lawyer or receiving anything more than a perfunctory court appearance (in a jail-house courtroom) where they were informed of the charges, bond amount and court date.² Many were charged with minor violations that would normally result in only a fine; indeed, nine were pedestrians, not motorists, charged with such offenses as “Pedestrian Obstructing Traffic”³ or “Pedestrian in Road”⁴ (jaywalking) and “Pedestrian Soliciting a Ride”⁵ (hitchhiking).⁶ The newspaper reported that both the Chief Judge

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The authors thank Douglas Ammar, Ricks Anderson, John Pickens, and Julie Smith for their assistance and comments. Cunningham dedicates this article to the Honorable Avern Cohn in honor of his twenty-five years of service as a United States District Judge for the Eastern District of Michigan, which have demonstrated that “[o]ne of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien.” Mahaday v. Cason, 222 F. Supp. 2d 918, 920 (E.D. Mich. 2002) quoting NAACP v. Meese, 615 F. Supp. 200, 206 (D. D.C. 1985). See, e.g., Reilly v. Grayson, 157 F. Supp. 2d 762 (E.D. Mich. 2001); *In re Jackson Lockdown/MCO Cases*, 568 F. Supp. 869 (E.D. Mich. 1983); King v. Wells, 94 F.R.D. 675 (E.D. Mich. 1982).

1. The authors borrow this title from an investigative reporting series published by the Atlanta Journal-Constitution. *When JUSTICE is a CRIME: The 11th in a series on Georgia’s indigent defense system, Funding lawyers cheaper than jail time*, ATLANTA J.-CONST., Mar. 21, 2002, at A19.

2. Rachel Tobin Ramos, *GSU Law Prof Sparks Traffic Court Reform, Frees Inmates*, FULTON COUNTY DAILY REP., Oct. 10, 2003, at 1. The events reported in this newspaper article were prompted by a letter sent to the Chief Judge of the Atlanta Traffic Court by the Georgia Justice Project (see *infra* Part III) and co-signed by author Cunningham. Letter from the Georgia Justice Project to the Hon. Calvin Graves, (Oct. 7, 2003) available at <http://law.gsu.edu/ccunningham/BIO/TrafficCourtLtr01.pdf> (last visited Sept. 9, 2004).

3. ATLANTA, GA., CODE OF ORDINANCE § 150-266 (2004).

4. GA. CODE ANN. § 40-6-96 (2004).

5. GA. CODE ANN. § 40-6-97 (2004).

of Atlanta's Traffic Court and the chief prosecutor "agreed that none of the inmates should've been held for more than forty-eight hours without a probable cause hearing"⁷ and that both "were aware of the problems."⁸ Their explanation was that "[t]he city doesn't have procedures for probable cause hearings . . . because it's so expensive to have the police officers, a public defender and the solicitor at the jail to hold those hearings, especially in cases involving minor traffic violations."⁹

Not only was the systematic failure of the Atlanta Traffic Court to conduct probable cause hearings illegal,¹⁰ it is clear that these persons, jailed for minor traffic violations, received punishment far in excess of what they should have received even if they were found guilty as charged. For them, to borrow from Malcolm M. Feeley's trenchant book title, the process was the punishment.¹¹

B. "The Process is the Punishment!"

The Process is the Punishment, Feeley's award-winning study¹² of the handling of cases in a lower criminal court, first published in 1979, was based on his close observation of the Court of Common Pleas in New Haven, Connecticut. Feeley began with the perspective offered by Roscoe Pound in 1924, who identified such courts, which ultimately affect the largest mass of people, as generating suspicion of the legal system. Pound, as quoted by Feeley, attributed such suspicion as unsurprising given "the confusion, the want of decorum, the undignified offhand disposition of cases at high

6. Letter and attachments from Douglas Ammar, Executive Director, Georgia Justice Project, and Clark D. Cunningham to the following individuals: Shirley Franklin, Mayor, City of Atlanta; Calvin Graves, Chief Judge, City Court of Atlanta; Thomas Pocock, Chief, Atlanta Department of Corrections; Richard J. Pennington, Chief, Atlanta Police Department; Linda K. DiSantis, City Attorney, City of Atlanta (Oct. 7, 2003) (on file with authors), available at <http://law.gsu.edu/ccunningham/BIO/TrafficCourtLtr01.pdf> (last visited Nov. 7, 2004).

7. The Fourth Amendment to the U.S. Constitution requires a prompt judicial determination of probable cause to arrest as a prerequisite to any extended pretrial detention following a warrantless arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991).

8. Ramos, *supra* note 2, at 5.

9. *Id.* It should be noted that the chief judge also informed the newspaper that he was immediately implementing new procedures to make sure that no one arrested for a traffic violation was jailed more than forty-eight hours without a probable cause hearing. *Id.*

10. Over 10 years ago the U.S. Supreme Court held in *County of Riverside v. McLaughlin* that the Fourth Amendment requires a probable cause hearing to be held "as soon as is reasonably feasible, but in no event later than forty-eight hours after arrest," whenever someone is arrested without a warrant, as is always the case for traffic violations. 500 U.S. at 57. The practices of the Traffic Court also violated a Georgia statute dating back to the Civil War, which also required a hearing before a judicial officer within forty-eight hours of arrest without a warrant or, in the event that such a hearing did not occur, that the individual be released (GA. CODE ANN. § 17-4-62) (2004). Furthermore, under Georgia law, failure to release a defendant within forty-eight hours constitutes the tort of false imprisonment and may even be considered a crime. See *Potter v. Swindle*, 77 Ga. 419, 3 S.E. 94 (1887). ("Though an arrest without warrant be justifiable, yet to detain the prisoner longer than a reasonable time for suing out a warrant . . . is false imprisonment, if not kidnapping . . .").

11. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (2nd ed. 1992).

12. Feeley received the American Bar Foundation's Silver Gavel Award for *THE PROCESS IS THE PUNISHMENT*; the book was also awarded the American Sociology Association's Citation of Merit. See also Joseph R. Grumfeld, *Foreword to THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (2nd ed. 1992), at xv ("Feeley's 1979 study has already taken its place as one of the major studies of how laws are administered in the United States."). Feeley, a political scientist, is the Claire Sanders Clements Dean's Chair Professor of Law at the University of California at Berkeley.

speed, [and] the frequent suggestion of something working behind the scenes, [that] . . . characterize the petty criminal court in almost all of our cities.”¹³

Feeley found that Pound’s description of urban criminal courts was still accurate in New Haven fifty years later.¹⁴ Indeed, Feeley noted in 1992, in the book’s second edition, that while the Court of Common Pleas was replaced by a “lower division” of a unified trial court, the underlying processes and attitudes remained the same.¹⁵

Feeley’s key insight, captured by the book’s title, was that the experience of being arrested, incarcerated, and processed through pre-trial court procedures is the primary form of punishment administered by the lower criminal courts, rendering the ultimate adjudication and sentencing essentially irrelevant. As Feeley described, becoming engaged in the system itself generates a cost to these defendants not only directly, but indirectly as well.

For every defendant sentenced to a jail term of any length, there are likely to be several others who were released from jail only *after* and *because* they pleaded guilty. For each dollar paid out in fines, a defendant is likely to have spent four or five dollars for a bondsman and an attorney. For each dollar they lose in fines, working defendants likely lose several more from docked wages. For every defendant who has lost his job because of a conviction, there are probably five more who have lost their jobs as a result of simply having missed work in order to appear in court. . . . When we view criminal sanctioning from this broader, functional perspective, the locus of court-imposed sanctioning shifts dramatically away from adjudication, plea bargaining, and sentencing to the earlier pretrial stages. In essence, the process itself is the punishment.¹⁶

The Atlanta Traffic Court story presented above clearly illustrates the injustices that may result when the process becomes the punishment. First, substantive injustices¹⁷ occur as a result of pre-trial incarceration, especially for minor offenses. For example, in many such cases defendants may receive far greater punishment, based on incarceration length alone, than could be legally imposed if the defendant was ultimately found guilty: their “time served” exceeds the jail time (if any) that could be correctly imposed under the applicable law. Furthermore, because pre-trial punishment falls equally on the innocent and guilty, innocent people inevitably are punished as if they are guilty. Thus, what predicts the probability of punishment for many defendants in the lower criminal courts is neither likelihood of guilt nor severity of offense but simply degree of poverty: people who can afford neither a bond nor a zealous lawyer to advocate for their release do their time “up front.”

13. Feeley, *supra* note 11, at 6 (quoting ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 190-91 (1975)).

14. Feeley noted that “The very language used to describe the business of the lower courts reflects their low status. Cases in lower courts are universally labeled as ‘garbage,’ ‘junk,’ ‘trash,’ ‘crap,’ ‘penny ante,’ and the like. These words not only describe the way in which court officials come to think of their work, they also reveal how they think of the defendants before them, and, ultimately, themselves as well.” FEELEY, *supra* note 11, at 4-5.

15. *Id.* at xxi.

16. *Id.* at 30-31.

17. “Substantive criminal justice,” as used in the title of this article and throughout, describes the outcome of a criminal case in which the facts are correctly determined and the relevant law correctly applied to those facts. Feeley uses the phrase “substantive justice” quite differently, to describe an attitude of the judges he studied which de-emphasized correct factual and legal determination of guilt in favor of a more discretionary “understanding about the defendant’s involvement in a troublesome situation in order to arrive at an appropriate disposition.” *Id.* at 283.

This punitive pre-trial process also can seriously distort the determination of guilt or innocence. Not only are incarcerated defendants often told, "if you plead guilty you can go home today," the consequences of a guilty plea are minimized. Most lower criminal courts offer various forms of probation that imply the initial conviction will disappear if the defendant successfully completes the probation period, yet for many important purposes the conviction remains, permanently marking the defendant as a criminal.

A process that punishes based primarily on an arresting officer's discretionary decision to arrest, combined with a defendant's poverty, carries the real risk of condoning substantive injustice. Consider this scenario based on several cases observed by author Cunningham in a court serving a suburban county bordering a large city. A busy public defender scanned a misdemeanor file containing a charge of assaulting a police officer. According to the police report, when stopped by a white police officer for riding his bicycle improperly, the defendant, a young black man, took a swing at the officer. The defendant told his lawyer that he was stopped for no apparent reason and then maced by the officer when he did not immediately "take the position" and consent to being searched. The arrest took place a week ago, but because a \$10,000 bond was set, the defendant sat in jail. Noting that this was the defendant's first arrest, the prosecutor offered to accept the seven days already spent in jail as "time served" if the defendant would plead guilty. The public defender advised the defendant to take the "deal," telling the defendant, "I may believe your story, but it's going to be your word against the cop in front of what is likely to be an all-white jury—and you're going to be sitting in jail for weeks waiting for your trial." The public defender believed that he gave the defendant sound, practical advice, but in the process the lawyer really taught his client two profoundly disturbing lessons: (1) that justice was not available to him because he is poor and black, and (2) that the next time a police officer stops him, he should submit quietly and "take the position."

One outcome of this lack of substantive as well as procedural justice, as suggested by Tom Tyler and Yuen Huo, is that the lack of procedural justice in the lower criminal courts may impair public safety by reducing voluntary compliance with law enforcement. In 1998 Tyler and Huo conducted telephone interviews with 1,656 residents of Los Angeles and Oakland, California, who reported at least one recent personal experience with either police or courts in their community.¹⁸ Respondents were asked a series of questions about their experience, specifically focusing on the objective outcome,¹⁹ satisfaction,²⁰ perceived trustworthiness of the police officer or

18. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND THE COURTS* 28 (2002).

19. Outcome questions inquired about how much was gained or lost, overall favorability, and how the outcome compared to expectations and outcomes obtained by others similarly situated. *Id.* at 38 (tbl.3.3).

20. Satisfaction measures included questions about whether the officer or judge "generally did a good job" and whether the respondent was "generally satisfied." *Id.* at 44 (tbl.3.5).

judge,²¹ procedural justice,²² and willingness to voluntarily accept the decisions or directives of the officer or judge.²³

Their results “strongly support[ed]” the hypothesis that citizens willingly accept decisions of the police and the courts, even when those decisions are unfavorable to them, if they believe those authorities are using fair procedures and they trust the motives of the authorities.²⁴ Furthermore, their findings indicated that “the favorability of the outcomes that legal authorities deliver is not central to the justice that people experience or the trust that they feel in the motives of the authorities.”²⁵ Rather, the findings of this research were consistent with what Tyler and his colleagues have reported for over two decades: “people’s assessment of procedural justice and motive-based trust flow primarily from their evaluations of the quality of decisionmaking and the quality of treatment that is part of the process.”²⁶

Tyler and Huo separately analyzed responses from a sub-group considered by police and courts as at “high risk” for resisting authority, namely young men (eighteen to twenty-five years old) self-identified as either African-American or Hispanic.²⁷ They found that this group considered procedural justice issues when making decisions about their actions. Specifically, this research highlighted that respondents considered fairness of the processes utilized both by the police and the courts, as well as what they perceived to be the motives of the criminal justice actors they came into contact with. Indeed, Tyler and Huo concluded that for this group of respondents, “procedural justice and motive-based trust are linked . . . primarily to the quality of the treatment they received when dealing with police officers and judges, although the quality of decisionmaking procedures also plays a secondary role.”²⁸

These findings further demonstrate the necessity of working to increase the legitimacy of the legal process by increasing procedural justice. A number of programs have been developed that have begun to facilitate this process.

21. In addition to asking whether the officer or judge was “someone that I trust,” Tyler and Huo inquired whether the authority considered the respondent’s views, tried hard “to do the right thing,” and cared about the respondent’s concerns. *Id.* at 68.

22. Procedural justice was measured by asking how fair were the procedures used to make the decision and how fairly was the respondent treated. *Id.* at 54 (tbl.4.1)

23. Willingness to comply with authority was measured with questions tapping whether the respondent willingly accepted the decision, would like to see a similar situation handled the same way in the future, or considered going to someone to change the decision. *Id.* at 44 (tbl. 3.5).

24. *Id.* at 95.

25. *Id.* at 96.

26. *Id.*

27. “The population to which high-risk characteristics are attached is young (eighteen to twenty-five), male, and minority. A small group in our sample, 123 respondents, fit these demographic characteristics.” *Id.* at 157. The researchers add this caveat: “[The] study did not target this high-risk subgroup. A telephone survey is likely to miss many high-risk respondents, and they are also more likely to refuse to be interviewed. Hence, research directed at this group is needed to test the arguments made here.” *Id.* at 159.

28. *Id.* at 159.

II

PROGRAMS SPECIFICALLY DESIGNED TO MINIMIZE PRETRIAL INCARCERATION

Pretrial incarceration is the most punitive form of procedural punishment imposed by the lower courts. Specifically, its imposition primarily is caused by poverty, thus generating “punishment,” through confinement, on the basis of class rather than guilt. Furthermore, research indicates that pretrial detention can seriously distort the determination of guilt; those held in pretrial detention are significantly more likely to receive a guilty verdict than those who are released on bail or their own recognizance.²⁹ Scholars thus have identified the bail stage as a critical juncture in which programmatic changes should be explored as a way of increasing procedural justice.

As law professor Douglas Colbert has documented, the right to counsel is not consistently, or even regularly, applied at the bail stage.³⁰ As a result, pre-trial release hearings are often “perfunctory” and swift with the odds stacked against lower-class defendants, particularly when an unrepresented defendant enters a proceeding in which the prosecutor “is present and recommends bail.”³¹ The consequences should not be ignored, as the costs, both to defendant and society, are high. Lower numbers of releases correlate with higher costs to taxpayers that result from full to overflowing jails. The increased probability of continued detention that results from the lack of an attorney’s presence at bail proceedings has wide-ranging impacts. Legally, the defendant’s case is disadvantaged, as he or she cannot help the attorney from this point on with his case, and access to attorneys is, de facto, limited. Furthermore, defendants’ lives are greatly affected, as they may lose jobs and homes, and family disruptions may be amplified.³²

This section briefly describes two quite different but impressively cost-effective programs: (1) the Baltimore City Lawyers at Bail Project, which tested the effects of adding free legal representation at the first court appearance, and (2) the San Francisco Misdemeanor Pre-trial Release program, which provided social services in the jail at the point of arrest.

A. Baltimore: Lawyers at Bail Project

The Lawyers at Bail Project was conceived by Douglas Colbert³³ who, with his colleagues at the University of Maryland,³⁴ set out to determine if having counsel at

29. See, e.g., BRIAN A. REAVES, U.S. DEPARTMENT OF JUSTICE, STATE COURT PROCESSING STATISTICS: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1998, Bureau of Justice NCJ 187232 (1998).

30. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case For the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1723-24 (2002).

31. *Id.* at 1726.

32. See *id.* at 1720-21, 1735-36 (describing the impact on detainees).

33. *Id.* (providing an in-depth description of the Baltimore City Lawyers at Bail Project, which outlines the issues regarding counsel at bail and the impact of bail on case outcomes, as well as the project itself). Further discussion and assessment of this project is in *The Right of Counsel at Bail and Pretrial Reform*, at <http://www.law.umaryland.edu/facpages/dcolbert/asp/bail.asp> (last visited Oct. 8, 2004), and *The Pretrial Release Project*, at <http://www.abell.org/publications/detail.asp?ID=55> (last visited Oct. 8, 2004).

pretrial release hearings would increase the number of defendants charged with non-violent crimes released on their own recognizance. They posited that the presence of attorneys at bail hearings would increase both substantive and procedural justice, increasing the likelihood that the punishment would “fit” the crime as well as reduce punishment inflicted on these defendants by the process itself. An early experiment, conducted in Baltimore in the spring of 1998, involved twelve law students supervised by Colbert who represented non-violent misdemeanor clients—meeting with them both prior to and at the proceeding—and whose representation yielded either release on recognizance or reduced (and affordable) bond for seventy percent of those represented.³⁵ What followed was the creation of the Lawyers at Bail Project (LABP).

In August 1998, with funding support from the Abell Foundation,³⁶ the Lawyers at Bail Project was launched with a staff of twenty panel attorneys and three paralegals. Using a randomized process, LABP lawyers were assigned to cases, and data (both current and follow-up) were collected not only on these clients, but also on a subset of other defendants that did not substantially differ from these clients on sociodemographic variables. Findings confirmed that the presence of an attorney did have a positive impact on the probability that a client would be released, with the researchers noting that “lawyers’ advocacy led judges to release LABP clients on recognizance two and a half times more often, and to reduce bails for many others to affordable amounts.”³⁷ Hence, these defendants experienced an increased degree of substantive justice.

Additionally, the presence of engaged attorneys for these proceedings seem to have produced a more procedurally just process for clients at the lower end of the socioeconomic spectrum. Analyses of interviews with represented clients and unrepresented defendants, querying their satisfaction with the process and their belief that they were treated fairly, indicated that those with representation were more satisfied with both the process and the fairness of the process.

B. Center on Juvenile and Criminal Justice in San Francisco

The Center on Juvenile and Criminal Justice (CJCJ) is a private non-profit organization, headquartered in San Francisco, with a mission to reduce reliance on incarceration as a solution to social problems.³⁸ The CJCJ jail services division works to reduce incarceration levels in San Francisco by providing safe and effective programs to

34. Colbert’s co-authors were two criminologists from the University of Maryland: Ray Paternoster and Shawn Bushway. They conducted a randomized experiment and provided analytical expertise to help determine if the presence of lawyers at bail did make a difference. Colbert, *supra* note 30, at 1720-26, 1735-36.

35. *Id.* at 1736.

36. *Id.* at 1738-39.

37. ABELL FOUNDATION, THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND’S PRETRIAL RELEASE AND BAIL SYSTEM at http://www.abell.org/pubsitems/hhs_pretrial_9.01.pdf (last visited Sept. 9, 2004).

38. See Center on Juvenile and Criminal Justice, *From the Director*, at http://www.cjcj.org/about/from_director.php (last visited Sept. 9, 2004).

persons facing imprisonment, two of which are centered around reducing the bail population in San Francisco by providing supervision for those released.³⁹

The Center's first project, the Supervised Misdemeanor Release Program (SMRP), was initiated in 1987 and developed out of its partnership with the San Francisco Sheriff's Department. The goal was to provide an alternative to jail for misdemeanor defendants arrested on bench warrants because of a failure to appear in court, which would ultimately yield a reduction in the serious overcrowding problems faced by the jail.⁴⁰ This program involved screening all pretrial misdemeanants in the jail population, gathering additional information through interviews with those eligible for the program, and checking their references. This process guided SMRP staff in making recommendations to the court regarding pretrial release. If a client was granted release, the staff of the SMRP provided follow-up contacts, reminders of court dates and additional support until the case concluded. Data provided by the CJCJ indicated that the program was successful. In 1999, the organization reported that eighty-five percent of those released on recommendation of SMRP made their court appearances.⁴¹ These numbers essentially have remained steady over time.⁴²

One result of this process was the realization that a large number of defendants were unable to qualify for this program or citation release because they were homeless.⁴³ With this recognition, the "No Local [Address]" project was launched in 1991, with its aim of releasing with a "promise to appear" homeless misdemeanor defendants who, had they not been homeless, would simply have received a citation or an infraction warrant.⁴⁴ As with the SMRP, the success rate, measured in terms of appearance, was high; a compliance rate of seventy-six percent was reported over a six-year period with over 1,700 persons released.⁴⁵ Ultimately, the Sheriff's Department amended its release criteria for such citations in 1997, leading to this program's closing.⁴⁶

39. See Center on Juvenile and Criminal Justice, *San Francisco Jail Services*, at http://www.cjcj.org/programs/jail_services.php (last visited Sept. 9, 2004).

40. ALISSA RIKER & URSULA A. CASTELLANO, COMMUNITY-BASED TREATMENT: THE IMPACT OF THE HOMELESS PRETRIAL RELEASE PROJECT 4 (2000) at <http://www.cjcj.org/pubs/hrp/hrp.html> (describing serious jail-overcrowding problems, with a 20-year-old consent decree directing the San Francisco Sheriff's Department "to decrease its jail population and improve confinement conditions").

41. *Id.*

42. The CJCJ website reports that in 2001 the court return rate was 84%, with 828 clients released and supervised. See http://www.cjcj.org/programs/jail_services.php (last visited Sept. 9, 2004).

43. Alissa Riker & Ursula Castellano, *The Homeless Pretrial Release Project: An Innovative Pretrial Release Option*, 65 FED. PROBATION 9, 10 (2001) ("Though homeless persons arrested for new misdemeanor offenses are regularly released on their promise to appear, those arrested on bench warrants were ineligible for SMRP because staff could not maintain contact with the defendants to remind them of court dates.").

44. *Id.* at 10; Center on Juvenile and Criminal Justice, *Jail Services for the Homeless*, at http://www.cjcj.org/programs/jail_services.php#jsh (last visited Nov. 5, 2004).

45. *Id.* at 10.

46. The CJCJ credits the success of the "No Local" project as providing the basis for this change in policy. Center on Juvenile and Criminal Justice, *Jail Services for the Homeless*, at http://www.cjcj.org/programs/jail_services.php#jsh (last visited Nov. 5, 2004).

A second and more far-reaching program targeting homeless misdemeanor defendants, the Homeless Release Project (HRP), was initiated in 1996⁴⁷ to assist those arrested on bench warrants with pretrial release.⁴⁸ Based on a social work model and designed to both provide community supervision and to develop a “care plan” with the client to identify needs and to supply the client with pertinent community resources,⁴⁹ HRP went beyond simply serving as a pretrial release program to one that is much more social service centered. This shift yielded a more well-rounded program that not only gathers greater information—such as descriptions of the defendant’s “existing relationships with community providers,” and “information on where the offender can be found in the community”⁵⁰—to increase the likelihood of pretrial release, but also one that provided assistance to defendants in re-establishing their ties to the community at large. The latter effort was pursued upon release when HRP would assist defendants in first finding temporary housing, followed by a care plan delineating short-term and long-term goals, including mental and physical health and substance abuse treatments. The HRP staff also would notify and accompany these clients to court appearances.

It is important to point out that the services and plans developed for HRP clients were developed “in collaboration with the client,”⁵¹ thus involving the client in the process in a manner consistent with Tyler’s suggestion that defendants would interpret a process in which they had a “voice” as being more procedurally just. Further, the addition of social services provides the basis for “restoring” the defendants, and, more importantly, segments of the homeless population, back to the community as a whole. Finally, by removing such clients from the criminal justice system, specifically the jails, this program ultimately provides a cost-effective way of dealing with misdemeanor defendants.

Programs such as those found in Baltimore and San Francisco do address issues of substantive justice—by alleviating the punitive nature of the pretrial criminal process, which is imposed without regard for whether the defendant is guilty or deserves incarceration as punishment—and can increase procedural justice. These programs are important and should be highly valued for addressing these issues. However, the extent of these programs is limited. Specifically, these programs focus on narrow aspects of the criminal justice process, bail procedures. Hence, they fail to address inequities faced by disadvantaged individuals in other stages of the criminal justice process, which are in large part exacerbated by the social context of the accused.

In contrast, the Georgia Justice Project (GJP), discussed later in this section, assists defendants at *every* stage of the criminal justice system (including incarceration

47. Funding was provided by the United Way for the development and implementation of a four-year pilot program.

48. Riker & Castellano, *supra* note 43 at 10.

49. *Id.* The social work model employed by HRP is referenced as a Community-Based Treatment Model by Riker & Castellano in *The Homeless Pretrial Release Project* on page 10. Under this model, the social worker is charged with assessment of the client’s needs, development of a resource attainment plan, and follow-up with the client.

50. *Id.* at 2.

51. Riker & Castellano, *supra* note 40, at 6.

and post-release entry into society) and also combines a wide variety of legal advocacy and social services to enable defendants to rebuild all aspects of their lives. This program not only demonstrates remarkable commitment to providing substantive and procedural justice for its clients, but also moves into the realm of restorative justice by combining both social services and legal aid. Indeed, while this program was born out of a passion for substantive justice and remains dedicated to procedural justice, it has evolved over its seventeen-year history into a remarkable example of a new form of restorative justice.

III

RESTORATIVE JUSTICE AND THE GEORGIA JUSTICE PROJECT

A. Restorative Justice

At the heart of the increasingly influential restorative justice movement⁵² is the desire to heal. This movement developed initially from experiments in Ontario, Canada, and Indianapolis, Indiana, in the 1970s that drew from and applied Mennonite peacemaking principles and Native American practices to burglary and other property crimes.⁵³ A crime was viewed as a breach in the social fabric that required restoration. Conventional prosecution and punishment of the criminal was inadequate to repair this breach, particularly because the harms experienced by both the victim and the community were not healed simply by punishment of the offender. One set of experiments brought the victim and offender together for an intimate encounter mediated by a third person in which the offender admitted his or her wrongdoing and came to understand the harm caused to the victim while the victim learned about what led the offender to commit the crime. If the victim and offender had a pre-existing relationship, this encounter was intended to promote the restoration of that relationship; if they were previously strangers, the encounter was still intended to heal the social fabric by reducing the fear, anger, and alienation both victim and offender were likely to feel as a result of the crime. A related experiment expanded this encounter to include other persons directly or indirectly affected by the crime into a “sentencing circle” that deliberated, often for many hours, seeking to reach a consensus about what the offender should do to repair the harm he or she had caused.

Restorative justice has become a global movement, with applications in highly varied settings. Because restorative justice began and has developed as a set of practices and principles rather than as a conceptual theory, its leading proponents have been reluctant to promulgate a single unifying definition.⁵⁴ However, the literature in

52. Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42 THE BRIT. J. OF CRIMINOLOGY at 596, 598 (2002) (noting that a resurgence of restorative justice in practice occurred internationally during the 1990s).

53. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 4, 11 (2002).

54. Perhaps the most expansive definition of restorative justice has been offered by Howard Zehr: “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.” *Id.* at 37. Zehr’s book, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE (1990), is a seminal

the field consistently speaks in terms of “victims” and “offenders,” terms that assume both that a crime has been committed and that the criminal—the “offender”—has been conclusively identified. This terminology thus has excluded from the potential scope of restorative justice at least three categories of criminal defendants: (1) clearly innocent defendants who still need healing from the harm caused by accusation, arrest, incarceration and pretrial court procedures; (2) defendants whose legal guilt may be uncertain or unprovable and who may nonetheless recognize that their own bad decisions contributed to the situation leading to arrest;⁵⁵ and (3) defendants who are prosecuted not in response to a complaint by an individual victim but rather by a regulatory state (e.g. traffic offenses, drug possession, providing a false name to a police officer, prostitution, gambling, bootlegging).

Even if the victim is identifiable and the defendant accepts the “offender” designation in order to participate in conventional restorative justice practices, most defendants need restoration to a different or larger community than one defined as those harmed by the crime. Arrest and incarceration is itself a radical separation from any kind of community other than that of other prisoners and is often likely to sever a low-income person’s ties to employment and housing. Defendants may emerge from jail not only homeless and unemployed but also to find that their families have shunned them and their children have been placed in foster care. Of course many defendants may have already lost connection with any kind of healthy or supportive community before they were arrested.⁵⁶

The apparent requirement that a defendant be found an “offender,” either through confession or adjudication, also tends to exclude (or at least alienate) a key player in the criminal justice system, the defense attorney. The defense lawyer is likely the only person the defendant can speak to freely without risking criminal liability and is the most competent person to help the defendant navigate the criminal justice system. But if the defendant has not yet been adjudicated guilty, the defense lawyer is understandably reluctant for his or client to enter into an encounter that requires admission of guilt without knowing in advance the likely sentencing consequences (or the likelihood of a dismissal or acquittal if the presumption of innocence is maintained). Further, the culture of criminal defense practice often discourages conversation between

work in the field, and he is often described as the “grandfather” of the restorative justice movement. *Id.* at 74. He is co-director of the Conflict Transformation Program at Eastern Mennonite University. *Id.*

55. See, for example, the story of one GJP client, “Lynn,” who was charged with murder. Lynn, a teenaged girl, was present when her cousin’s boyfriend shot and killed a man who had previously insulted Lynn and her cousin. Lynn ultimately pled guilty to conspiracy to commit aggravated assault and was sentenced to four months of incarceration and five years of probation. During the pretrial period Lynn wrote a letter of sympathy to the victim’s family and after sentencing she and her mother met with the victim’s father. Douglas B. Ammar, *Forgiveness and the Law – A Redemptive Opportunity*, 27 *Fordham Urb. L.J.* 1583, 1583-84.

56. The story of Ricks Anderson is a powerful example. See *infra* notes 87-89 and accompanying text.

lawyer and client about either legal guilt or moral culpability.⁵⁷ And if the defendant has been found guilty, many defense lawyers consider their job to be concluded.⁵⁸

Both because the restorative justice movement offers an appealing new vision for criminal justice and because its practice is becoming widespread, many scholars are now engaging in constructive critique and suggesting reconceptualization. While it appears that a pure conceptualization of restorative justice envisions elimination of the traditional justice system,⁵⁹ problems with the viability of this, in practice, are numerous, including issues regarding due process,⁶⁰ ethnic or racial disparity in outcome,⁶¹ and further victimization of the victim through continued contact with the offender.⁶² Another critical question is the role and meaning of "community." Andrew Ashworth has noted that one difficulty in including the community into a restorative justice policy model is the lack of a clear definition of "community."⁶³ He argued that a geographic depiction of community is insufficient given the complexity of our society and suggested that a better conceptualization would be those involved in the offense.⁶⁴ Indeed, it is likely that the most successful program, as described by Ashworth,⁶⁵ is one that can exist in today's political setting, that maintains the traditional justice system, and that utilizes a conceptualization of community that involves those who work in the justice system.

As a result of these inquiries, a number of scholars have noted that perhaps the concept of community should be broadened, particularly as restorative justice must, at the moment, co-exist alongside the traditional justice system.⁶⁶

57. Douglas Ammar & Tosha Downey, *Transformative Criminal Defense Practice: Truth, Love and Individual Rights – the Innovative Approach of the Georgia Justice Project*, 31 *FORDHAM URB. L. J.* 49, 59-62 (2003).

58. "To my knowledge, there has been no consideration of the role that the criminal defense attorney might play. . . . Today, restorative justice processes generally do not begin until after the criminal trial is over and the defense attorney is out of the picture." Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 *J. L. & RELIGION* 211, 213 (1999-2000).

59. Andrew Ashworth, *Responsibilities, Rights and Restorative Justice*, 42 *BRIT. J. CRIMINOLOGY* 578 (2002); see also Kathleen Daly & Russ Immarigeon, *The Past, Present, and Future of Restorative Justice: Some Critical Reflections*, 1 *CONTEMP. JUST. REV.* 21, 30 (1998) (noting that restorative justice "sets itself against traditional justice practices").

60. Ashworth, *supra* note 59, at 578.

61. *Id.* at 580-82.

62. As Ashworth notes, the possibility of such secondary victimization is only beginning to be explored. *Id.*

63. *Id.* at 578.

64. *Id.* at 582.

65. Ashworth has highlighted the role of the offender in the restorative justice framework, noting in particular the link between the offender and the actors in the criminal justice system: "[T]he closer the adjudicators and enforcers are to the offender, the more likely they are to be effective in bringing about the desired changes in behaviour (partly, perhaps, because their legitimacy is more likely to impress itself on the offender)." *Id.* at 582, *et seq.*

66. James Bonta et al., *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 *CONTEMPORARY JUST. REV.* 319, 333 (2002) (determining that the program they have evaluated, which focuses on offenders, "should encourage those who see restorative justice as offering a viable alternative or adjunct to traditional criminal justice") (emphasis added); see Lode Walgrave & Ivo Aertsen, *Reintegrative Shaming and Restorative Justice: Interchangeable, Complementary, or Different?*, 4 *EUROPEAN JOURNAL ON CRIMINAL POLICY & RESEARCH* 67 (asserting that restorative justice can be reflected in a wide range of programs); see, e.g., Daly & Immarigeon, *supra* note 59, at 30, 31, 37.

B. The Georgia Justice Project⁶⁷

This section offers an extended case study of an innovative non-profit organization in Atlanta, the Georgia Justice Project (GJP), that is having notable success in restoring defendants to the community by integrating restorative justice principles into the setting of a criminal defense practice. Like any conscientious defense attorney, GJP lawyers strive for substantive justice—vindication of the wrongfully accused and, for those found guilty, a sentence that is fair and appropriate. However, they also resist the procedural injustice of the criminal courts, working hard to keep defendants out of jail while the case is pending and affirming at every step the dignity and worth of their clients. Over time the organization's commitment to substantive and procedural justice and to developing personal relationships with its clients has caused it to evolve into a complex organization that defies simple description. The GJP describes itself as "an unlikely mix of lawyers, social workers, and a landscaping company."⁶⁸ The organization explains its mission in the following words: "When a poor person is accused of a crime, most of society sees this as an end. Georgia Justice Project sees it as a beginning. . . . GJP defends people accused of crimes and, win or lose, stands with our clients while they rebuild their lives."⁶⁹

The GJP undertakes this ambitious mission by first creating a more procedurally just process: its defense lawyers involve the client in the case to an unusual degree, for example by promoting procedural justice at least in the lawyer-client relationship even though they have limited control over how other agents in the criminal justice treat their clients.⁷⁰ In other words, GJP is a program that is engaged in "restoring" defendants by increasing procedural fairness within traditional justice processing. Second, and perhaps more importantly, GJP creates a kind of new, temporary "community" in which the success of the defendant, not only in the legal case but also in the life changes they engage in, is supported.⁷¹

The following story told by Douglas Ammar, the executive director of the GJP, is a powerful example of how a person charged with a crime has been restored in almost every imaginable meaning of the word.

Ben⁷² was married last month. Most of the GJP staff was there. We have worked with Ben for over ten years. Five years in prison and five years out of prison. He was imprisoned after

67. Unless otherwise indicated, the information in this section is based on Cunningham's Interview with Douglas Ammar, Executive Director, Georgia Justice Project (Nov. 14, 2003).

68. See Georgia Justice Project, *About the Georgia Justice Project*, at <http://www.gjp.org/about.html> (last visited Sept. 9, 2004).

69. *Id.*

70. In *The Past, Present, and Future*, Daly and Immarigeon noted that one difficulty of restorative justice is the question of "restoring the injured parties." They questioned whether "priority [is] given to offenders or to victims with respect to fairness?" Daly & Immarigeon, *supra* note 59, at 37.

71. Paul McCold & Benjamin Wachtel argue in *Community is Not a Place: A New Look at Community Justice Initiatives*, that within the restorative justice framework, "it is important for community justice to encourage and create community, as a perception of connectedness to an individual or group in its efforts to respond to and prevent crime. The microcommunities created by incidents of crime are a useful framework for action." Paul McCold & Benjamin Wachtel, *Community is Not a Place: A New Look at Community Justice Initiatives*, 1 CONTEMP. JUST. REV. 71, 81 (1998). This is consistent with Ashworth's position that different actors in the criminal justice process are important "community" elements. Ashworth, *supra* note 59, at 582-84.

72. "Ben" is a pseudonym provided by Ammar to protect the confidentiality of the actual client.

being convicted of armed robbery. He was sixteen[]years old and, quite unfortunately, he grew up in prison. We were with him throughout his case. We visited him during his mandatory five-year term in prison. He started working for GJP's in-house business (New Horizon Landscaping) within a week of being released from prison. . . . At his wedding, ten years after interviewing a scared kid in jail, I feel nothing but pride. He is marrying the mother of his children and he is in the best place I have seen him in years. He successfully went through a drug treatment program. He enrolled in a local community college. And he has been a dependable part of our landscaping company. . . . As Ben's grandfather performed the ceremony and about one hundred or so friends and family gathered around, I saw a community. I saw the lines blur between lawyer and client, employee and employer. Client turned counselor turned supervisor turned friend. I saw the breaking of old and the formation of community. It is this vision of community that keeps me going. After almost fourteen years of doing this work, Ben's wedding provided a glimpse—a confirmation, really—of our goal.⁷³

Although GJP has, since its inception, had as its core activity providing free legal representation to indigent defendants in the Atlanta metropolitan area, it operates in a way very different from conventional public defender programs. As Ammar explains:

At the GJP, the attorney-client relationship is only the beginning of the relationship, not the end. It does not define the boundary of our relationship. In the realm of criminal defense and legal ethics, many assert that such amorphous boundaries cause problems in the attorney-client relationship and are beyond the scope of professionalism. We have found the opposite to be true. More permeable boundaries allow our clients to trust us more and begin to see us as true advocates.⁷⁴

Ammar insists that “[b]eing relationship driven is the most unique and powerful aspect of the GJP’s practice. At the GJP, we seek long-lasting, redemptive relationships with our clients. Attorneys and other staff delve deep into clients’ lives to better understand their legal, social, emotional, and mental health background.”⁷⁵ The “justice” in the middle of the organization’s name is not just the substantive justice of a correct adjudication of a criminal charge. Indeed, it even goes beyond the procedural justice of a fair criminal proceeding. Ammar has reached out and adapted another description of justice to explain their work—*restorative justice*: “[I]t is the status of the relationships (attorney-client, client-victim, client-community) that creates the opportunity for restoration—restoration for defendants, victims, and the community. For restoration to be possible in the criminal justice system, the centrality of “relationship” is vital.⁷⁶

C. The History of the Georgia Justice Project

To understand the current practices of GJP, particularly if there is to be an effort at replication, the history of the organization must be recounted. It is within this historical context that the elements of substantive, procedural, and restorative justice can be teased out. The Georgia Justice Project did not originally develop out of any grand theoretical underpinnings, nor was it purposively guided by restorative justice tenets in its beginnings. Rather, the project developed and evolved organically, such that all

73. See, e.g., Ammar & Downey, *supra* note 57, at 49-50.

74. *Id.* at 56.

75. *Id.* at 55.

76. *Id.* at 56.

the players greatly affected the agency's function. It is thus revealing to retrace the steps of those who have been particularly influential in the project's evolution, as it is only through such an account that the importance of listening and responding to the defendants themselves becomes clear.

In the eighteen years since its founding in 1986, the Georgia Justice Project has grown from a one-person operation operating out of a house into a nationally known organization with eight full-time employees (including three attorneys and two social workers), as well as two part-time counselors, a landscaping crew, and, at almost all times, a large contingent of student interns from a variety of disciplines.

The organization began as the initiative of a single attorney, John Pickens. While still a partner in one of Atlanta leading business litigation law firms, Pickens had volunteered for several years at a homeless night shelter operated by a church near downtown Atlanta. As homeless people at the shelter learned he was a lawyer, they began calling him from local jails and asking for legal advice and representation. As a result, Pickens started going to Atlanta's various criminal courts, first as an observer:

Before I became actively involved in the criminal justice system, I went to the courts to observe what was happening. From the outside, things felt rushed—hctic—somewhat confused by the speed of persons passing through the courts. Something wasn't right. It seemed like people were being expedited.⁷⁷ That feeling of years ago has now been confirmed—expedited justice is no justice at all.

Pickens then moved from observation to doing volunteer criminal defense work for the homeless. That experience led him on a pilgrimage that began when he left the law firm in 1981 to open a store-front law office in a poor section near downtown Atlanta in order to be accessible to low-income and indigent clients. Over the next five years Pickens continued both his volunteer work with the homeless shelter and his legal practice with the indigent. Pickens came to feel even more intensely that the conventional model for indigent legal representation was inadequate to meet the myriad legal and social needs of indigent criminal defendants. As a result, in April 1986, he left private practice entirely to found a non-profit organization that was initially called "The Atlanta Criminal Defense and Justice Project."⁷⁸ In the first of what became a series of regular newsletters to friends and supporters, Pickens explained his decision:

I have come to believe that it is important to look at the way justice is dispensed in our criminal courts from a faith perspective, and not from just a worldly view, because a faith perspective brings into the system a sensitivity that fosters compassion, reconciliation, understanding, truth, relatedness and an end to oppression. Such sensitivity gives balance to a system so prone and subject to harshness, disrespect, punishment and closed-mindedness.

From such a faith perspective, 'criminals' become human again, no better or worse than ourselves; the poverty, racism and physical and psychological abuses suffered by many become understandable circumstances of the crime, not just intolerable excuses; fear is transformed into caring; forgiveness overrides desires for revenge; and hope for positive, life-

77. John Pickens, *Counselor, You're Wasting Our Time*, in MATTERS OF JUSTICE (The Atlanta Criminal Defense and Justice Project (now Georgia Justice Project), Atlanta, Ga.), Oct. 30, 1986, at 1 (on file with the authors).

78. The organization was renamed "The Georgia Justice Project" in 1993.

giving change replaces apathy and disinterest. Viewed through such eyes of faith, much of what the world calls justice is exposed as injustice and cries out for transformation.⁷⁹

Pickens described the work of this organization as a “ministry,”⁸⁰ and, in its early years, the organization was affiliated as a “ministry with Family Consultation Service,” a Christian community development organization.⁸¹ From 1986-1988 the organization operated out of Pickens’s home. Douglas Ammar, who later succeeded Pickens as executive director, worked with Pickens as a volunteer during the summer of 1986, before Ammar started law school.⁸² In the fall of 1988, Pickens arranged for the Mennonite Central Committee (MCC) to place Gray Fitzgerald, a minister and counselor by training, with GJP for a two-year volunteer term,⁸³ primarily to work with persons in prison or recently released from prison. Apart from these two volunteers, Pickens was the organization’s sole staff person—and the only person providing legal services—during its first four years.

A five-year grant from the Public Welfare Foundation⁸⁴ combined with small donations, primarily from individual lawyers who knew Pickens, enabled Pickens to move the organization out of his home into a small store-front location at 458 Edgewood Avenue in 1988, sharing space with a non-profit restaurant that provided meals to the homeless. This location was near downtown and in the heart of the Martin Luther King, Jr. National Historic Site.⁸⁵ Pickens explained his choice of location as follows:

For a number of years, I have felt it important to have an office in the Edgewood-Auburn Avenue area. . . . [M]any of my clients frequent and live there. In ministry, I have come to believe that where you do your work (i.e. where you place your body) is just about as important as what you actually do. This is especially true when working with the poor and marginalized.⁸⁶

79. John Pickens, *Justice Through the Eyes of Faith*, in MATTERS OF JUSTICE (The Atlanta Criminal Defense and Justice Project (now Georgia Justice Project), Atlanta, GA.), Aug. 29, 1986, at 1 (on file with authors).

80. *Id.*

81. <http://www.fcsministries.org/fcsum/about.htm> (last visited Sept. 9, 2004). Although GJP currently receives some funding and volunteer support from churches and other religious organizations, the organization does not currently describe itself in the same kind of religious terms as were used during its early years under Pickens’ leadership.

82. Ammar graduated from Davidson College in 1984 and worked in Atlanta during 1985 with FCS Urban Ministries. In Fall 1986 he began law school at Washington & Lee University.

83. Long-term service volunteers do not receive a salary but are paid a modest monthly stipend and full living expenses by the MCC. See http://www.mennonitecc.ca/servicetree/faq4_frame.html (last visited Sept. 9, 2004).

84. The Public Welfare Foundation is a non-governmental grant-making organization located in Washington, D.C., which supports organizations that provide services to disadvantaged populations and work for lasting improvements in the delivery of services that meet basic human needs. See <http://www.publicwelfare.org/about/about.asp> (last visited Sept. 9, 2004). The Foundation’s five-year grant ran from 1987-92 and provided about \$15,000 per year to the organization.

85. Around the corner from the new office, and on the same block, were Dr. King’s grave, the Martin Luther King Jr. Center for Nonviolent Social Change, and Ebenezer Baptist Church where Dr. King’s grandfather, father, and Dr. King himself served as pastors.

86. John Pickens, *New Beginning at Year’s End – Year-End Funding Request*, in MATTERS OF JUSTICE (Georgia Justice Project, Atlanta, Ga.), Dec. 1, 1987, at 1 (on file with authors).

In 1990 Ammar returned as the organization's second lawyer and paid staff member. The following year the organization took a significant turn when it hired as its third staff member Ricks Anderson. Although Anderson had earned a law degree in 1977, by 1990 he had spent over eight years living in the street—due to a drug habit that started soon after law school. When his father died in 1981 Anderson put his mother in a nursing home, squandered his parents' life savings to buy drugs, and abandoned his wife and five children in Chicago to adopt "the lifestyle of a nomad."⁸⁷ Pickens represented Anderson several times between 1987 and 1989 on theft and burglary charges. When Anderson first became a client, the organization not only represented him in court, but also found him a place to live, money for food, and a job after he got out of jail. But Anderson reverted to his old ways. It was not until 1990 that Anderson finally succeeded in conquering his addiction.⁸⁸

Although initially hired to assist Pickens and Ammar as a paralegal, Anderson's personal experience motivated him enter into intense counseling relationships with clients that paralleled the legal representation the lawyers were providing. Ammar credits Anderson as the main initiator of two of the most innovative aspects of the GJP program. It was Anderson who successfully urged that the zealous legal advocacy being provided for free by the lawyers be used explicitly as an incentive for clients to begin making profound changes in their personal lives—a strategy that eventually evolved into the multi-stage agreement that clients make with GJP as a condition of receiving services.

The client counseling informally initiated by Anderson⁸⁹ became an explicit component of GJP's structure in 1992 when a recently graduated seminarian, Kevin Wilkinson, was hired to provide social services. Although Wilkinson was not, like Anderson, a former client, he also had deep personal connections to the kinds of problems experienced by GJP clients.⁹⁰ Wilkinson's hiring coincided with the phasing out of the MCC volunteer program,⁹¹ and apparently his initial job description, like the work of the MCC volunteers, focused on prison visitation and post-release support.⁹² However, as indicated in a newsletter published the month he was hired, Wilkinson,

87. Shirley L. Smith, *Addict Exchanges Desperate Lifestyle for Hope and a Chance to Help Others*, ATLANTA J.-CONST., Aug. 8, 1993, at D8.

88. *Id.*

89. During his first period of employment with GJP, from 1991-93, Anderson started work on becoming a Certified Addiction Counselor, receiving his certification after leaving in 1993 for employment with Welcome House, an Atlanta social service agency which provided housing and support to the working poor.

90. Wilkinson, a former professional football player turned successful businessman, had decided to enter the ministry following the intersection of two events. First his great aunt, to whom he was very close, was assaulted and raped by a homeless man addicted to crack cocaine. Then, just a few weeks after this crime, Wilkinson's brother came to him, admitting that he was addicted to crack and near the point of suicide. After getting his brother through a drug treatment program, Wilkinson moved to Atlanta to attend seminary, where he focused on inner-city ministry to the homeless and addicted.

91. Fitzgerald had been replaced by Bob Jones, who served as an MCC volunteer until 1992.

92. Douglas Ammar et al., *Introducing Kevin Wilkinson: Prison Visitation – Post Release Support*, in MATTERS OF JUSTICE (Georgia Justice Project, Atlanta, Ga.), Oct. 15, 1992, at 1 (on file with authors).

like Anderson, immediately became intimately involved with clients during their pre-trial representation.⁹³

Through the combined efforts of Ricks Anderson, Pickens, and a GJP Board member, the organization began to think about starting its own business to provide job training and employment for its clients released from prison. At that time, Fred Francis, another former client, had been volunteering with GJP and going through a small business entrepreneurial program at the same time. Francis was asked by GJP to develop a business plan for starting a business in which GJP could offer job training and actual paid employment to its clients. Francis's work and planning led to the development of a landscaping business, which in time became renamed as New Horizon Landscaping and operated as a part of GJP. Francis was its first director for several years and worked hand-in-hand in the field with the landscaping crew. During his time as director, Francis had a substantial impact mentoring GJP's clients who were part of his landscaping crews.⁹⁴

Although GJP's hiring of former clients was motivated in large part by a desire to help those individuals rebuild their own lives, their insights and increasing leadership were a significant force that led to the transformation of the organization into its current unique form. GJP's founder, John Pickens, originally saw the work of substantive and procedural justice as the task of the lawyers in the phases leading up to case resolution and the work of restorative justice primarily as the work of the non-lawyers in the post-resolution period in the form of jail visitation and post-release housing, employment, and counseling.⁹⁵ Although both lawyers (Pickens and Ammar) regularly performed legal and non-legal tasks (such as prison visitation and post-release rehabilitation), there was still a distinction between the "legal work" and the "social work," as indicated by the organization's referring to the positions and work by its non-lawyer staff members as "paralegal," "receptionist," "prison visitation," and "post-release support." However, as former clients became co-workers and colleagues, a new kind of community was formed—the kind described by Ammar in "Ben's Wedding"—in which the lines between legal representation and social work blurred and many different approaches to working with criminal defendants blended.

The 1993-1995 period marked the transition to a new generation of leadership on the GJP staff. Anderson took a new job in 1993, Pickens resigned as executive director at the end of 1994,⁹⁶ and Wilkinson left in 1995. Ammar took over as executive

93. "Several of our clients in the community relate almost exclusively to Kevin, and we are in closer community with all our people because of Kevin's efforts. . . . Kevin and two of our former clients are co-leading our Friday night support meetings for our clients living in the community. Additionally, the three of them are planning other ways that we can be of service to our clients." *Id.*

94. At this point three of GJP's five employees were African-American: Anderson, Wilkinson, and Francis. Another former client, an African-American woman, joined the staff in 1993 as its first full-time receptionist.

95. Telephone interview with John Pickens (June 7, 2004). (Pickens did not use the specific terms *procedural justice* and *restorative justice* to describe the organization's work in its early years.)

96. Pickens is now the executive director of the Alabama office of the Appleseed Foundation.

director effective January 1, 1995. Much of GJP's growth over the next two years was attributed to student interns and other volunteers.⁹⁷

In August 1996 David Rocchio joined GJP as a full-time volunteer under the Jesuit Volunteer Corps (JVC)⁹⁸ program; his major responsibility was coordination of the Emory student volunteers. Hired to succeed Francis as director of the landscaping operation in 1997, Rocchio was replaced by another JVC volunteer; a JVC volunteer has continued to be on staff from then to the present. (Rocchio is now director of development at GJP.) In 1998 Anderson's daughter, Kenya Anderson—who had just completed a degree in criminal justice—was hired part-time to implement her father's original vision for a comprehensive social service component to GJP's work. Her work led to a grant from the Woodruff Foundation in 1999 that enabled GJP to hire Julie Smith as Director of Social Services.⁹⁹ Also in 1999 GJP added a second, permanent staff attorney position,¹⁰⁰ hiring Deborah Poole, who also has a master's degree in counseling and had previously served as director of human services for Fulton County (the urban county where Atlanta is located). GJP added a third attorney position in August 2001, hiring Amy Vosburg, a former summer intern who had earned both an M.S.W. and a law degree.¹⁰¹ Ricks Anderson also rejoined the GJP staff in September 2002 as a part-time drug counselor; and another former client, Faheem Martin, was hired as a part-time youth counselor at the same time.

During its growth GJP moved three times, yet remained within a one-block radius of its initial location. In February 2002 it moved into its present location at 438 Edgewood—a renovated gas station that includes both a spacious kitchen for GJP's frequent feasts with clients and their families and a bay for the trucks and other equipment of the landscaping operation. The new office is within 100 feet of Dr. King's grave.

D. Current Practice at the Georgia Justice Project

1. Selection Criteria

Because of its status as a private, non-profit organization, GJP, in contrast to public defender systems, has complete discretion in choosing the clients it will repre-

97. Juliet Zelkowitz worked as a full-time lawyer volunteer from May–December 1995, nine law students interned during the summer of 1995, and students from the Candler School of Theology at Emory University began providing social services in Fall 1995.

98. JVC is the largest Catholic lay volunteer program in the country. See *Jesuit Volunteer Corps, Who JVs are*, at <http://www.jesuitvolunteercorps.org/whojvsare.html> (last visited Sept. 9, 2004). JVC pays for the volunteer's transportation to and from the agency site and provides a small monthly stipend; the host agency pays the volunteer's living expenses. Volunteers typically serve for one year.

99. Smith has a Ph.D. in Education from New Orleans Theological Seminary as well as an M.S.W. from the University of South Carolina.

100. Zelkowitz had become a full-time employee in January 1996, working both as a lawyer and fund raiser. She left in May 1998; except for a short-term employee later that year, the second lawyer's position remained empty until Poole was hired in March 1999.

101. Vosburg had also worked as a JVC volunteer, but in Micronesia, not Atlanta.

sent.¹⁰² The organization selects clients through an intensive and extensive process of data collection, client meetings, and internal review.

The process begins when potential clients, or representatives for them (such as family members, friends, etc.), contact the organization and provide the bare facts of the situation.¹⁰³ Such facts usually include a brief description of the charge, the potential client's bond status, whether she is on probation or otherwise being held and for what charges. At this initial stage GJP usually rejects cases from outside the Atlanta metropolitan area, cases that involve only traffic charges, or cases in which it appears the person can afford a private attorney.¹⁰⁴ The organization also has a general policy of not representing defendants on charges relating to domestic violence, child abuse, rape, or large-scale drug trafficking.¹⁰⁵ Finally, the stage of the person's case generally affects the decision to consider a potential client. If the case has already proceeded past indictment or is already on the trial calendar, GJP usually will not accept it.¹⁰⁶

If the case passes this initial screening, further information is collected, including identifying information, such as names and aliases, addresses, and social security numbers, as well as information about the arresting agency, the specific court involved, the next court appearance and purpose.¹⁰⁷

As an aside, if GJP decides at this early stage—prior to the social selection criteria being examined—that it is advisable to provide preliminary legal assistance, such as appearing at hearings or obtaining bond, the potential client must sign a preliminary contract with the organization. This contract specifies that the organization is not agreeing to more extensive representation until the review and selection process is completed.

Once the introductory information is collected, the case passes through an early review by the GJP staff. A six-page form¹⁰⁸ guides a more extended personal inter-

102. Ammar admits that this is a luxury afforded to this organization. Ammar & Downey, *supra* note 73, at 54. However, it should be noted that GJP does not shy away from serious felonies and controversial cases. For example, GJP has represented a number of people accused of murder.

103. Most clients "are referred by former clients, word of mouth, or by other social service agencies." *Id.* The various public defender offices in metropolitan Atlanta have also contacted GJP to request representation for clients originally assigned to them. *See, e.g., id.* at 67.

104. *Id.* at 54 (those referred cannot afford an attorney; GJP is the only organization other than the public defender to provide indigent defense in Atlanta's court system).

105. George Justice Project, *GJP Legal Services*, at <http://www.gjp.org/legal.html> (last visited Nov. 5, 2004). Cases involving sexual assault are not pursued "because we are unwilling to employ defense tactics that are tantamount to 'attacking the victim,' and drug trafficking cases would be too burdensome on the agency's staff and resources because of their complex and multi-jurisdictional nature." Ammar & Downey, *supra* note 57, at 54 n.9. James Bonta, who evaluated the program "Restorative Resolutions," noted that this program did not accept "offenders charged with sexual assaults, gang violence, drug offenses, and domestic violence." Bonta et al, *supra* note 66, at 323. Thus, it is clear that one advantage such programs have is the selection of the cases that they will pursue. However, this also indicates that GJP is not alone in the use of such requirements.

106. From the standpoint of zealous representation, GJP prefers to work on cases from the outset of prosecution, while evidence is fresh and when there is the maximum amount of time for investigation and research. GJP staff also wants as much time as possible to develop their relationship with the client and to initiate a process of rebuilding client lives before a case comes to a point of resolution either through plea negotiation or trial.

107. The information gathered in this initial screening process is gathered using a form referenced as a "two-pager" by GJP staff (copy on file with authors).

108. This form is referred to by GJP staff as "the six-pager" (copy on file with authors).

view of the defendant, which often takes place in jail. The legal information collected includes the defendant's personal data; detailed information on the charge; the defendant's account of incidents leading to the charge, a summary of the defendant's criminal history, both adult and juvenile; and current probation or parole status. Preliminary personal information is also gathered, including educational background, military service, employment history or source of income information, and medical and mental health history.

An important step of this particular interview is the description of the GJP that the interviewer provides to the defendant. Specifically, the GJP mission¹⁰⁹ is shared with the defendant, and the selection process is explained within the context of that mission, with an emphasis on the idea that GJP works with clients who are committed to rebuilding their own lives. Defendants are informed that while there is no monetary payment for the legal services rendered, if they are accepted as GJP clients they will be undertaking obligations that will be worked out between them and GJP through the social service part of the case review process.

The information from this interview is verified through calling the courts, collecting arrest and conviction records, reviewing police reports, and obtaining information from the current defense attorney, if there is one, and the prosecutor's office. Often these information-gathering pursuits will uncover additional charges that the potential client faces, some of which the defendant did not know about.

The attorneys at GJP review the information collected in the interview along with the collected follow-up information and usually meet personally with the defendant if they have not already done so. The attorneys consider the degree to which a "quality" defense will enhance a positive outcome for the potential client. (A "quality" defense includes contacting witnesses, filing motions, and considerable levels of investigation that a public defenders' office likely will not have time to pursue.) Because the organization is concerned not only with winning cases, but also about the client as a person, the staff also considers all these case aspects in the context of the stakes faced by the client. In other words, it considers the magnitude of the charge not only in a legal sense, but its impact on the life of the client as a whole.¹¹⁰ If at that point the attorneys are interested in representing the client, or if they want to gather more information, the next step of the assessment process moves to the social services unit. As a general rule, if the organization commits to represent a client, the attorneys will work on all criminal cases affecting the client, even those uncovered as a result of the legal assessment. The goal of GJP is that its clients leave with a legally "clean slate."

109. The Mission Statement is stated on the six-pager: "The Georgia Justice Project's Mission is to ensure justice for the indigent criminally accused and assist them in establishing crime-free lives as productive citizens. GJP's unique holistic approach combines social services with legal representation."

110. In a personal communication, Julie Smith noted that they [GJP] consider if it is "a case in which the stakes are high for the client," noting that this "may be from either end of the spectrum—from a first offender who has a good chance at having their good record preserved or a serious offender (murder) for whom a good defense is critical." E-mail from Julie Smith, Director of Social Services, Georgia Justice Project, to Brenda Blackwell, Assistant Professor, Dept. of Criminal Justice, Georgia State University (Dec. 12, 2003) (on file with author Blackwell).

The third and final stage of the review process is the completion of a social service assessment. It is at this stage that the defendant's contextual information and desire to change is most closely assessed. As Ammar notes, "[t]he focus has been to accept clients who are willing to make a serious commitment to changing their lives. This helps to ensure that they move beyond the social, emotional, and personal challenges that may have contributed to their legal problems."¹¹¹ In very real terms, then, the social service assessment becomes the heart of the client's relationship with GJP. The social service assessment includes a meeting of the social service staff with the defendant that involves an in-depth assessment of his social history: The interview form guides the interviewer to gather information on the social context of the offense, including family issues, his social support system, employment history and status, educational background, and any physical or mental health issues that he faces. If appropriate, the social worker gathers information on the defendant's medical background, including history and current use of drugs and alcohol, as well as prior treatment for substance abuse. The social service staff asks the defendant about significant people in his life and what the dynamics of his home were like while he was growing up. In addition, the assessment involves an attempt to determine who the defendant has as personal and other support providers (such as friends, religious leaders, and other community or public agencies).

The social service staff also discusses the offense or offenses for which the potential client is charged. The direction of this discussion, in contrast to that in the legal assessment, is designed to find out the defendant's perception of whether she feels some responsibility in the incidents giving rise to the alleged offense, even if she may not consider herself guilty.¹¹² This may include discussions about use of drugs or alcohol and whether such use affected the defendant's emotional state at the time of the offense.

Finally, the social worker discusses with the defendant the kinds of services GJP provides, both internally and as referrals to other programs, and asks for the defendant's personal assessment of how GJP can help her in her life.

In sum, the social service assessment is designed to aid the social service staff in evaluating "the client's strengths, needs, and goals in light of [his or her] current legal situation."¹¹³ The final decision to take a case usually turns on an overall picture of whether the defendant needs to change his life, the extent to which he is committed to doing what it takes to make those changes, and the degree to which GJP can assist in that transformation, both in a legal context and in all the other aspects of his life.

After gathering the information from the social service assessment, a final decision is made by the staff at GJP to accept or decline representing the potential client. If the client and the organization agree to pursue a relationship, a two-step process, punctuated by different contracts, is initiated.

111. Ammar & Downey, *supra* note 57, at 54.

112. Probes used to encourage this discussion including asking the defendants how they came to be placed in the situation, what mistakes they made, what choices they would make differently and how, as well as about their emotional state at the time.

113. Ammar & Downey, *supra* note 57, at 54-55.

2. *The Role of Contracts*

The first step in developing the client relationship is often a “probationary client contract.” This contract represents a “contingent agreement” between the two parties for a specified period.¹¹⁴ During this period, the client typically agrees to meet with a GJP counselor on a weekly basis to establish goals toward which the client will work and to complete assignments given by the GJP counselor. If, for example, substance abuse is an issue, the contract may specify steps to be taken toward a treatment or relapse-prevention plan as well as random alcohol and drug testing.¹¹⁵ It is not uncommon for clients to enter residential drug treatment programs at this point, often as a condition of pre-trial release negotiated by GJP with the prosecutor and judge. The client and GJP also delineate the exact charges the organization will be pursuing on the client’s behalf. If clients do not follow through with the commitments they have made to GJP and themselves, the probationary contract can be terminated.¹¹⁶ For clients who make a good faith start on the plan for rebuilding their lives, the result is the beginning of a “long-lasting, redemptive” relationship, marked by signing a “full” contract.¹¹⁷ The contract contains the following language: “As part of the goal of the Georgia Justice Project to assist the client in establishing a crime free and productive life, the client agrees to adhere to the following recommendations.”¹¹⁸

In this way the structure of the process toward representation hinges on the social service element of GJP’s workings. And it is the social service aspect of GJP that, combined with the legal representation, provides the entrance of restorative justice into the legal model employed by the organization.

3. *The Multidisciplinary Approach*

While some conventional public defender offices also employ social workers,¹¹⁹ the integration of legal and social work processes at GJP is distinctive. The approach taken by GJP can be called multidisciplinary in many ways. The GJP lawyers differ from the traditional public defender model by taking a small number of clients, not only to provide high-quality legal representation, but also to develop relationships with their clients as people. Meanwhile, the social service unit of GJP does not limit

114. For some cases GJP in conjunction with the client develops a written set of ‘goals’ instead of a more formal contract. E-mail from Julie Smith, Director of Social Services, Georgia Justice Project, to Clark Cunningham, Georgia State University, College of Law, W. Lee Burge Professor of Law & Ethics (November 2, 2004) (on file with author Cunningham).

115. These requirements are stated on the “Georgia Justice Project Probationary Client Contract” form. If the client is incarcerated, the requirements will be different. *Georgia Justice Project, GJP Social Services*, at <http://www/gjp.org/social.html> (last visited Dec. 13, 2003).

116. See Ammar & Downey, *supra* note 57, at 54-55. See also Patrick Jonsson, *Lawyers Defend Poor – If they Mend Their Ways*, CHRISTIAN SCI. MONITOR, Jan. 23, 2002, at 1.

117. Ammar & Downey, *supra* note 57, at 55.

118. Quote taken from Georgia Justice Project “Full Client Contract” form.

119. See, e.g., CAROL J. DEFRANCES & MARIKA F.X. LITRAS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NATIONAL SURVEY OF INDIGENT DEFENSE SYSTEMS, 1999: INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, NCJ 184932 (Nov. 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf> (last visited 11/07/2004). This report notes that public defender programs are more likely to have social service funding than other programs for indigent defense, yet not all public defender programs have such services available. *Id.* at 4.

its influence to any particular facet of a client's life. It is the breadth and depth of the relationships a client forms within the organization that provide for an experience Ammar refers to as "transformative."¹²⁰

Ammar observes that "[b]y providing quality and caring representation[,] . . . we are reversing the way legal services have traditionally been provided to the poor. We make sure that our representation is both thorough and personal, involving the client in all stages of the representation."¹²¹ Forming such a relationship grants the attorneys the ability, and likely the drive, to secure a more procedurally just process as the client's case proceeds. It is also through these relationships that the attorneys provide building blocks for the creation of "community," another cornerstone of restorative justice.

The social service unit of GJP is also imperative to the formation of "community" in a restorative justice sense, and in this realm the multidisciplinary aspect of GJP is apparent. The social service unit provides comprehensive case management¹²² for GJP clients. Its initial assessment is a key aspect of the social service component of GJP because it lays the foundation for identifying the client's needs and the services that GJP will provide, as well as the referrals that GJP will make to external sources. These services and referrals range from a need for housing to individual and group counseling, from drug and alcohol treatment to employment. The social service unit works closely with the client to provide an arena in which the client can change.

This unit also provides useful information and, sometimes, solutions for the attorneys in the legal case being pursued. This multidisciplinary approach, combining the legal with the social, has, according to Ammar, attracted the attention of many local judges:

It is not uncommon for a judge to release clients to our custody with the agreement that they seek treatment for their substance abuse, educational, or mental health issues. [The] implementation [of] the social services plan often helps clients avoid a prison sentence, but not always. Members of the bench often want to keep offenders out of prison if it does not seem that prison will be the best option for them. This willingness on the part of the judiciary makes a restorative justice framework possible."¹²³

Finally, the key element of GJP's approach—that of forming relationships with its clients—is not limited to the duration of the legal case. Clients often volunteer at GJP for a period of time. In addition, the organization hosts a monthly "family" dinner for their clients and former clients. The staff at GJP take the creation of "community" to heart, and these relationships tend to stand the test of time. When clients do not receive a sentence involving incarceration, the organization continues to work with them to achieve their goals, opening the door for counseling and additional referrals as needed, as well as continuing education classes and, sometimes, even employment

120. Ammar & Downey, *supra* note 57, at 55.

121. *Id.*

122. In *Generalist Case Management: A Method of Human Service Delivery*, case management is described as "a creative and collaborative process, involving skills in assessment, consulting, teaching, modeling, and advocacy that aim to enhance the optimum social functioning of the client served. . . . [I]t includes the dual role of coordinating and providing direct service." MARIANNE WOODSIDE & TRICIA MCCLAM, *GENERALIST CASE MANAGEMENT: A METHOD OF HUMAN SERVICE DELIVERY* 4 (2nd ed. 2003).

123. Ammar & Downey, *supra* note 57, at 56.

with GJP's landscaping business. If a client is incarcerated, the organization nevertheless continues its relationship with the client, albeit in different ways. The GJP staff visits,¹²⁴ writes letters, and accepts collect calls, thus providing a solid community to which the client can return. The organization goes a step further to "provide emotional support for [the] family," which may include driving family members to visit the client, talking with family members, providing emotional support, or securing a spot at summer camp for the client's children. These contacts are constant, so the clients are consistently reminded of the community they have joined.

Upon the release of an incarcerated client, social services continue with coordinating needed services (such as finding a home, medical care, etc.) and providing them (such as individual and group counseling and education). The organization's landscaping business exists in large part to provide the key first job for persons released from prison.

D. Outcomes

In 2001, GJP conducted a recidivism study¹²⁵ of the forty-eight persons considered "full clients" represented in 1996.¹²⁶ Of these, GJP obtained criminal history records for forty-four clients from the Georgia Criminal Information Center (GCIC, operated by the Georgia Bureau of Investigation), which revealed that only eight had been convicted of a new crime¹²⁷ during the period of 1997-2000.

In 2003, GJP studied case outcomes for 2000, 2001, 2002 and the first eight months of 2003.¹²⁸ In none of these periods was incarceration the outcome for more than eight percent of cases. GJP contrasts this outcome with data showing a typical incarceration rate in excess of seventy percent for urban public defender offices.¹²⁹ This difference is not attributable to a higher rate of acquittals; the acquittal rate for GJP was very small, as it was for the comparison group.¹³⁰ GJP did achieve an outright dismissal about twice as often.¹³¹ However, the outcome of negotiated pleas was equally important. Pleas negotiated by GJP clients are much less likely to result in incarceration than those negotiated by the comparison group of urban public defenders. However, as discussed in the conclusion, determining the causes of these differences in outcome—both in terms of recidivism and rates of incarceration—is complex.

124. The full-time JVC volunteer regularly visits the clients who are incarcerated. Other staff may visit them as well.

125. Summary of Recidivism Study (n.d.) (copy on file with authors).

126. GJP accepted 52 clients during 1996 but terminated four for non-compliance with their GJP contract.

127. GJP did not count as a new crime conviction any probation violation or traffic violation.

128. Georgia Justice Project, Caseload Tracking 2001-2003 (unpublished, on file with authors).

129. Public defender offices in the 75 largest counties in the United States had an average incarceration rate of 71.3% for 1996. CAROLINE W. HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 2 tbl.11, NCJ 179023 (Nov. 2000), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (last visited Sept. 9, 2004).

130. The GJP acquittal rate ranged from 2.7% to 1.7%, *supra* note 128, as compared to 1.3% for the urban public defender offices, *supra* note 129 at 6 (tbl.10).

131. The urban public defender offices had an average dismissal rate of 23%, *supra* note 129, at 6 (tbl.10); the GJP dismissal rate ranged from 45.8% to 52%, *supra* note 128.

IV

CONCLUSION

This symposium issue originated in the Fourth Annual Public Law Conference, hosted by Duke Law School in December 2002. The conference was organized around the question whether there were distinctive “progressive and conservative” versions of the Constitution and other legal systems. A very early version of this article was presented at a panel on criminal justice. Also participating on that panel was Louis Michael Seidman, who identified himself as a “criminal justice progressive” but went on to offer a concise and trenchant critique of seven different progressive models of criminal justice. When he was done, he offered the following observation:

So what in the end [does the left have] to say about crime and justice? The answer is, I am afraid, not much. . . . Still, there is one thing to say in defense of the left. . . . The left is not the right. . . . True, there’s not much left of the left, but neither is there much right about the right.¹³²

Public discourse about whether to spend more resources on the lower criminal courts, particularly on indigent defense, do tend to get stuck on “left v. right” distinctions—opposing the rights of defendants on the one hand against concerns for public safety and for limiting government spending on the other. At the December 2002 panel, author Cunningham suggested one way to transcend these distinctions by posing a kind of “thought experiment”: “What if spending more money on indigent defense ended up saving taxpayer dollars and made communities safer?” The Lawyers at Bail Project in Baltimore¹³³ and the misdemeanor release programs in San Francisco¹³⁴ have both proven that making pretrial procedures less punitive by reducing pretrial incarceration can produce significant government savings.¹³⁵ These savings were not offset by one form of short-term costs, in that defendants released from jail through these programs had an excellent rate of appearing for subsequent court appearances in the pending case. The cost-benefit ratio sufficiently impressed the sheriff of San Francisco that, when the initial foundation support ended, he took over funding the misdemeanor release programs out of the jail budget.¹³⁶

But what about the concern for public safety? It seems that even some proponents of increased spending on indigent defense take as a given that better indigent defense means less public safety. For example, one newspaper in Georgia published an editorial under the headline, *Save Indigent Defense*, that offered the following argument against a proposal then circulating in the state legislature for election of public defenders: “What incentives do voters have to elect competent public defenders? District attorneys run on their records of successful prosecutions—putting bad guys behind bars. What would a good public defender run on? A record of keeping bad guys on the streets?”¹³⁷

132. Louis Michael Seidman, *Left Out*, 67 LAW & CONTEMP. PROBS. 23, 31-32 (Summer 2004).

133. See *supra* notes 33-37, *supra*, and accompanying text.

134. See *supra* notes 38-51, *supra*, and accompanying text.

135. Colbert et al, *supra* note 30, at 1722-23; <http://cjcj.org/pubs/hrp/hrp.html> (last visited Nov. 7, 2004).

136. Cunningham interview with Michael Hennessey, Sheriff, San Francisco, CA on Sept. 3, 2002.

137. *Save Indigent Defense*, AUGUSTA CHRONICLE (GEORGIA), Feb. 27, 2003, at A04.

The work of the Georgia Justice Project seems to indicate it is possible to provide meaningful, indeed comprehensive, justice to criminal defendants while at the same time making “the streets safer.” However, GJP has not yet produced analytic reports that address the following key issues: First, to what extent could their distinctive outcomes be attributable to different inputs? Could it be that because of GJP’s unique procedures for selecting clients, its clients are inherently less likely to engage in recidivism? Second, which of GJP’s many innovative approaches contributes most significantly to better outcomes? Third, what is the cost-benefit ratio of GJP’s approach? How much more does it cost per client to produce a better outcome than for the persons in the comparison groups?

Fortuitously, at the time the authors began their study of GJP, the organization had already decided to give high priority to the creation of a sophisticated database to record much of the information collected about clients at point of intake as well as to track case activities and outcomes. Such a database would make possible much of the analysis needed to address these questions. Cunningham offered to use research funds at his disposal to assist GJP in designing its database so that it would not only meet its case management and reporting needs but also provide a rich and reliable source of data for empirical research. GJP accepted this offer, and Blackwell agreed to be a consultant for the database design and implementation.

Although the process of developing the database is ongoing it has revealed a number of issues of general application. The evaluation of programs based on restorative justice principles such as GJP raises several questions that must be considered in designing a data collection instrument. Indeed, as pointed out by James Bonta and colleagues,¹³⁸ to-date evaluations of restorative justice programs are vastly different in their presentation, ranging from “descriptions of program processes and anecdotal accounts of their value to more sophisticated experimental evaluation.”¹³⁹ Such evaluations also note a problem with evaluations of restorative justice programs to date is the lack of reliance on recidivism as an outcome.¹⁴⁰ As with evaluations of other criminal justice programs, these need to control for both legal variables—offense seriousness, criminal history, aggravating and mitigating circumstances, and the sociodemographic characteristics of offenders and victims, such as sex, race, class, and age. Controlling for these factors is particularly important for an evaluation of GJP given GJP’s selection process, one which raises concerns about selection effects when the recidivism rates of GJP clients are compared with those of other offenders.

The goal of database design to this point has been to ensure that the data an agency like GJP collects is compatible with that on similar offenders collected by other agencies. Variables included in reports of recidivism rates for comparable offenders in Georgia are being collected using the data that GJP has at hand.

Finally, measures of outcome should capture the “goal” of the agency. While Bonta argues that recidivism should be viewed as an outcome, the risk is that other

138. Bonta et al., *supra* note 66.

139. *Id.* at 320.

140. *Id.* at 321.

important elements of restorative justice that are the focus of the program may be left out. This would occur at a great cost to the discussion surrounding the value of a program such as GJP. Hence, an important consideration in the design of the database is the need to include multiple measures to tap the different outcomes sought by the programs implemented for clients. For example, the database is being designed to capture not only the recidivism rates for the clients served by GJP, but also to look at the outcomes produced by the legal team. For an adequate evaluation of GJP, the data must include measures that look at the range of possible outcomes, from findings of guilt or innocence and all that may fall between, including, in some cases, the lighter sentence sought by the legal staff, rather than exoneration. The data must capture these nuances in order to provide a meaningful context for evaluation of success. Finally, the data should also consider the social service outcomes. The feature of GJP that sets it so far apart from public defender offices is the degree to which the organization services “the whole client.” This is the framework under which relationships, and ultimately “community,” are built at GJP. The degree to which this community exists, with continued contact and continued “life” success in the larger community must also be measured.¹⁴¹

If the punishment is taken out of the process, and the processes of criminal justice become effective at restoration—and if rigorous empirical research might show that a restorative process costs less money and produces greater public safety—that would be a result both the “left” and the “right” (and everyone in between) would embrace.

141. These have been the foci of the development of the database for GJP. However, with the growth of GJP over the past few years, the database is being designed to serve not only as a source of information for evaluation efforts, but also as a tool for the staff to use on a daily basis.

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.¹

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

I

INTRODUCTION

In early 2001, two corporate law scholars together boldly pronounced the “end of history” for corporate law.³ 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, 2001,⁴ 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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This Article is also available at <http://www.law.duke.edu/journals/lcp>.

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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,⁵ ushering in passage of the Sarbanes-Oxley corporate governance reform legislation,⁶ 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.⁷ Though many robust and varied social movements, many of which were bolstered by the 1999 WTO protests in Seattle,⁸ have been and are engaged in challenging this hegemony from many angles,⁹ 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.¹⁰ 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. Oppel, Jr., *Corporate Conduct: The Overview; 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. FISCHEL, *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 Delliros, *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 Shamdasani, *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.¹¹ 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.¹² 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.

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.¹³ That is, it is viewed as an aggregate of various inputs acting together to produce goods and services.¹⁴ 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.¹⁵ 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.¹⁶

Under this view of the firm, state corporate law is relegated to enabling the explicit and implicit bargains that comprise the firm.¹⁷ 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.¹⁸ 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,¹⁹ to the extent that corporate law has a substantive thrust, it is aimed at solving agency problems.²⁰ 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.²¹ 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.²²

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.²³

The board of directors is charged with managing the corporate enterprise. All powers and duties reside in the Board as a whole.²⁴ 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.²⁵

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.²⁶ 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.²⁷

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;²⁸ increasing wealth disparities that undermine economic democracy both domestically and globally;²⁹ concentrations of corporate power and

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;³⁰ and environmental degradation and other externalities visited upon workers, consumers, and communities.³¹

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,³² progressive corporate law scholars view the dominant model of corporate law itself as a large part of the problem.³³ 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.³⁴

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.³⁵ 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.³⁶ 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.³⁷ 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.³⁸ In addition to shareholders, stakeholders variously include workers, creditors, the community, and society as a whole.³⁹ 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.⁴⁰ 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.⁴¹ Some issues presently under explora-

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;⁴² (b) whether “outside” directors enhance corporate decisionmaking, and what it means to be an “outside” director;⁴³ 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.⁴⁴

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.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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;⁴⁸ that task will not be repeated

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., Kellye 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.⁴⁹ 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.⁵⁰ 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.⁵¹ Stemming from psychologist Carol Gilligan's work on moral reasoning,⁵² 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.⁵³

Furthermore, as feminist legal theory has progressed, it has increasingly focused on power relationships, group-based oppression, and systemic subordination.⁵⁴ Drawing on post-modernism,⁵⁵ 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.⁵⁶ Because one of its core methodologies is consciousness raising,⁵⁷ 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.⁵⁸ 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.⁵⁹

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-

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 Truylol, *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.⁶⁰ 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.⁶¹ 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.⁶²

Outside of the socialist critique of capitalism, one of the earliest efforts to apply feminist theory to corporate law came in 1985.⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶ Today, Ms. Kanter is a chaired professor in the Harvard Business School, and a successful consultant to and director of many corporations.⁶⁷

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."⁶⁸

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&facEmId=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.”⁶⁹ 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,”⁷⁰ 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.⁷¹ 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.⁷²

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*,⁷³ 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.⁷⁴ 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 liability⁷⁵ as well as many feminist theoretical approaches⁷⁶ 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,⁷⁷ as well

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,⁷⁸ Gabaldon instead argues for shareholder empowerment and enhanced insurance requirements for business enterprises.⁷⁹

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,⁸⁰ as have a handful of other scholars, including Ronnie Cohen,⁸¹ Janis Sarra,⁸² Cheryl Wade,⁸³ Faith Kahn,⁸⁴ Marleen O'Connor,⁸⁵ and this writer.⁸⁶

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.⁸⁷ 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.⁸⁸ 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).⁸⁹

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-

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.⁹⁰ 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.⁹¹ As a result, the progressive corporate law project can cure its remarked-upon⁹² 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.⁹³ 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.⁹⁴ More often than not, that harsh side falls disproportionately on women.⁹⁵ And despite continued celebrations of capitalism's global triumph, societal wealth dispari-

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/epbw-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.⁹⁶ 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.⁹⁷ 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,⁹⁸ 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.⁹⁹ 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.¹⁰⁰

There are additional interdisciplinary connections to be made as well, many of which I have written about elsewhere,¹⁰¹ 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

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://humandevlopment.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 & Martha 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.¹⁰² 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 feminist¹⁰³ and socio-economic¹⁰⁴ 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

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).¹⁰⁵ 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.¹⁰⁶ The team forms because the members perceive that each will obtain more from the cooperative endeavor than from individual action,¹⁰⁷ 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.¹⁰⁸ 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.”¹⁰⁹ 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

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.”¹¹⁰ 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.¹¹¹ 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.¹¹²

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-

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.¹¹³ 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."¹¹⁴ 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.¹¹⁵ 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

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.”¹¹⁶ Care would mean more what the settlement decision in *In Re Caremark International Inc. Derivative Litigation*¹¹⁷ suggests: proactive, searching for trouble in order to prevent it or cure it rather than sitting back and hoping not to hear of any.¹¹⁸

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-

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.¹¹⁹

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 21st

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.