FEMINIST THOUGHT AND CORPORATE LAW: IT'S TIME TO FIND OUR WAY UP FROM THE BOTTOM (LINE)

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I. INTRODUCTION

Feminist theory and jurisprudence raise questions about the validity of many basic assumptions that support the American legal system. Thus far, feminist legal scholars have been concerned primarily with inequities resulting from the application of theory to specific issues that most directly affect women, such as rape, job discrimination, and family leave policies.[1] This article moves beyond these areas to examine the traditionally male corporate sphere through the lens of feminist jurisprudence.

Based on the reality of women's experiences in society, feminist theory offers a new perspective on the powerful role that corporations play in American culture. Feminist theory can enhance the laws and theories of corporations which have developed from a male-dominated point of view. A feminist approach has the potential to transform the corporate environment from one that is adversarial, competitive, and abstract into one that is cooperative, concrete, and nurturing.

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1. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975) (providing a seminal, historical, and analytical work on rape); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982) (discussing the limited ways that the courts have analyzed and defined equality in cases such as General Electric Co. v. Gilbert, 429 U.S. 125 (1976), in which the Supreme Court held that a comprehensive employer health plan excluding pregnancy from coverage did *not* violate Title VII).

The law must hold corporations accountable to the public, and must advance the concept that corporations should work not only for profit, but also for the social good.

This article examines some of the scholarly writing that has contributed to the development of feminist theory, particularly feminist jurisprudence. It then surveys corporate theory and law, including its history and evolution to modern corporate law. Finally, it contemplates particular aspects of corporate theory and law from a feminist perspective, and discusses areas where the application of feminist principles could transform the corporate environment in desirable ways.

II. FEMINIST THEORY

A. Themes Within the Theory

Feminist theory generally may be described as a challenge to the prevailing accounts of women's societal position, and a means to recover women's stories, which have long been suppressed in Western culture.[2] Feminist theory is deconstructive;[3] rooted in the experiences of women, feminist theory seeks to expose the maleness of traditional theory and the exclusion and invisibility of women in existing theories in all fields of knowledge.[4]

From the center of a web of feminist scholarship are multiple theoretical strands, which sometimes connect, and sometimes extend

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2. Ann C. Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard Steamship Co.*, 57 MO. L. REV. 371, 372 (1992) (stating that one of the major projects of feminist scholarship has been the recovery of suppressed stories of women from the official or accepted accounts of events or conditions in the world).

3. To "deconstruct" is to examine "allegedly neutral, universal concepts and principles to expose their constructed, contingent nature and the power relations lurking behind them." FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 7 (Katharine T. Bartlett & Roseanne Kennedy eds., 1991); *see also* Madelyn C. Squire, *Discovering Our Connections: Reflections on Race, Gender and the Other Tales of Difference*, 23 GOLDEN GATE U.L. REV. 795, 796 n.2 (1993) (stating that "[t]he feminist's project is to deconstruct cultural or social concepts accepted as universal or natural that reify gender difference"); *cf.* Margaret J. Radin, *Lacking Tranformative Social Theory: A Response*, 45 STAN. L. REV. 409, 416 (1993) (agreeing that generally feminist theory should deconstruct traditional concepts of womanhood, but also noting that sometimes, as a strategic matter, traditional ideology can be used for certain political gains for women).

4. *See, e.g.*, CYNTHIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER AND THE SOCIAL ORDER (1988) (describing, assessing, and critiquing scientific analyses of gender distinctions in sociological research); JUDY WAJCMAN, FEMINISM CONFRONTS TECHNOLOGY viii-ix (1991) (investigating many technological fields and uncovering the pervasive male control over those fields); THE CUSTOM MADE CHILD? WOMEN-CENTERED PERSPECTIVES x (Helen B. Holmes, Betty B. Hoskins & Michael Gross eds., 1981) (exploring the insights and perspectives that women can bring to help correct the lack of women's input in the area of reproductive technology).

in different directions.[5] Theresa Gabaldon describes these strands as liberal, socialist, radical, relational, and analytical feminist theories.[6] Although such rigid categorizations may be an oversimplification of a complex body of thought, they are useful in differentiating the strands that make up the web of feminist scholarship.

Liberal feminism describes the women's rights movement of the 1960s and 1970s.[7] In the American tradition of individual rights, liberal feminists argue for equal rights for women and men without challenging the underlying patriarchal culture.[8] Liberal feminists are responsible for great improvements in women's social, economic, and political power over the last two decades. Without diminishing their enormous contribution, however, we must recognize that other feminist theories go further in challenging prevailing ideas of equality and justice.[9]

Socialist feminism is a critique of capitalism that specifically considers the role of gender when examining inequality. Alienation of workers from their labor is the cornerstone of socialist criticism of

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5. Use of the web or fiber metaphor is intended to remind the reader that women's stories are often found in the fiber arts. *See* QUILTS IN WOMEN'S LIVES (Ferrero Films 1980) (portraying seven very different American women's lives and exposing this difference as seen in their quilts).

Historically, the mainstream art community has marginalized these art forms, not even recognizing them as "fine art." Patricia Mainardi, *Quilts: The Great American Art, in* FEMINISM AND ART HISTORY: QUESTIONING THE LITANY 331 (Norma Broude & Mary Ganard eds., 1982). But needlework and textile art such as quilting are now more frequently recognized as "fine art" and not just functional bed coverings. *Id.*

6. Theresa Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1417-24 (1992) (outlining the various themes and analytic divergences in feminist jurisprudence).

7. *See* STEVEN M. BUECHLER, WOMEN'S MOVEMENTS IN THE UNITED STATES 62-63 (1990) (describing the National Organization for Women (NOW) which was formed in 1966, and the role of NOW in the efforts to pass the Equal Rights Amendment (ERA)); BETTY FRIEDAN, THE FEMININE MYSTIQUE 357 (1963) (arguing that the key to escaping the trap of the feminine mystique is education, and that women are not satisfied with housework alone but seek also to put their education to use in the workplace).

8. The Civil Rights Act of 1964, 42 U.S.C. § 2000 (1988 & Supp. III 1991), is the leading tool of the liberal feminists. It requires that women and men be treated the same, without examining whether same treatment is actually equal treatment. *See also* MARY BECKER, CYNTHIA G. BOWMAN, & MORRISON TORREY, *Feminist Theory, in* CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 50, 50-51 (1994) (observing that during the 1970s, feminist scholars generally followed the liberal approach, which assumes autonomous adults making choices in their own self-interest, and does not challenge the socially constructed nature of gender and power).

9. *See, e.g.*, Joan C. Williams, *Sameness, Feminism and the Work/Family Conflict*, 35 N.Y.L. SCH. L. REV. 347, 352-54 (1990) (recognizing that demands for equality in a big law firm, for example, leave unquestioned a system that reflects gender privilege because few women can attain the ideal worker standard of working long hours, six days a week, while still being a wife and mother); CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination, in* FEMINISM UNMODIFIED 32 (1987) (proposing a theory of social dominance to explain sex inequality). MacKinnon describes her dominance approach as an alternative approach, one that questions the distribution of power, specifically, of male supremacy and female subordination. *Id.*

capitalism.[10] According to socialist feminism, the separation of consumption from production, families from productive work, and reproduction from the public sphere further characterize capitalism.[11] Socialist feminists are concerned with the effect of corporations on society as a whole, and on the role of women as workers in society.[12]

Radical feminism and relational feminism challenge social values that are based on male domination and the oppression of women. According to radical feminists, the abstract principles of Western philosophical thought are male-dominated.[13] Further, radical feminists view Western philosophy as a subtle but potent means of oppressing women and perpetuating the patriarchal structure.[14]

Relational feminists also challenge the underlying male bias in the social value system.[15] Like radical feminists, they reject generalized abstractions in favor of a more concrete set of values which are

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10. Marx's classic statement of alienation was that the laborer expends labor on the object he produces but neither identifies with it nor owns it. *See* KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, at 110-11 (Dirk J. Struik ed., 1964).

11. *See* Jane Flax, *Do Feminists Need Marxism?, in* BUILDING FEMINIST THEORY, ESSAYS FROM QUEST 174, 179 (The Quest Staff eds., 1981) (recognizing the influence of Marxism, but pointing out that Marx failed to understand or highlight that the division of labor has different consequences for men and women); Linda Phelps, *Patriarchy and Capitalism, in* BUILDING FEMINIST THEORY, ESSAYS FROM QUEST, *supra*, at 161 (viewing the convergence between feminism and socialism as an important development within the women's movement and noting that the sexual division of production is the major theoretical link).

12. *See* Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543, 549 (1985) (noting that socialist feminists' analysis about the effects of corporate structure on the larger culture assumes the dominance of the corporate structure within capitalism).

13. *See* JEAN GRIMSHAW, PHILOSOPHY AND FEMINIST THINKING 1-5 (1986) (observing that most philosophers ignore women, or regard them as inferior, and further recognizing that the central tenets of feminist theory conflict with this traditional philosophy).

14. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237 (1989) (stating that in male supremacist societies, the male viewpoint takes the form of the objective standard so that the social dominance is invisible and appears legitimate).

15. See CAROL GILLIGAN, IN A DIFFERENT VOICE (1982), and her subsequent research in LYN MIKEL BROWN & CAROL GILLIGAN, MEETING AT THE CROSSROADS (1992), which supports the relational feminists' insights. In her earlier work, Gilligan compared the problem-solving approaches of boys and girls and concluded that there were differences in the value systems at work in their approaches. GILLIGAN, *supra* at 25-37. In an attempt not to categorize the different responses as strictly male and female approaches, Gilligan discussed individual components and referred to them as male and female voices. *Id.* at 33. In a patriarchal society, the female voices are largely suppressed while the male voices are rewarded. *Id.* at 29. Gilligan's study illustrates that the boy's response, which was based on conventions of logic, was treated as a good solution, while the girl's proposed solution, which was based on the process of communication in relationships, was basically rejected. *Id.* In the subsequent study of adolescent girls, Brown and Gilligan observed girls' conflict in dealing with their own voices and the way in which the culture responded to them, concluding that "[w]omen's psychological development within patriarchal societies and male-voiced cultures is inherently traumatic." BROWN & GILLIGAN, *supra* at 216.

identified in the shared experiences of women.[16] Through the process of consciousness-raising, in which women share their particular experiences with each other, the participants begin to see that they share certain common experiences.[17] As women begin to become more connected as a group rather than isolated as individuals, they also move from powerlessness to power. Catharine MacKinnon observed that, "'[i]n order to discover their own identity as distinct from that of the oppressor, [that identity] has to become visible to itself.'"[18] Thus, from the informal consciousness-raising groups of the 1960s and 1970s came an identity characterized by the unnatural separation of public and private lives, alienation from the articulated values of liberal theory, and above all, oppression.[19]

These strands of feminist theory share a common conviction that women and men are unequally situated. For women, as for other marginalized groups, the law has provided a forum in which equality can be demanded, although it is not always won.[20] Therefore, while

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16. *See* MACKINNON, *supra* note 14, at 83, 84 (exemplifying the radical feminist's identification in the shared experiences of women through consciousness-raising); GILLIGAN, *supra* note 15, at 25-37 (representing the relational feminist's challenge to the male value system, which emphasizes mathematical logic, by identifying the experiences of women and their collective experiences as nurturers and moral caretakers).

17. It is important to note here that feminists have criticized the notion that all women share essential values because characteristics other than sex, such as race, class, and sexual orientation, also play a role in shaping values. *See* Angela P. Harris, *Race and Essentialism*, 42 STAN. L. REV. 581, 585 (1990) (arguing that the notion of a unitary "essential" women's experience silences some voices, in particular the voices of black women).

Consciousness-raising may be deficient if it seeks only to include the experience or context of white middle-class women. *See* Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of Black Feminist Ideology*, 14 SIGNS 42, 46-47 (1988) (explaining that black women experience the multiple jeopardy and multiple consciousness of racism, sexism, and classism). Although I respect anti-essentialist arguments, I am comfortable with the idea that some values are related to the role of all women as the caregivers of society and that these are the values that help us make connections as feminists and as people.

18. MACKINNON, *supra* note 14, at 84 (quoting SHEILA ROWBOTHAM, WOMAN'S CONSCIOUSNESS, MAN'S WORLD 27 (1973)).

19. *See* MACKINNON, *supra* note 14, at 84-89 (explaining that the consciousness-raising groups which sprung up in many contexts unmasked "realities hidden under layers of valued myth" as women collectively confronted the range of overt violence and oppression represented in the life experience of the group).

20. Title VII of the Civil Rights Act makes it an unlawful employment practice to discriminate against an individual with respect to "compensation, . . . conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. III 1991).

In an example of successful litigation using Title VII of the Civil Rights Act, the Supreme Court construed Title VII to prohibit gender discrimination in connection with employer-provided pension plans. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (holding that Title VII prohibits an employer from requiring women to make larger contributions to pension plans in order to obtain the same monthly pension benefits as men). Several scholars have pointed out, however, that Title VII has been ineffective in addressing or eliminating the phenomenon of multiple discrimination against women of color. *See, e.g.*, Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1476 (1989) (proposing a multi-factor approach under Title VII to take into account the special situation of black women); Judith Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection*

liberal feminist demands for equality are made within mainstream jurisprudence, radical feminists challenge that jurisprudence.

Law as a form of oppression is especially insidious because once the predominant view of social ordering is incorporated into law, it is perceived as neutral.[21] Law legitimizes the power of the dominant, thereby making the fact of dominance invisible.[22] Feminist jurisprudence requires critical examination of the law's abstract notions of equality and justice in light of women's concrete reality. Through critical review of the abstract legal principles that determine societal rules about the allocation of burdens and benefits, feminist theorists have uncovered a pervasive male bias.[23] Feminists seek to add to these legal principles the perspectives of women that, whether environmentally or biologically determined, differ from those of men.[24] In the area of jurisprudence, all types of feminists seek to affect the way the law applies to particular factual disputes by viewing the facts from the perspective of the collective experiences of women.[25]

B. Feminist Analysis and Critique of Legal Doctrine

1. Deconstructing the Cases

Feminist legal scholars have taken different approaches to existing legal theory. Some have focused on particular cases to determine whether a court's interpretation of the facts and application of legal principles is gender neutral. Others have looked at the legal principles underlying a particular area of law to determine whether, and to what extent, those principles embody male-biased values.[26]

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of Race and Gender in the Civil Rights Act of 1990, 79 CALIF. L. REV. 775, 777 (1991) (presenting three case histories that illustrate the vulnerability of women of color to discrimination in the workplace).

21. MACKINNON, *supra* note 14, at 237.

22. *See* MACKINNON, *supra* note 14, at 237-38 (arguing that through "legal mediation," male dominance is made to seem like a feature of life rather than a one-sided construct imposed by force).

23. *See supra* note 14 and accompanying text.

24. *See supra* notes 4 and 15 accompanying text.

25. *See supra* note 2 and accompanying text.

26. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203-10 (1989) (arguing that male-centered views of harassment are entrenched in the workplace, and further asserting that if employment discrimination of women is to be curtailed, current norms must be modified to include women's perspectives). *But see* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1280 n.2 (1987) (rejecting terms such as "male-biased" because it suggests that simply "squeez[ing] the male tilt out" of an institution will result in gender neutrality).

An analysis of an uncomplicated tort case[27] and of a simple contract case[28] are summarized as examples of the case analysis approach. An example of a recent sexual harassment case[29] is then included to show that feminist theory has had an impact on at least one court's interpretation of the facts and legal principles of a case.

Ann Shalleck analyzed the case of *O'Brien v. Cunard Steamship Co.*,[30] in which a young Irish immigrant woman suffered injurious side effects from a smallpox vaccine that was administered to her before entering the port of Boston in 1889.[31] The court held that the Cunard Steamship Company was not liable for O'Brien's injuries because she had consented to being vaccinated, and thus no battery occurred.[32] In describing the situation of the young woman, the court noted that she would have been detained at the port if she refused the vaccination on the ship and did not have proof of a prior vaccination.[33] The court also found that O'Brien did not object to the shot being administered.[34] Under these circumstances, the court held that any reasonably prudent person would have been deemed to have consented to the procedure.[35] Yet, O'Brien's actual testimony suggested that she did not know that she could have objected to the shot and that no one discussed other options with her.[36]

The court's decision in favor of the steamship line characterizes this young woman as an autonomous individual making an informed choice regarding compliance with governmental requirements for medical care.[37] The court did not take into account her experience;

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27. Shalleck, *supra* note 2, at 371 (explaining the importance of questioning and deconstructing an appellate court's account of the facts of the case).

28. Mary Jo Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1113-34 (1985) (emphasizing the impact that readers' ideas regarding gender have on their understanding of legal doctrine).

29. See the discussion of Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), *infra* notes 45-52 and accompanying text.

30. 28 N.E. 266 (Mass. 1891).

31. *Id.* at 266.

32. *See id.* at 267 (concluding as a matter of law that the steamship line was not liable for the negligence of the doctor that the company had hired to perform vaccinations and that the trial court had correctly ruled that claims for battery and negligence could not go to the jury); *cf.* Shalleck, *supra* note 2, at 374-76 (pointing out that the *O'Brien* court adopted an underlying false model of abstract, autonomous individuals making free, informed choices).

33. *O'Brien*, 28 N.E. at 266.

34. *Id.*

35. *Id.* at 267; *cf.* Shalleck, *supra* note 2, at 380 (applying a feminist analysis, Shalleck reveals that the court's construction of reasonableness was from the male doctor's perspective and not from Mary O'Brien's perspective, that of a young, Irish, female immigrant).

36. *O'Brien*, 28 N.E. at 266; Shalleck, *supra* note 2, at 375. Shalleck further explains that Mary O'Brien perceived the entire vaccination procedure as threatening and coercive, and that no one had to touch O'Brien to let her know that the doctor was a superior force and that she had no choice. *Id.* at 382-83.

37. Shalleck, *supra* note 2, at 376.

she had just traveled from Ireland in steerage, to an unknown place and an unknown future, and had no idea what choices she had regarding the vaccination.[38] Thus, the law fictitiously transformed O'Brien's powerlessness into the power to choose, and the actions of the steamship company and its doctors were legitimized.[39] Mary O'Brien's individual experience was obliterated from history.[40]

In what might be considered another "simple" case, Mary Jo Frug examined the facts from the perspective of a woman involved in a contract dispute.[41] In *Allied Van Lines, Inc. v. Bratton,*[42] a woman had signed a bill of lading for a shipment of goods. The men who delivered the goods were cold and tired and in a hurry to leave, so she did not take the time to read all of the fine print on the document.[43] When a subsequent dispute arose under the terms of the contract, the court enforced the obligation against the woman because her reason for not reading the contract carefully did not fall within a recognized exception to contract law principles.[44] Her experience, and her sympathy for the men who had delivered the goods, were rendered legally meaningless.

In contrast to these two examples, a more recent case illustrates a court's use of a feminist approach in the area of sexual harassment. In *Ellison v. Brady,*[45] Ms. Ellison, a Department of the Treasury employee, brought a sexual harassment claim against her employer because of the bizarre actions of a co-worker which had created a hostile working environment for Ms. Ellison.[46] The Ninth Circuit first considered the standard by which to evaluate the actions of the co-worker and to determine whether his actions constituted sexual

38. Shalleck, *supra* note 2, at 377.

39. Shalleck, *supra* note 2, at 381.

40. Shalleck, *supra* note 2, at 375, 387-96 (recapturing Mary O'Brien's lost history by contextualizing legal reasoning and rules).

41. Frug, *supra* note 28, at 1125-34.

42. 351 So. 2d 344 (Fla. 1977).

43. *Id.* at 346 n.3.

44. The court cited All Florida Surety Co. v. Coker, 88 So. 2d 508 (Fla. 1956) for the principles that a contract is binding "unless one can show facts and circumstances to demonstrate he was prevented from reading the contract, or that he was induced by statements of the other party to refrain from reading the contract" and that "[n]o party to a written contract in this state can defend against its enforcement on the sole ground that he signed without reading it." *Allied Van Lines,* 351 So. 2d at 346-47; *cf.* Frug, *supra* note 28, at 1131 (explaining that Mrs. Bratton, as a woman, was socialized to consider and value others' feelings above her own and was thus constrained from carefully studying the contract).

45. 924 F.2d 872 (9th Cir. 1991).

46. *Id.* at 873-74 (summarizing the actions of Ellison's co-worker, which consisted of notes and letters that maintained the idea that he and Ellison had some type of romantic relationship).

harassment.[47] The court reviewed a number of other cases that held that in order to invoke liability for sexual harassment, a plaintiff's psychological well-being must seriously be threatened,[48] or that the harasser's conduct must cause anxiety and debilitation sufficient to poison a working environment.[49] Rejecting these tests, the *Ellison* court held that the victim's subjective perception of the pervasiveness or severity of the harasser's conduct, not the alteration it may cause in the "objective" conditions of the working environment, determines liability for sexual harassment.[50] The court stated, "we adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[51]

The *Ellison* court was concerned with an area of the law where women's experiences as women directly relate to the legal wrong that they are attempting to redress. The same analysis, however, is as appropriate for allegedly neutral areas of the law, such as corporate law, as it is in the area of sexual harassment law. The *Ellison* case is clearly a substantial step toward a redefinition of equality and justice in the law.[52]

2. *Deconstructing the Doctrine*

In addition to analyzing the principles enunciated in particular cases, feminists also deconstruct the legal principles applicable to an entire area of law to unmask any gender bias. For example, Leslie Bender has written extensively on feminist legal theory and tort law, stating that "[t]ort law cries out for feminist insights, methodologies,

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47. *Id.* at 875-76 (deciding that this case involved a hostile environment claim rather than a quid pro quo claim, the latter involving cases where an employer conditions employment benefits on sexual favors).

48. *See* Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 (6th Cir. 1986), *cert. denied*, 481 U.S. 104 (1987) (ruling that the presence of vulgarity and sexually oriented posters in the workplace was not evidence of sexual harassment that would violate Title VII because the vulgarity and posters had not seriously affected the plaintiff's psychological well-being).

49. *See* Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213-14 (7th Cir. 1986) (holding that plaintiff Scott had not demonstrated harassment because evidence of demeaning conduct and sexual stereotyping did not cause such anxiety and debilitation to plaintiff that working conditions were "poisoned" within the meaning of Title VII).

50. *Ellison*, 924 F.2d at 877-78.

51. *Id.* at 879.

52. *See* Abrams, *supra* note 26, at 1198 (explaining that recent cases on the meaning of "hostile environment sexual harassment" reflect judicial confusion and uncertainty about how to evaluate it). The United States Supreme Court recently clarified this murky area by holding that a plaintiff in a sexual harassment case need not prove psychological injury. Harris v. Forklift Sys., Inc., __U.S.__, 114 S. Ct. 367 (1993). The threshold for a violation of Title VII is whether the harassing conduct illegally alters the working conditions for the woman. Harris, 114 S. Ct. at 370-71.

critiques, and reconstructions."[53] In the area of corporate law, however, there have been very few feminist writings. As Theresa Gabaldon suggests, this dearth may be caused by the domination of male values in corporate law.[54] This domination makes it quite difficult to isolate particular biases. Gabaldon also suggests that feminists may believe that mainstream corporate law scholars would not be receptive to a feminist approach.[55] Recent debates over fundamental values within mainstream corporate law scholarship[56] have provided an excellent opportunity for feminists to inform, if not transform, the law of corporations.

American corporations enjoy enormous power and control much of the public's wealth. Corporate law has developed based on the philosophy of liberal autonomy, which has as its basic premise the self-interested individual.[57] The conflict between the interest of the individual investor and the role of corporations in society has been the cause of much legal theorizing and litigation.[58] The law has sought to preserve the liberal philosophy in this area and has regulated behavior only when individual self-interest has caused certain kinds of quantifiable harms.[59]

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53. Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 575 (1993).

54. Gabaldon, *supra* note 6, at 1415.

55. Gabaldon, *supra* note 6, at 1415.

56. *See* Symposium, *The American Law Institute's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 871 (1993).

57. *See* William W. Bratton, *Self-Regulation, Normative Choice, and the Structure of Corporate Fiduciary Law*, 61 GEO. WASH. L. REV. 1084, 1109 n.110 (1993) (noting that the long-standing doctrine underlying corporations was a vision of "shareholder-to-shareholder interrelations to a contractual world of self-interested pursuits"). *But see* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 32 (1983) (observing that the rhetoric of maximization of profits has been "deemphasized in favor of achievement of human aspirations, use of corporate resources and personnel in social programs, environmental protection, special training for disadvantaged persons, and other nonprofit oriented activities").

58. *See* Trevor S. Norwitz, *"The Metaphysics of Time": A Radical Corporate Vision*, 46 BUS. LAW. 377 (1991) (discussing this conflict in the area of corporate takeovers); *see also* Paramount Communications v. Time, Inc., 571 A.2d 1140, 1154-55 (Del. 1989) (moving away from the classic ownership model of the corporation in which responsibility to shareholders entirely defines directors' duties, to a recognition of broader responsibility to other corporate interests and to the society in which the corporation functions).

59. The well-known business judgment rule protects directors of corporations from liability as long as they meet the requirements of being informed, disinterested, and rational. *See* DETLEV F. VAGTS, BASIC CORPORATION LAW: MATERIALS-CASES-TEXT 210-12 (3d ed. 1989) (setting forth the business judgment rule). Even when an allegation is made that directors have acted contrary to the interests of shareholders, the rules for derivative shareholder litigation are very restrictive. *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 786 (Del. 1981) (holding that where a shareholder institutes a derivative action against the board of directors, alleging a breach of fiduciary duty, the board retains the corporate power concerning litigation decisions.).

Of course, the shareholders themselves are shielded from liability for the actions of the corporation by the very structure of corporations in general. *See* VAGTS, *supra*, at 82-83 (describing incorporation and the concept of limited liability). The limited exceptions for

Implicit and explicit in the American law of corporations are such values as competition, hierarchy, aggression, and strict classifications of roles.[60] Excluded from this body of law are values that are more associated with the feminine gender, such as nurturing, maintaining relationships, and recognizing the symbiotic nature of our existence.[61] The conclusion of this paper[62] argues that this historical development of the law shows the same male bias that was discussed earlier with respect to tort law, contract law, and sexual harassment law.[63] The conclusion further suggests that the law of corporations would benefit from the inclusion of feminist values in the areas of labor management relations, corporate social responsibility, and technology.

III. A BRIEF HISTORY OF THE LAW OF CORPORATIONS

Two theoretical perspectives have defined the parameters of corporate law since the early 1900s: the entity theory and the aggregate of individuals theory.[64] Early corporate law was governed

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holding shareholders personally liable when the corporation is too thinly capitalized, organized to avoid existing obligations, or to perpetuate a fraud, generally only apply to small, closely held corporations. *See* J.L. Brock Builders, Inc. v. Dahlbeck, 391 N.W.2d 110, 117-18 (Neb. 1986) (finding that evidence of undercapitalization, insolvency, and that sole shareholder transferred all corporate assets to himself was sufficient to "pierce the corporate veil" and hold the shareholder liable for the actions of the corporation).

60. Each of these characteristics of the American corporate culture is embodied in the laws governing corporations. Competition is protected by the antitrust laws. *See ABA Section Task Force Offers Suggestions to Administration on Antitrust Enforcement*, 64 ANTITRUST & TRADE REG. REP. 219 (Mar. 4, 1993) (discussing the Clinton Administration's commitment to preserving and enhancing competition as a component of national economic policy). Hierarchical structure is mandated by the state corporate laws and the REVISED MODEL BUSINESS CORPORATION ACT 1984 [hereinafter RMBCA] § 8.01 (Requirement for and Duties of Board of Directors); RMBCA § 6.22 (Liability of Shareholders); RMBCA § 6.02 (Terms of Class or Series of Shares Determined by Board of Directors). Aggressive attempts to control corporations are codified in the laws governing proxy fights. *See* 15 U.S.C. § 78n (1988 & Supp. IV 1992) (setting forth rules that govern proxies). Laws governing hostile takeovers are codified in the Securities and Exchange Act of 1934. 15 U.S.C. § 78m(d)-(e), 78n(d)-(f) (1988 & Supp. IV 1992). Collective bargaining mandates the strict separation of management and labor under the National Labor Relations Act. *See* 29 U.S.C. § 152(3)-(11) (1988) (defining categories of persons involved in labor relations).

61. *See* Virginia Held, *Feminist Transformations of Moral Theory*, 50 PHIL. & PHENOMENOLOGICAL RES. 321, 321 (1990) (discussing the relational experiences between mother and child as a model for relationships outside of the family, resulting in the greater importance of emotion, nurture, and cooperation in our culture).

62. *See infra* part VI.

63. *See supra* notes 26-52 and accompanying text.

64. The entity theory views the corporation as an entity existing separately from its shareholders and other participants. Thus, the corporation is viewed as a legal person apart from the aggregation of shareholders that owns and controls it. *See* David Millon, *Frontiers of Legal Thought I: Theories of the Corporation*, 1990 DUKE L.J. 201, 206. Under the aggregate of individuals theory the corporation is seen as a mere aggregation of natural individuals without a separate existence. *Id.* at 201.

by the entity theory.[65] Initial postulations recognized the corporation as an artificial entity that the state could legitimately create and regulate.[66] State corporate statutes placed considerable limitations on the actions of corporations, such as limiting the corporation's purpose,[67] limiting the duration of a corporation's existence,[68] and imposing specific capitalization requirements.[69] These statutory constraints maintained considerable legislative control over corporate behavior and forced corporations to act consistently with the specific purposes stated in the corporate charter.[70]

Questions of corporate social responsibility had to be viewed within this theoretical and statutory framework. For example, in 1916, Henry Ford, who owned fifty-eight percent of Ford Motor Company, embarked on a major expansion plan.[71] To finance the plan, Ford refused to raise the price of cars and, in fact, lowered the price from $440 to $360 per car.[72] Ford accumulated a large surplus by changing the dividend policy to eliminate the special dividends that were paid to certain shareholders in preceding years.[73] Ford said that he chose this financing method because it was his goal "'to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes.'"[74] The Dodge brothers, who were minority shareholders of Ford Motor Company, challenged Ford's decision, arguing that to bestow a benefit on society at the expense of the shareholders violated the fiduciary duty of the directors.[75] The court agreed with the Dodge brothers, stating: "There should be no confusion . . . of

65. *Id.* at 205-06.

66. *Id.* at 206 (discussing nineteenth century theories of the corporation); *see also* Gause v. Commonwealth Trust Co., 89 N.E. 476, 479 (N.Y. 1909) (stating that although a corporation has some unexpressed and incidental powers they are limited to those reasonably necessary to enable it to perform its corporate functions); London & Lancashire Indem. Co. of Am. v. Fairbanks Steam Shovel Co., 147 N.E. 329, 331 (Ohio 1925) (stating that a "corporation cannot, by the mere act of individuals, be given a power which the state for general reasons has withheld from it").

67. One author explains that "[a]n action outside of the power granted to a corporation by its charter is referred to as *ultra vires* and may be invalid depending upon the rules in force in the state in question." VAGTS, *supra* note 59, at 812.

68. *See* Millon, *supra* note 64, at 208 (showing that limits on a corporation's existence was one means that states used to prevent monopolistic control by corporations).

69. *See* Millon, *supra* note 64, at 207-08 (noting that states imposed limits on capitalization as a method of responding to balance of power concerns that monopolistic power would be created).

70. Millon, *supra* note 64, at 208-09.

71. Dodge v. Ford Motor Co., 170 N.W. 668, 671 (Mich. 1919).

72. *Id.* at 670.

73. *Id.* at 671.

74. *Id.*

75. *Id.* at 672 (quoting a letter written by the Dodge brothers to Mr. Ford).

the duties which Mr. Ford conceives that he and the shareholders owe to the general public and the duties which in law he and his co-directors owe to the protesting minority shareholders."[76]

The entity theory continued to prevail until the late 1920s.[77] However, there was a significant shift away from the idea of an artificial entity, whose only rights were those granted by state corporation laws, to the idea of a natural entity, which had rights analogous to those enjoyed by individuals under the United States Constitution.[78] Signaling this change was the holding in the case *Santa Clara County v. Southern Pacific Railroad*,[79] in which the United States Supreme Court stated that corporations are "persons" under the Fourteenth Amendment and are thus entitled to the rights guaranteed to individuals under the Bill of Rights.[80]

This development also signaled a shift in the source of the corporation's power. Under the artificial entity theory, a corporation draws all of its power and legitimacy for its actions from legislative enactments.[81] Under the natural entity theory, however, the power of a corporation is drawn from the individual shareholders who collectively constitute the corporate entity.[82] This theoretical shift was the backdrop for a legislative move away from statutes that restricted the actions of corporations toward more permissive statutes.[83] For example, instead of requiring a corporation to state a specific purpose in its charter, these newer statutes permit a corporation to state in its charter that it was organized simply to conduct any lawful activity.[84] The ultra vires doctrine that permitted corporations and third parties to challenge corporate contracts if they were beyond the scope of the corporation's business purpose also fell

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76. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

77. *See* Millon, *supra* note 64, at 214 (discussing the fact that despite an emerging reliance on the aggregate theory, the entity theory was still dominant).

78. *See* Jeffrey Nesteruk, *Legal Persons and Moral Worlds: Ethical Choices Within the Corporate Environment*, 29 AM. BUS. L.J. 75 (1991) (discussing the moral and ethical dimensions of corporate personhood).

79. 118 U.S. 394 (1886).

80. *Id.* at 394-95.

81. *See supra* note 66 and accompanying text.

82. Millon, *supra* note 64, at 213.

83. RMBCA § 3.01. The following states have adopted the Revised Act either in part or whole: ALA. CODE § 10-12-4 (Supp. 1993); ARK. CODE ANN. §§ 4-27-101 to 4-27-142 (Michie 1987 & Supp. 1993); GA. CODE ANN. § 14-2-101 (1989); IND. CODE ANN. § 23-1-17-1 (Burns 1989 & Supp. 1993); KY. REV. STAT. ANN. § 271B (Baldwin 1989); MISS. CODE ANN. § 79-4-1.01 (1989); MONT. CODE ANN. § 35-9-101 (1993); N.C. GEN. STAT. § 55-1-01 (1990); OR. REV. STAT. § 60.074 (1991); S.C. CODE ANN. § 33-1-101 (Law. Co-op. 1990); UTAH CODE ANN. §§ 16-10a-101 to 16-10a-1705 (Supp. 1993); VA. CODE ANN. §§ 13.1-601 to 13.1-780 (Michie 1993); WASH. REV. CODE ANN. §§ 23B.01-010 to 23B.01-590 (West Supp. 1993).

84. *See* RMBCA § 3.01 official cmt. (discussing the near universal acceptance of the clause "any lawful purpose").

into disfavor with the courts.[85] Similarly, restrictions on the duration of corporate existence were dropped in favor of perpetual existence.[86]

As a consequence of the shift from artificial to natural entity, the interests of shareholders became paramount. Subsequently, in the 1930s, upon the emergence of the aggregate of individuals model, corporations no longer had to justify their actions by legislative standards. Emphasis in corporate governance was placed on the role of the corporation in protecting the individual property of shareholders without a distinct public responsibility. Corporations came to be viewed as trusts existing for the benefit of the shareholders, with the management acting as trustees.[87] The new standard of accountability was, therefore, mandated by the shareholders, and not by the legislature. This, in turn, solidified the notion that shareholder profitability was the sole motivating force, as well as the sole justification, for corporate action.[88]

In 1932, Professors Adolf Berle and Gardiner Means published the now classic work, *The Modern Corporation and Private Property*, in which they asserted that separation of ownership from control of private property was nothing less than a revolution in corporate structure.[89] They studied the implications of this revolution and concluded that the enormous power vested in corporations could be used "without any test of public welfare of necessity [and is] nominally uncontrolled."[90] Berle and Means warned that "[u]nless the law stops the wide open gap the corporate mechanism has introduced, the entire system has to be revalued."[91] Berle and Means analogized the relationship between a corporation's managers and its shareholders to that of a trustee to the beneficiaries of a private trust in which the

85. *See* David A. Kulwicki, Comment, *Amalgamated Sugar: The Auspicious Return of the Ultra Vires Doctrine*, 49 OHIO ST. L.J. 841, 848 (1988) (detailing the history of the ultra vires doctrine).

86. RMBCA § 3.02 (listing perpetual duration among the general powers of a corporation).

87. *See, e.g.*, Loft, Inc. v. Guth, 2 A.2d 225, 238 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939) (asserting that corporate directors have a fiduciary relationship with the corporation and its shareholders and that the rules governing the conduct of trustees apply to directors); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1146 (1932) (discussing the fiduciary relationship between stockholders and directors); Paul G. Haskell, *The University as Trustee*, 17 GA. L. REV. 1, 1 (1982) (analogizing the university as a corporation chartered to perform charitable services to the corporate trust company chartered to act as trustee of charitable trusts).

88. Dodd, *supra* note 87, at 1146 (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) for the proposition that the sole function of the corporation is to make a profit).

89. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 7 (1967) (suggesting that these new relationships changed the nature of profit-seeking enterprise).

90. *Id.* at 219.

91. *Id.*

trustee is granted absolute power to manage the trust.[92] The function of corporation law, as a branch of trust law, is to insure that the trustee-directors use their power in the interest of the beneficiary-shareholders.[93]

In addition to Berle and Means, Professor E. Merrick Dodd greatly contributed to the discourse on corporate management.[94] Dodd argued that because corporations were such large concentrations of wealth and power, management was the trustee for both the public interest and for the shareholders, and had an affirmative duty to act in a socially responsible way.[95] Dodd did not believe that shareholders would want to encourage corporate social responsibility.[96] Yet Dodd argued in favor of treating the corporation as having a personality distinct from its shareholders, and recognizing that it must meet needs that are different from the immediate profit needs of its shareholders.[97] Dodd's view is now the foundation of several current alternative theories of corporations,[98] but in the 1930s the prevailing ideas were those expressed by Berle.[99] Berle took the position that corporations were solely private trusts. Applying the principles of trust law, he reasoned that corporate management as trustees could not use the private property entrusted to them for any purpose other than to benefit the shareholder-beneficiaries of the trust directly.[100] But Berle and Means together recognized the limitations of the trust theory, calling for a new analytical framework, not in terms of a

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92. *Id.* at 241-42.

93. *Id.* at 242. Berle and Means further stated that four conclusions naturally follow from this analogy: first, the law must check for technical correctness of the use of the corporation's power and whether under all of the circumstances the result fairly protects the interests of the shareholders; second, most shareholder rights are really equitable remedies to be used when the trust has been violated; third, new remedies which are within the broad equitable powers of the courts will be needed to maintain and preserve the interests of shareholders; and fourth, nothing in a corporate charter can defeat this fundamental equitable control. *Id.*

94. *See* Dodd, *supra* note 87, at 1156-57 (discussing social responsibility and the role of managers and the interests of stockholders).

95. Dodd, *supra* note 87, at 1156-58.

96. Dodd, *supra* note 87, at 1157-58. He wrote: "That stockholders who have no contact with the business other than to derive dividends should become imbued with a professional spirit of public service is hardly thinkable." *Id.* at 1153.

97. *See* Dodd, *supra* note 87, at 1160-63 (analyzing the relationship between corporate managers and shareholders).

98. *See* RALPH NADER, MARK GREEN, & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 62 (1976) (discussing an alternative theory in which corporate activity is subject to public interest regulation); Millon, *supra* note 64, at 225-29 (citing theorists who focused on the question of accountability).

99. *See* Adolf A. Berle, Jr., *For Whom Are Corporate Managers Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) (emphasizing the importance of viewing corporations as existing solely for the purpose of making profits for their stockholders).

100. *Id.*

business enterprise, but in terms of a social organization.[101] They equated power struggles throughout ecclesiastical and political history with those taking place in the economic arena.[102]

In the 1930s and 1940s, the corporate model was further developed by applying principles of laissez-faire economics and contract theory.[103] This development was based on the idea that the relationship between the corporation and its shareholders is not analogous to the relationship between trustees and beneficiaries. Instead, it is based on a private contract between the two.[104] The theoretical shift from the early natural entity model controlled by legislative accountability to a model based on private law and individual profitability was complete. This is the view that prevailed, bolstered by the economic justification of a free market, and the reluctance of the judiciary to interfere with private contracts, until the corporate social responsibility debate re-emerged in the late 1960s.[105]

Products liability, corporate criminal responsibility, treatment of employees, and a national environmental policy were significant issues in the 1960s that once again required attention to be focused on the role of corporations in society. Later, the corporate takeovers of the

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101. BERLE & MEANS, *supra* note 89, at 309-10 (discussing the "interrelation of a wide diversity of economic interests"—those of owners, workers, and consumers).

102. BERLE & MEANS, *supra* note 89, at 309-10. Throughout the book, the authors compare the rise of corporate power to struggles for religious and political power. For example, they note that the struggle for reform in the Catholic Church and the development of constitutional rights are all part of the same phenomenon. The phenomenon is characterized as a constant warfare between the individuals wielding power and the subjects of that power. This conflict in the economic field is present in the sense that as an economic organism grows, the possessor of power is more easily located, and the demand for responsible power increases. *Id.* at 310.

103. *See* R. Collin Mangrum, *In Search of a Paradigm of Corporate Social Responsibility*, 17 CREIGHTON L. REV. 21, 27-28 (1983) (describing the contract model of corporate law whereby all rights and responsibilities of individuals involved in a transaction are established through contracts); Daniel J. Morrissey, *Toward a New/Old Theory of Corporate Social Responsibility*, 40 SYRACUSE L. REV. 1005, 1009 (1989) (explaining that corporate law was based on a pure contract model in the late nineteenth century).

104. Morrissey, *supra* note 103, at 1011 (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) for the proposition that contractual expectations of stockholders should take precedence).

105. In 1967, in a revised preface for a new edition of *Modern Corporations and Private Property*, Berle observed that

> [p]rofits are an essential part of the corporate system. But the use of corporate power solely to serve the stockholders is no longer likely to serve the public interest. Yet no criteria of good corporate performance has yet been worked out. Should the problems of bad performance be worked on piecemeal, as has been done by the laws concerning theft and breach of contract, drug distribution and auto safety? Or can criteria for good performance be developed to guide corporate management and inducements be provided to encourage the good? . . . [I]s there some alternative system that could better serve the public interest?

BERLE & MEANS, *supra* note 89, at xxxv.

1980s focused the corporate social responsibility debate on whether corporate constituencies other than shareholders could legitimately hold corporations accountable for their actions.[106] Employees, consumers, and the community-at-large were all viewed as stakeholders in the corporate undertaking.[107] During the 1980s, corporations widely adopted internal codes of ethics.[108]

Commentators in the 1990s are taking a different focus in their analysis of corporate social responsibility.[109] Academic observers emphasize that values based on personal, moral responsibility should set standards for corporate values.[110] For example, an article in the January 27, 1992 issue of *Fortune* questioned what values corporations will need to have in order to succeed in the coming decade, and concluded that the individualism of the 1980s must give way to a new commitment to community in the 1990s.[111] Similarly, scholars have recently articulated new theoretical frameworks for corporate social responsibility based on notions of personal morality, a re-examination of liberal autonomy and individualism, and communitarianism.[112]

The forum for much of the debate about corporations for the past fifteen years has been the American Law Institute (ALI) Corporate Governance Project, which culminated in the *Principles of Corporate Governance: Analysis and Recommendations* released in 1992.[113] Much discussion and criticism of the ALI principles has focused on their

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106. THADDEUS F. TULEJA, BEYOND THE BOTTOM LINE 28-30 (1985) (explaining that the corporate social responsibility model focuses on stakeholders, that is, anyone who has an interest in how the corporation performs its social roles).

107. *Id.* at 30-32.

108. For example, the Johnson & Johnson credo, adopted in the 1940s and then revised slightly in the 1970s, states that the company's responsibilities are first to the doctors, nurses, patients, and mothers who use their products; next, to the employees and the community; then, to the environment; and finally, to the stockholders to whom the corporation owes a "fair return." *Id.* at 206.

Although corporate credos have not been taken seriously for the most part, some corporations have created credos and diligently tried to apply the principles therein. *Id.* at 203.

109. *See, e.g.*, Millon *supra* note 64, at 251-61 (discussing the appropriate goals of corporate law and comparing differing viewpoints on the role of public interest concerns in corporate activity); Morrissey, *supra* note 103, at 1032-39 (describing the corporation as a community within a community).

110. *See infra* notes 129-33 and accompanying text.

111. Brenton Schlender, *The Values We Will Need*, FORTUNE, Jan. 27, 1992, at 75.

112. *See* Morrissey, *supra* note 103, at 1033-36 (concluding that the corporation, like the community, is an organic unit with its own values and culture); *see also* Thomas L. Hazen, *The Corporate Persona, Contract (And Market) Failure, and Moral Values*, 69 N.C.L. REV. 273, 310-11 (1991) (describing a view of the fiduciary model of corporate law whereby shareholders, as responsible members of the community, instill in the corporate contract an obligation to the community at large).

113. Geoffrey C. Hazard, *Forward* to AMERICAN LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS at x (Proposed Final Draft 1992) (stating that the goal of the corporate governance principles was to establish a corporate code which takes into account social values and laissez-faire economic theories).

failure to address the most fundamental question of corporate law that Berle and Dodd first addressed in 1932:[114] whether the corporation is a public or private institution.[115]

The George Washington University symposium on the ALI principles encompassed a variety of theoretical perspectives.[116] The moderator of the program, Professor Lawrence Mitchell, presented the principles as a brokered compromise of competing interests,[117] lacking a "philosophically, politically, and doctrinally coherent corporate model."[118] None of the symposium participants found the ALI Principles completely satisfactory.[119] Three of the models identified by Mitchell,[120] and used by the symposium participants to assess the effectiveness of the ALI Principles, suggest elements that might be contained in a comprehensive corporate model.

The efficiency model advocates that the goal of corporate law should be to ensure an environment of market efficiency to enable the corporation to achieve its goal of maximizing shareholder profits.[121] This model rejects public regulation as inefficient and looks to private contractual rights as the desirable means of corporate control.[122]

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114. *See supra* notes 89-93 and accompanying text.

115. *See* Lawrence E. Mitchell, *Private Law, Public Interest?: The ALI Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 871, 872-73 (1993) (criticizing the principles as lacking a clear and coherent theory of the corporation).

116. *See id.* at 878-80 (commenting on the ALI proposal and the corporate law debate and discussing the papers presented at the symposium by categorizing them according to the corporate models they propose); William J. Carney, *The ALI's Corporate Governance Project: The Death of Property Rights*, 61 GEO. WASH. L. REV. 898, 919 (1993) (interpreting The Corporate Governance Project as expanding the role of fiduciary duties and the number of open terms in the corporate contract that only courts can clarify); Larry E. Ribstein, *The Mandatory Nature of the ALI Code*, 61 GEO. WASH. L. REV. 984, 998-1011 (1993) (detailing the extent to which the ALI Code embodies a regulatory theory of corporate law).

117. Mitchell, *supra* note 115, at 895.

118. Mitchell, *supra* note 115, at 872. Mitchell considers the ALI principles to be incoherent because they constitute a blending of different corporate models.

119. *E.g.*, Carney, *supra* note 116, at 953 (arguing that the ALI Corporate Governance Project marks the demise of an effective property rights and contractual rules system of corporate law); Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Director's Conflict of Interest Transactions and the ALI's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 954, 955 (1993) (indicating that the ALI Principles are a move in the right direction but fall short by not focusing on ethical duties of corporate officers); Ribstein, *supra* note 116, at 985-87 (questioning the effectiveness of mandatory rules as compared to corporate contracts).

120. *See* Mitchell, *supra* note 115, at 876-80 (describing the debate in terms of the constituency, efficiency, and socio-economic models).

121. *See* Carney, *supra* note 116, at 901-19 (stating that private contractual rules provide a more efficient system of corporate governance than fiduciary duty); Ribstein, *supra* note 116, at 1032 (arguing that contractual controls of corporate management are more effective than mandatory rules).

122. *See* Carney, *supra* note 116, at 949 (declaring that corporate legal rules are a less efficient means of corporate control as compared to contractual property rights); Ribstein, *supra* note 116, at 989 (asserting that corporate contract theory is based on the belief that contracting

The socio-economic model[123] uses concepts from the early fiduciary model.[124] Instead of assuming a fiduciary duty of managers to protect the interests of private beneficiaries, this model assumes the existence of significant shared values and communal interests[125] that deserve legal protection under the rubric of trust law.[126]

The constituency model views the board of directors as a mediating body among corporate constituencies.[127] Using corporate takeovers as an example, this model places responsibility on the corporate board to mediate the interests of shareholders, employees, consumers, and the community in which the corporation is located in order to determine the appropriate response to a takeover bid.[128]

IV. ALTERNATIVE VISIONS FOR THE CORPORATE MODEL

Professor Christopher Stone offers a different perspective by suggesting that personal morality is the appropriate model for corporate responsibility.[129] Since corporations are treated as legal persons for constitutional purposes, Stone argues that a model of personal responsibility is an appropriate starting place to redefine corporate responsibility.[130] He suggests that the main attributes of personal responsibility include: lawfulness, moral reflection, and perception of morally salient features of the environment, such as the

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parties should determine the terms of the contract rather than standardized legal rules).

123. The socio-economic model is based on the idea that moral principles should be used as part of the basis for corporate law. *See, e.g.*, Bratton, *supra* note 57, at 1123 (suggesting that corporate legal theory adopt the contract law value of good faith); Mitchell, *supra* note 115, at 879 (describing the socio-economic model as one in which market efficiency and public policy serve as the bases); O'Connor, *supra* note 119, at 966 (emphasizing the importance of moral norms in establishing a fiduciary duty in corporate legal theory).

124. *See* Bratton, *supra* note 57, at 1084 (emphasizing the importance of traditional fiduciary law in corporate governance); O'Connor, *supra* note 119, at 963-71 (discussing the importance of fiduciary law in establishing a moral and ethical norm).

125. The notion of shared communal values is consistent with some elements of feminist theory, particularly with respect to the need to develop and articulate these values in a contextual rather than an abstract fashion. *Cf.* Gabaldon, *supra* note 6, at 1445 (averring that feminism rejects separation of individuals through social and legal norms).

126. Lyman Johnson & David Millon, *Corporate Takeovers and Corporate Law: Who's in Control?*, 61 GEO. WASH. L. REV. 1177, 1179-81 (1993) (explaining that corporate law must begin to take account of non-shareholders in order to survive societal changes).

127. *See* Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1157, 1162-65 (1993) (discussing the emergence of stakeholder/constituency statutes and their effectiveness in corporate law). For a discussion of the constituent model from an ethical perspective, see TULEJA, *supra* note 106, at 28-31 (explaining that corporations should recognize their responsibilities to society rather than merely their responsibilities to shareholders).

128. *See* TULEJA, *supra* note 106, at 30-31 (examining the groups that have a stake in the corporation's decision); Karmel, *supra* note 127, at 1163-64 (explaining that stakeholder statutes force corporations to consider all interested parties when making decisions).

129. Christopher D. Stone, *Corporate Social Responsibility: What it Might Mean, If It Were Really to Matter*, 71 IOWA L. REV. 557, 559-60 (1986).

130. *Id.*

pain or aspirations of others.[131] The problem with which Stone wrestles is how to transfer these qualities to the corporation.[132] Enforcement of civil and criminal laws is an unsatisfactory method of ensuring social responsibility because it assumes that questions of social responsibility will be recognized by the legal system, and that laws will be in place and enforced whenever irresponsibility occurs.[133] Moreover, as several commentators have argued, the function of the law is to set the minimum threshold level of compliance.[134] Finally, administrative and legislative enactments cannot resolve a conflict of responsibility when the responsible choice is clearly the more expensive choice, while the less expensive choice is irresponsible but not illegal.[135]

Each of these theories of reform is limited by the theoretical and practical dichotomy of public versus private responsibility.[136] Because each theory implicitly affirms the fragmentation and alienation between personal morality and productive use of property, feminist theory can contribute new perspectives to the corporate law debate. It can offer a perspective that approaches the issue of responsibility from a unitary, rather than a fragmented, perspective.[137] Stone begins to do this with his personal responsibility model, but then retreats with concerns about diverting corporate

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131. *See id.* at 559-60 (suggesting that a morally responsible person considers not only one's own feelings but also the feelings of others).

132. *See id.* at 567-68 (explaining that legal reform cannot anticipate all possible moral dilemmas, and therefore, responsibility must become part of the corporate code).

133. *See id.* at 561 (setting forth common scenarios in which civil and criminal liability would not serve as effective responses to the problem of establishing corporate responsibility).

134. *Cf.* James A. Henderson, Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765, 792-93 (1983) (rejecting the imposition of criminal penalties and arguing for a corporate legal doctrine to monitor managerial behavior); Joel Seligman, *The Case for Federal Minimum Corporate Law Standards*, 49 MD. L. REV. 947, 974 (1990) (proposing federal reform in corporate law to counteract the deterioration of corporate managerial standards). For a discussion of the application of the criminal law to corporations, see Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems and Prospects*, 73 GEO. L.J. 1 (1984).

135. Stone, *supra* note 129, at 564-65 (offering an example of a company becoming aware of a health hazard in which administrative and legislative measures would be ineffective, because the cost of remedying the situation exceeds the expected legal penalties if the employees are left exposed to the hazard).

136. *See* MACKINNON, *supra* note 14, at 190 (describing the liberal theory that holds that all that is private is out of the sphere of state control while that which is public is subject to state control).

137. However, there are a number of schools of thought that fall under the broad term "feminism." *See supra* notes 6-25 and accompanying text. These different schools may take different perspectives on a given issue. *See, e.g.*, Lahey & Salter, *supra* note 12 (showing that liberal, socialist, and radical feminists approach their respective critiques of the corporate structure quite differently); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14 (1988) (explaining that both radical and relational feminist approaches are based on an underlying belief in women's connectedness with other human beings).

managers from what they do best: enhance shareholder profits.[138] Nevertheless, Stone eventually makes the important point that what is really needed is a change in social consciousness.[139] He recognizes that while gains can be made in making corporations act more responsibly, true social responsibility will not be achieved without far-reaching theoretical and structural change.[140] It is here that feminist theory can make its greatest contribution to the discourse.

The relational[141] and radical[142] models of feminism are especially useful for critiquing and creating corporate theory. Initially, such an approach requires a rejection of all distinctions between public and private spheres,[143] and an articulation of values based on the ways in which people are connected to each other rather than how they are opposed to one another.[144] The next section of the article uses this model to discuss feminist approaches to various aspects of corporations and offers some suggestions about how to develop a comprehensive feminist theory of corporations.

V. A FEMINIST APPROACH

Feminist jurisprudence and social theory provide a fresh analytical framework for criticism of existing legal theory and the system of positive law that it generates.[145] As Leslie Bender notes, "[h]alf the

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138. *See* Stone, *supra* note 129, at 573-74 (contending that the personal responsibility model for the corporation only works in the abstract).

139. *See* Stone, *supra* note 129, at 575 (advocating a change in the corporate culture and in the attitudes of society in general).

140. *See* Stone, *supra* note 129, at 575 (arguing that changes must be made both inside the corporate culture and in society in general through the evolution of societal norms).

141. *See supra* notes 15-19 and accompanying text.

142. *See* MACKINNON, *supra* note 14, at 237-49 (discussing how feminism can change our existing legal and social systems which are based on male dominance).

143. *See* Held, *supra* note 61, at 326-27 (rejecting the public/private distinction which pervades our patriarchal society).

144. West, *supra* note 137, at 14 (noting that the belief that women are connected to other human life and identify themselves based on this connection is the foundation for both radical and relational feminist thought); Held, *supra* note 61, at 338-39 (discussing the mother/child relationship as a context in which shared values can be identified). Held states:

> If we look, for instance, at the realities of the relation between mothering person (who can be female or male) and child, we can see that what we value in the relation cannot be broken down into individual gains and losses for the individual members in the relation. Nor can it be understood in universalistic terms. Self-development apart from the relation may be much less important than the satisfactory development of the relation. What matters may often be the health and growth of and the development of the relation-and-its-members in ways that cannot be understood in the individualistic terms of standard moral theories designed to maximize the satisfaction of self interest.

Id.

145. Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613, 627 (1986) (explaining that feminist theory focuses on identity of interest and mutual concerns as compared to the existing legal focus on personal advantage); *see also* West, *supra* note 136 (comparing radical and relational

battle is changing the way we think about things. We must start somewhere."[146] Feminists challenge the traditional notion that law is a set of neutral, abstract principles, and that specific events must be categorized according to these abstract principles.[147] Beginning with the rejection of liberal theory, and the diminution of personal experience that it embodies,[148] feminists can construct a theoretical framework by examining the personal sphere of human life.[149] Feminist theory seeks the elimination of the duality of reason and emotion, public and private, political and personal.[150] These dichotomies have been the justification for the devaluation of the traditional female domain, and the equation of power with the traditional male domain.[151] Through the method of group consciousness-raising, feminists collectively focus on daily life as the cornerstone of theoretical development.[152]

A. Liberal Theory and Corporate Law

Liberal theory defines "man"[153] in his natural state as a self-interested, aggressive individual.[154] It is necessary to limit his natural self-interest and aggression only to the extent required to protect each individual from the natural instincts of others.[155] This

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feminism to liberal and critical legal theory).

146. Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 DUKE L.J. 848, 908.

147. MACKINNON, *supra* note 14, at 237-49 (arguing that law is based on male dominance and is created through the male perspective).

148. *See* Matsuda, *supra* note 145 (asserting that abstraction as a basis for liberalism nullifies the theory due to its disregard of concrete social realities).

149. *See* Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1383 (1986) (explaining that women view relationships as part of the self); West, *supra* note 137, at 19 (stating that women define themselves based on their personal relationships).

150. *See* MACKINNON, *supra* note 14, at 249 (explaining that feminist theory proposes a change in legal thinking concerning the relationship between life and law).

151. *See* Held, *supra* note 61, at 321-23 (asserting that historically, philosophers have focused on those characteristics associated with maleness and ignored or degraded those characteristics associated with femaleness); *see also* Matsuda, *supra* note 145, at 617-18 (describing the traditional practice of equating women with traits considered to be inferior to those traits equated with men).

152. *See* MACKINNON, *supra* note 14, at 94-96 (suggesting that consciousness-raising is a means by which women can recount their common experiences and thereby redefine their views of the law); Matsuda, *supra* note 145, at 618, 622 (explaining that consideration of real-life experiences is essential to a well-developed theoretical framework).

153. I deliberately chose this word rather than person or woman.

154. Matsuda, *supra* note 145, at 624-25 (stating that the bases of liberalism are self-interest and mutual disinterest); *see also* Held, *supra* note 61, at 333 (noting that liberalism has as its premise "mutually disinterested rational individualists").

155. *See* Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1178 (1992) (commenting that feminists view liberalism as being based on a social contract model which assumes that the parties to the contract are self-interested individuals); West, *supra* note 137, at 9 (observing that liberal theory views individuals as being in a struggle between maximizing their own personal freedom and minimizing the

is the function of law in society.[156] Individual autonomy, the desire to protect private property, and the endeavor to increase personal power and wealth are the inevitable and natural defining characteristics of social "man."[157]

Corporations, as aggregations of individuals, take on the collective manifestations of these characteristics in the form of profit seeking, aggressiveness in the market and toward competitors, and the accumulation of wealth and property.[158] Corporate law provides a check on corporate behavior in the same way that criminal and civil laws provide checks on individual behavior. Feminist theory criticizes liberal theory for taking atomistic individuals as the basic units of political and legal theory because liberal theory fails to recognize the inherent social nature of human beings.[159] People cannot exist outside a social context, in the absence of relations with others.[160] Relational qualities that characterize human beings in their natural state are an essential, but previously omitted, part of the theory that shapes our law.[161]

With respect to corporations, this means that the law must recognize the enormous collective power of the corporate entity, not merely the aggregation of individuals. The legal justification for the existence of the corporate form must be the advancement of the social good as well as the enhancement of corporate and individual profit.[162] Under current law, profit enhancement clearly takes

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threat from others).

156. *See* McClain, *supra* note 155, at 1178 (describing the social contract as the adaptation of the individual to societal living); West, *supra* note 137, at 9 (explaining that the liberalist dilemma is solved through the creation of and allegiance to a legal system).

157. For a discussion of the tensions between feminist thinking and Western philosophy, see GRIMSHAW, *supra* note 13.

158. *See* Bender, *supra* note 146, at 908-09 (asserting that both our legal and political structures provide no redress for corporate accumulation of wealth and power); Melvin A. Eisenberg, *The Structure of Corporate Law*, 89 COLUM. L. REV. 1461, 1461 (1989) (defining a corporation as an enterprise comprised of individuals whose goal is to make a profit).

159. *See* Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 36 (1989) (arguing that a new idea of autonomy, one which takes into account both individual and social aspects of people, must be developed).

160. *See* Held, *supra* note 61, at 337-38 (suggesting that human beings are defined by their ties to others).

161. *See* Held, *supra* note 61, at 337 (emphasizing the importance of both social ties and the concept of self); Scales, *supra* note 149, at 1373 (asserting that the legal system is based on abstract, objective, universal goals rather than people's relationships with each other).

162. *Cf.* Lahey & Salter, *supra* note 12, at 556 (describing a feminist critique of current corporate law and providing an alternative that is based on responsibility, connection, ethics of care, and sharing). For examples of organizations which attempt to advance the social good, see John Eckhouse, *Make a Call, Save a Whale: S.F. Phone Firm Makes it Easy To Do Good Deeds*, S.F. CHRON., Sept. 25, 1993, at D1 (describing a phone company which donates a percentage of its profits to groups working for peace, human rights, and the environment); Gary Strauss, *Businesses: Profits, Planet Do Mix*, USA TODAY, June 10, 1992, at 1A (introducing an advocacy group which plans to show companies how they can make profits while still taking account of

precedence over social responsibility.[163] A feminist theory of corporations would, by definition, be a theory of corporate social responsibility. It would require recognition of the qualities of caring and nurturing within the corporation in areas of employee relations, job safety, and decision-making, and outside the corporation, in areas such as environmental protection, and product and consumer safety.[164]

B. A Participatory Feminist Approach

One of the defining characteristics of the modern corporation, the concept of limited shareholder liability, is anti-feminist from the outset.[165] Alienation and compartmentalization of different spheres of existence is one of the main themes criticized in feminist thought.[166] Separation of the investor from the productive use of her assets is but one pernicious form of alienation.[167] According to Professor Gabaldon, a feminist corporation would have a mechanism to increase the practical involvement of the shareholders.[168] She proposes legal culpability for shareholders who do not participate in decisions about the use of their assets.[169] This is consistent with the feminist view that responsibility should replace passivity in collective enterprises.[170]

Gabaldon anticipates two main criticisms of her approach. First, she recognizes that theorists from the law and economics school would argue that shareholder monitoring is duplicative and inefficient.[171] Second, she recognizes that some may argue that if legislatively imposed limited liability were repealed, it would be

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environmental and societal concerns).

163. *See supra* notes 57-63 and accompanying text.

164. *See* Gabaldon, *supra* note 6, at 1453 (arguing that a feminist corporate system would focus on personal care rather than profits); Lahey & Salter, *supra* note 12, at 556 (suggesting a feminist view of corporate law which is based on moral principles and "ethical consciousness").

165. Gabaldon, *supra* note 6, at 1429 (explaining that the concept of limited liability distances the shareholders from their investments, thereby contradicting the feminist ideal of connectedness).

166. *See* Gabaldon, *supra* note 6, at 1445 (stating that feminist theory rejects the segregation of legal structures and the existence in our society of separate spheres of social status).

167. Gabaldon, *supra* note 6, at 1429 (stating that a feminist perspective would reject such separation through consideration by decision-makers of the effect of their decisions on others).

168. Gabaldon, *supra* note 6, at 1429.

169. *See* Gabaldon, *supra* note 6, at 1429-30 (arguing that feminism views limited liability as a destructive social force and that feminism embraces the concept of personal responsibility).

170. Gabaldon, *supra* note 6, at 1431 (describing feminist reasoning which sees an interest in monitoring activity as a social good).

171. Gabaldon, *supra* note 6, at 1431.

replaced by negotiated contractual limitations.[172] To each of these objections, Gabaldon has a feminist response.

As to the first argument, participation and responsibility are positive values; thus shareholder monitoring is a social good which is not necessarily dependent on a particular outcome.[173] As to the second argument, contractual limitations on liability would be subject to public limitations on the enforcement of all private contracts.[174] This would require a contextual determination of whether a limitation in a particular case was consistent with the values of participation and responsibility, as well as other articulated policy concerns.[175] Gabaldon emphasizes that corporate responsibility would be an integral part of a feminist corporate structure.[176]

Gabaldon then poses the more practical question: will investors continue to invest if limited liability is eliminated?[177] Gabaldon wonders whether investors would be more likely to make decisions to invest in conscientiously managed enterprises which would result in reduced risk for shareholders, creditors, and consumers.[178]

In her conclusion and recommendations, Gabaldon does not pursue the important implications of personal and institutional responsibility. A feminist theory of corporations would include a component whereby the structure of the corporation permits, or indeed mandates, evaluation by investors on the basis of responsibility, not solely on profitability. Instead, Gabaldon focuses on a different alternative, increased enterprise insurance.[179] This is somewhat

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172. Gabaldon, *supra* note 6, at 1432.

173. Gabaldon, *supra* note 6, at 1436-38. The theme of involvement rather than passivity is also discussed by Professor Bender regarding the duty of care in traditional torts law, which she advocates should be replaced by a duty to care in feminist torts law. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 30-32 (1988) (discussing the traditional tort doctrine of "no duty to rescue" as antithetical to a feminist ethic of responsibility).

174. For a feminist-based alternative to the economic model of corporations, see Gabaldon, *supra* note 6, at 1448-54 (asserting that giving more knowledge and power to investors, combined with requiring corporations to carry adequate insurance, will help to eliminate the problems presented by limited liability).

175. Such a determination would be similar to the established bodies of law concerning the enforcement of exculpatory clauses and non-competition clauses, and the doctrine of unconscionability under the Uniform Commercial Code § 2-302 (1987).

176. Gabaldon, *supra* note 6, at 1436-37 (describing a feminist view of investment, whereby risk aversion would be defined as "avoiding risk to oneself and to those to whom one feels most immediately connected").

177. Gabaldon, *supra* note 6, at 1407-09 (suggesting that since price reflects risk, and risk reflects amount of liability, eliminating limited liability may result in less capital available for investment).

178. For a discussion on the effects of feminist values on investment behavior, see Gabaldon, *supra* note 6, at 1437.

179. Gabaldon, *supra* note 6, at 1449-54 (arguing that retaining limited liability along with mandatory adequate insurance is a sound approach to take).

disappointing and inconsistent, because insurance introduces an additional layer of separation of risk from investor, producer from consumer, injurer from injured. Gabaldon does hint that insurance need not be in the traditional form and need not even be money.[180] In the alternative, a feminist approach would require the corporation's managers to personally care for victims of corporate wrongdoing.[181] Other means of developing a contextualized criteria for responsibility that do not separate individual from corporate responsibility need to be explored by feminists.

Like Gabaldon, Lahey and Salter[182] identify the corporation as an institutional form of male power and "masculist" values.[183] Their review of existing feminist critiques of the corporation points to areas where theory has had some impact on corporate values, opening new directions for feminists to explore.[184]

Liberal feminists have focused on how the corporate organizational structure has generated constraints for participation by women.[185] They also have identified ways in which women can succeed in male-dominated institutions.[186] Lahey and Salter criticize this approach because it puts the responsibility on women to change themselves to fit into a male model without analyzing whether the model itself is good for women, or indeed for people in general.[187] Similarly, they warn that movements towards worker participation, employee buyouts of failing companies, and worker security plans, which do not change the essential nature of the corporation, may have the effect of co-opting feminist values.[188]

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180. Gabaldon, *supra* note 6, at 1453 (suggesting that insurance could be in the form of personal care rather than monetary compensation).

181. Gabaldon, *supra* note 6, at 1453; *see also* Bender, *supra* note 146 and accompanying text.

182. Lahey & Salter, *supra* note 12.

183. Lahey and Salter explain that they chose the term "masculist" because it "more effectively enables the reader to think of gender female people as being 'masculist' when they resisted feminist analyses and (remain) committed to malestream projects, issues, or methodologies." Lahey & Salter, *supra* note 12, at 543 n.1.

184. Lahey & Salter, *supra* note 12, at 569-72 (suggesting that feminist theory can have an impact on the traditional corporate concept, by the elimination of hierarchies and, in general, movement out of a patriarchal system).

185. *Cf.* Lahey & Salter, *supra* note 12, at 546-47 (explaining that liberal feminism teaches women how to change their behavior to fit into the male-dominated corporate structure).

186. Lahey & Salter, *supra* note 12, at 546-47 (summarizing "how to succeed guidebooks" for women in the corporate world as an example of how women must change to be successful); *cf.* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 197-205 (1977) (describing how power is held in corporations and how women's upward mobility has been limited by the distribution of power).

187. Lahey & Salter, *supra* note 12, at 546-47.

188. Lahey & Salter, *supra* note 12, at 570-71 (arguing that these modifications to the corporate system do not effectuate a change to the underlying patriarchal system).

Socialist feminism focuses on the "effect(s) of corporatism on the larger culture" and particularly on women as workers.[189] The alienation recognized by socialist feminists is manifested by the separation of corporate (productive) work performed by women from private (reproductive) work performed by women,[190] and the devaluation of the latter because it is done outside of the dominant institution.[191]

The radical feminists see the corporation as serving the needs of a capitalistic patriarchy.[192] Emphasis within this patriarchy is on efficiency, discipline, and control.[193] While these corporate characteristics are somewhat mitigated by corporate programs promoting diversity, decentralization, and greater worker participation, radical feminists point out that such reforms do not change the essential patriarchal nature of the power upon which corporate culture depends.[194] What is needed is an ethical structure to challenge the most basic elements of the corporate culture, which include profit for individuals gained through hierarchical control and disconnection of corporate participants from one another.[195] Lahey and Salter suggest that collective and cooperative organizations, alternative families, and feminist communities provide sources of feminist organizational values.[196] While not discussing these models in detail, the authors conclude that women can draw analogies to the corporation based on "the values of contextuality, continuity, and holistic participation."[197]

C. A Feminist Contextual Critique of Corporate Law

Professor Bender concentrates her critique of corporate actions in the context of tort law.[198] Specifically, she discusses the response of corporations to mass torts, such as in the recent cases of *A.H. Robins*

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189. Lahey & Salter, *supra* note 12, at 549.

190. *See* MACKINNON, *supra* note 14, at 187, 190 (providing an in-depth analysis of the public/private distinction and its use as a means for subjugating women).

191. Lahey & Salter, *supra* note 12, at 549-50.

192. Lahey & Salter, *supra* note 12, at 553 (describing the radical feminist contribution to corporate law analysis). For an explanation of feminist views of the patriarchal state, see MACKINNON, *supra* note 14, at 161-63, 237-39; Scales, *supra* note 149, at 1378-79; West, *supra* note 137, at 58-60.

193. Lahey & Salter *supra* note 12, at 554.

194. *See* MACKINNON, *supra* note 14, at 238 (explaining how the liberal state is inherently patriarchal by virtue of its basis in neutral, abstract rules); Lahey & Salter, *supra* note 12, at 555 (illustrating that corporations have adopted these programs in such a way that the corporations do not change their essential character).

195. Lahey & Salter, *supra* note 12, at 555.

196. Lahey & Salter, *supra* note 12, at 545.

197. Lahey & Salter, *supra* note 12, at 570.

198. Bender, *supra* note 146, at 849-50.

and the Dalkon Shield,[199] *Johns Manville* and asbestos,[200] and the Union Carbide poison gas leak in Bhopal, India.[201] Bender's revisitation of tort law based on a feminist ethic of responsibility is consistent with the idea of unlimited shareholder liability. She seeks to establish personal responsibility within the corporation for mass torts committed by corporations.[202]

Bender begins by examining current tort law as it applies to mass torts committed by corporate defendants and notes several problems with how the law deals with liability issues. First, she challenges the "blame the victim" approach taken by the law.[203] This diverts attention away from the real wrongdoer, and the system that perpetuates these wrongs. "Mass torts are about corporate violence, power, irresponsibility, and cultural, social, and political conditions that ultimately prioritize wealth and production over human welfare. Blaming common law tort for the liability crisis is like blaming women for being raped."[204] Blaming the victim assures that the powerless will remain powerless.

Bender next criticizes the way that the law treats mass torts and notes that tort law ignores the vast inequality of power between the corporate defendant and the victim.[205] The notion of equality under the law is a fiction that perpetuates domination by institutions over individual welfare.[206] Bender writes, "we permit [corporations] to function without the power checks ordinarily imposed on our traditional, collective political institutions."[207] The liability crisis, she argues, is not caused by the law's response to tort victims, but by the corporation's ability to impose these risks.[208] Bender offers several practical suggestions which would enable courts to neutralize the power differences between the corporation and the victim.[209] For example, a shift in the burden of proof and a rebuttable presumption

199. Barrington v. A.H. Robins, 702 P.2d 563 (Cal. 1985).

200. Ball v. Johns-Manville Corp., 625 A.2d 650 (Pa. Super. Ct. 1993).

201. Connecticut Ins. Guar. Ass'n. v. Union Carbide Corp., 585 A.2d 1216 (Conn. 1991).

202. Bender, *supra* note 146, at 882 (discussing the advantage that corporate defendants have over plaintiffs in mass tort cases).

203. Bender, *supra* note 146, at 853-57.

204. Bender, *supra* note 146, at 857.

205. Bender, *supra* note 146, at 858-59.

206. Bender, *supra* note 146, at 858 & n.29 (implying that the law will permit corporations to impair health or safety in exchange for advancing economic well-being as long as corporations can then provide compensation to injured parties).

207. Bender, *supra* note 146, at 859.

208. Bender, *supra* note 146, at 860.

209. Bender, *supra* note 146, at 892 (showing that in order to empower a mass tort plaintiff in a suit against a corporation, the court must neutralize existing "impediments to equal justice").

of corporate liability would recognize the vast legal arsenal available to the defendant and the contrasting limited legal resources available to the plaintiff.[210] Bender also suggests requiring the corporation to pay plaintiffs' expenses pending the outcome of litigation so that tort victims would not be as desperate to settle their claims in order to obtain medical, psychological, and other necessary care.[211]

Bender further argues for expanding the legal responsibility of corporate tortfeasors to include a "holistic, needs-based, caregiving response."[212] Compensation in the form of money damages is an inadequate punishment or deterrent to the corporation because it fails to truly compensate the victims for their loss.[213] While recognizing the obvious importance of compensation, Bender urges that corporate employees who are responsible for decisions that cause mass harm acquire a non-delegable duty of caring for the victims.[214] This duty would force corporate actors to take personal responsibility for their actions and would bridge the gap between personal and political action.

Bender's ideas challenge the basic values and assumptions of corporate and tort law. Insights drawn from feminist theory are particularly applicable to corporations in both their internal and external relations. For example, differences in problem-solving approaches by female and male managers, which some have attributed to gender, could change the way decisions and policies are made by corporate actors.[215] The model of reason over emotion, the cornerstone of liberal theory, may not be the best model for decisions which affect the lives of thousands of employees. The artificial separation of the public and private lives may be, at worst, untenable for many employees and, at best, unfulfilling for many others.[216]

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210. Bender, *supra* note 146, at 892 (suggesting that a balance of power will be achieved if the court shifts the burden of proof to that party who is most capable of bearing it "by virtue of wealth, power, knowledge, and access to information").

211. Bender, *supra* note 146, at 894 (suggesting also that requiring corporations to pay immediately before a finding of liability might encourage defendants not to delay and would achieve results more quickly).

212. Bender, *supra* note 146, at 895, 896, 897-98 (suggesting that corporations should make it a policy for an employee to pledge to take care of those that are harmed as a result of their negligence).

213. Bender, supra note 146, at 898-99 (asserting that the notion that money supplies complete compensation "provide[s] pathetically inadequate support for an entire law of personal injury").

214. Bender, *supra* note 146, at 905-07 (articulating the duty not as a punishment but as "being human and interconnected").

215. *See* GILLIGAN, supra note 15, at 25 (describing responses to problem-solving exercises from a male and female perspective).

216. For a feminist critique of current workplace reforms, *see* Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REVIEW 941 (1989).

Just as corporations would assume caregiving responsibilities for victims of torts committed by the corporation under Bender's model, so too could they assume responsibility jointly with employees for the care of children and other family members of corporate employees, as needed.

Other benefits of rejoining public and private aspects of the lives of corporate employees would be the increase in the input of employees to the work of the corporation. This has been attempted formally by a number of worker participation programs.[217] A feminist approach to corporations would create an environment in which informal participation by workers was valued as well. Levelling the hierarchical structure of the corporation might give workers a greater sense that their participation is valued in many areas. For example, employees might rearrange their work hours informally with one another to accommodate outside of work activities, such as volunteering in schools and hospitals, and working with charitable organizations. Thus, such activities would become part of the whole of the employees' "work."

Marion Crain and Gillian Lester have examined collective bargaining processes in the United States and Canada, respectively, from a feminist perspective.[218] Both authors have observed that labor relations law is based on a male-biased view of power and autonomy which does not incorporate the experiences of a significant part of the work force.[219]

The common law of contracts, the legal basis of a corporation's relationship with its employees, has been modified by the collective bargaining process.[220] The law of contracts is premised on the equality of bargaining power of the parties and freedom of choice in contractual relations.[221] Collective bargaining laws recognize the

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217. *See* Benjamin Duke, *Regulating the Internal Labor Market: An Information-Forcing Approach to Decision Bargaining Over Partial Relocations*, 93 COLUM. L. REV. 932, 981 (1993) (noting that "a growing body of empirical evidence supports the view that collaborative workplace arrangements yield significant increases in employee productivity, while promoting more active participation in enterprise decisionmaking."); *compare* Kenneth A. Clark, *Ensuring Good Faith in Dismissals*, 63 TEX. L. REV. 285, 304-05 (1984) (suggesting that, for the most part, "halfhearted management commitment renders employee participation ineffective both in increasing productivity and in improving quality of worklife.").

218. Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481 (1992); Gillian Lester, *Toward the Feminization of Collective Bargaining Law*, 36 MCGILL L.J. 1181 (1991).

219. Crain, *supra* note 218, at 488 (asserting that a "patriarchal vision of power" permeates labor law); Lester, *supra* note 218, at 1181 (stating that collective bargaining law overlooks women as a rich source of insight into the mechanics of the bargaining environment).

220. Lester, *supra* note 218, at 1183.

221. Lester, *supra* note 218, at 1183-84.

modern reality of the inequality between corporate employer and employee, and attempt to equalize the two sides by strengthening the employees' bargaining power through the single bargaining unit concept.[222] Collective bargaining laws also presume that the relationship between the employer and employee is adversarial,[223] and that conflict is inevitable.[224] Collective bargaining embodies the notion that the adversarial process will result in the fairest resolution of conflicts, and ensure that conflicts are resolved exclusively through an adversarial process of decision making.[225]

Crain and Lester reject the inevitability of conflict between employees and their employer corporations. Lester suggests a system of employee/management teams whose specific task would be to identify opportunities for cooperative rather than adversarial decision making.[226] Crain rejects the single bargaining unit requirement as it presently exists in the American system in favor of a more decentralized approach to union structure.[227]

Another area in which feminist ideas challenge the prevailing corporate culture is in the relationship between people and technology. Helen Holmes has identified six operative values which drive policy makers in the field of reproductive technology.[228] These values are that: (1) technology is intrinsically good and serves as a means as well as an end;[229] (2) domination or power over other people is necessary;[230] (3) objectification of people, rather than objectivity, is acceptable;[231] (4) the earth exists in order for human beings to exploit it;[232] (5) hierarchies of ideas and values based on the status of the person expressing the idea or value are sound;[233] and (6) profit is the underlying value of the entire health care system

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222. *See* Lester, *supra* note 218, at 1218 (describing the bargaining unit as a group which gains power in the bargaining process relative to its size and its employer).

223. *See* Lester, *supra* note 218, at 1198-99 (arguing that collective bargaining is like combat, and citing the language used for holding meetings such as "hard bargaining" and "bull sessions" to show that it creates visions of angry rivals).

224. Crain, *supra* note 218, at 503-04.

225. *See* Lester, *supra* note 218, at 1192 (explaining that "[c]ollective bargaining seeks to correct for injustices within the common law of employment").

226. *See* Lester, *supra* note 218, at 1213 (explaining that teams would meet on a scheduled basis to discuss issues and to make each other aware of the other's concerns).

227. *See* Crain, *supra* note 218, at 509-12 (arguing that this unified union block tends to silence women and minorities, and offering an alternative feminist vision).

228. Helen Holmes, *Reproductive Technologies: The Birth of a Women-Centered Analysis, in* THE CUSTOM MADE CHILD? *supra* note 4, at 1-8.

229. Holmes, *supra* note 4, at 3-5.

230. Holmes, *supra* note 4, at 5-6.

231. Holmes, *supra* note 4, at 6.

232. Holmes, *supra* note 4, at 6-7.

233. Holmes, *supra* note 4, at 7.

and reproductive technology.[234] These six values describe the corporate approach to other technologies as well. Holmes argues for a new set of values based on respect for the individual and a recognition that our personal lives affect our decision-making.[235] She argues that anyone who is affected by a technology should have a genuine choice of whether or not to submit to it.[236] Wholeness of the individual, the community of women, the human community, and the ecosystem should be considered in making policies about technology.[237] Finally, Holmes asserts that connectedness of ideas as opposed to rank-ordering is necessary to achieve participatory policy making.[238]

In *Feminism Confronts Technology*,[239] Judy Wajcman critically examines feminist critiques of technology which assert that technology is a masculine culture and fundamental to the gendered division of labor.[240] In the area of medical and reproductive technology, a field that has been increasingly mechanized and masculinized in this century, technology reinforces existing social inequalities, rather than eradicates them.[241] Corporate decisions about the allocation of capital for the development of new technologies continue to be male-dominated.[242] Wajcman argues that technological innovation must "recognize the gendered nature of the design and production of the built environment . . . [and] begin to make space for women."[243] Wajcman suggests that more women in technological and scientific fields will help to challenge the male culture of technology, and greatly advance a new design of technology.[244]

VI. CONCLUSION

An important debate is now taking place in the field of corporate law about the fundamental nature of the corporation. While many

234. Holmes, *supra* note 4, at 7-8.
235. Holmes, *supra* note 4, at 8-9.
236. Holmes, *supra* note 4, at 10-11.
237. Holmes, *supra* note 4, at 11-13.
238. Holmes, *supra* note 4, at 13.
239. WAJCMAN, *supra* note 4.
240. WAJCMAN, *supra* note 4, at 137 (asserting that the "enduring force of the identification between technology and manliness . . . . is the result of the historical and cultural construction of gender"). Wajcman fully explores the impact of technology on the division of labor by gender. *Id.* at 27-53.
241. WAJCMAN, *supra* note 4, at 78.
242. *Cf.* WAJCMAN, *supra* note 4, at 162 (stating that "the production and use of technology are shaped by male power and interests" and arguing that feminist theorists must examine this critically).
243. WAJCMAN, *supra* note 4, at 135.
244. WAJCMAN, *supra* note 4, at 164.

who are engaged in this debate take a practical approach to answering this question based on how American corporations are presently structured, this article takes a more idealistic approach based on the two strands of feminist thought that are described as relational and radical feminist theory.[245] Capitalism, and its inherent reverence for private property and profit, generates the values of our corporate culture within the singular context of production for profit. Because of the exclusion of women from meaningful participation in this culture, and the devaluation of the experiences of women outside of it, alternative female values have not had an impact on the ethical and legal discourse concerning corporations. As women have an increasing opportunity to experience the corporate culture, many identify elements of it that alienate them and cause them to have their lives unnaturally fragmented into public and private spheres.[246] Some may also feel that they are excluded because their insights may be based partly on emotion and not wholly on reason. Other women feel disconnected from one another due to their respective places in the corporate hierarchy.[247] From these shared responses to the corporate culture, feminist theory can make a significant contribution to the current debate on legal and ethical reform.

Corporations which are innovative in their organizational behavior, and which recognize the connectedness of personal and public aspects of society, will be able to succeed in fulfilling an untold number of social needs. First, corporations must adopt policies that extinguish the artificial separation of the personal and public lives of employees, shareholders, and directors. Policies such as the Family and Medical Leave Act of 1993[248] and the proposed Health Security Act,[249] are two examples of the public and private spheres being reconnected by legislation. But these necessary programs alone cannot effectively solve the problem of conflicting family and outside work responsibilities when family care continues to have no value, as

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245. *See supra* notes 5-25 and accompanying text (discussing the strands of feminist theory).

246. *See, e.g.*, Suzannah Bex Wilson, *Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform*, 67 IND. L.J. 817, 821 (1992) (noting that women in the workplace "are not permitted to ignore their assigned gender roles, creating tension between their personal and public lives."); Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1184 (1988) (recognizing that professional women receive mixed signals from society and the workplace that they "must put . . . family first, but must not permit it to interfere with . . . employment obligations.").

247. *See* Rhode, *supra* note 246, at 1203 (observing that popular books and magazines emphasize that professional women should avoid personal relationships with female subordinates, and should be particularly assertive with lower level employees).

248. Pub. L. No. 103-82, 107 Stat. 861 (1993) (to be codified at 5 U.S.C. §§ 6381-6387; 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654).

249. H.R. 1200, 103d Cong., 1st Sess. (1993).

evidenced by the fact that family leave is *unpaid* leave.[250] Although such social legislation is better than no reform at all, these programs rely on the fair enforcement of laws, and allocation of benefits by the state or by the management. Some feminists argue that fairness is achieved by an ethic of responsibility for others that begins in the context of personal relationships,[251] and that private responsibilities are of no less value than responsibilities for production.[252]

Feminist structural changes in the corporation would include such reforms as decentralized decisionmaking, flattening corporate hierarchies, and increased opportunity for all types of corporate employees.[253] However, these reforms are in danger of co-opting feminist values into the patriarchal structure, unless they are accompanied by a wide distribution of authority and responsibility, and the ability of corporate participants to join in the decision-making process without regard to such classifications as laborer, manager, shareholder, and director.

Suggestions for legal reforms such as those presented by Bender, Gabaldon, Crain, and Lester provide a model for a corporate environment in which a feminist ethic could develop. For example, if corporate actors who are responsible for causing mass torts personally participate in the actual, physical care of victims, the perception of those corporate managers about corporate behavior may become intimately connected with their personal behavior.[254] Similarly, if Gabaldon's model of culpability for non-participation of shareholders were to be enacted into law, shareholders would necessarily bring their private experiences to bear on the collective action of the corporation.[255] Shareholders would be empowered to protect societal interests as well as their own financial interests. For

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250. One criticism of the Family and Medical Leave Act is that it only addresses the needs of middle-class and upper-class women who can afford to take unpaid leave. *See* Maria O'Brien Hylton, *"Parental" Leaves and Poor Women: Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 477 (1991) (evaluating an earlier version of the Act).

251. *See* Lester, *supra* note 218, at 1200 (describing an informal governing structure in which women co-workers would take some personal responsibility for the others' family responsibilities).

252. *See* Lester, *supra* note 218, at 1202 (suggesting that while work in the home may be unpaid and socially devalued, it is in fact quite important).

253. These organizational reforms were suggested by KANTER, *supra* note 186, at 273, 276-81, 267-70.

254. *See* Bender, *supra* note 146, at 907 (noting that feminists need "to help change the dominant ideology from individualist to interconnected").

255. Gabaldon illustrates this with the following hypothetical: "[S]uppose, for a moment, that Ford shareholders themselves had been involved in resolving the issue of the exploding Pinto gas tanks. Apart from any loss of secrecy issue, is it likely that they would have voted, 'Yes, let the [gas] tanks explode'? Is that how *you* would have voted?" Gabaldon, *supra* note 6, at 1431 (footnote omitted).

example, a corporation's decision about the use of a new technology for which the corporation owns the patent is currently considered a decision wholly within management prerogatives.[256] Under a feminist approach the profitability question might still be answered by management, but the societal implications of the use of the technology would be subject to shareholder scrutiny in a participatory forum as well as an adversarial one.

A corresponding right of shareholders to hold officers and directors accountable under a new social responsibility standard would also be enacted.[257] This would necessarily change the fiduciary duty of directors. The trust model, as conceived by Berle and Means,[258] is based on the patriarchal notions of absolute power and the separation of rights and responsibilities. As such, the model is wholly incompatible with all strands of feminist theory.[259] A model based on shared rights and shared responsibilities would require input by the shareholders and a redefinition of the role of directors. Directors would act as facilitators of the shareholder decisions about social responsibility rather than as trustees of shareholder property.

A parallel development would be a change in the business judgment rule.[260] The standard of protected behavior for directors would include a duty to be informed specifically of the social consequences of corporate actions and a duty to ascertain whether shareholder participation had occurred. These criteria would then be factored into the definition of rationality that enables directors to be immune from shareholder intervention in management decisions. Significantly, the business judgment rule might still protect directors from liability if a corporate decision adversely affects the shareholders, but would still serve the social good. A feminist rationale for the rule

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256. *See* Jeffrey N. Gordon, *Shareholder Initiative and Delegation: A Social Choice and Game Theoretic Approach to Corporate Law*, 60 U. CIN. L. REV. 347, 351 (1991) (stating that "for the large public corporation the pattern of delegation gives management virtually unbounded decisionmaking authority over business matters . . . . ").

257. A perfect opportunity for testing these ideas may present itself in the bio-medical ethical debate over cloning human cells that has recently been undertaken in the scientific and corporate communities. *See, e.g.*, Barbara Ehrenreich, *The Economics of Cloning*, TIME, Nov. 22, 1993, at 86 (reporting on the cloning of human embryos as an example of "genetic manipulation of the creepiest sort"); Richard A. McCormick, *Should We Clone Humans? Wholeness, Individuality, Reverence*, CHRISTIAN CENTURY, Nov. 17, 1993, at 1148 (questioning whether cloning human cells is ethical).

258. *See supra* notes 89-93 and accompanying text.

259. *See supra* notes 5-25 and accompanying text.

260. The generally accepted criteria for the application of the business judgment rule is that when the directors of a corporation make a decision within their power, they must be informed, disinterested, and rational, and if they meet these three criteria, the decision of the board of directors will not be subject to question by the shareholders. *See supra* note 59 and accompanying text.

would be that proper management decisions can only be made after participation by shareholders and consideration of social impact. The rule would protect this process, while not mandating any particular outcome. Liability would fall on shareholders in the form of removing their protection of limited liability to third parties, if the shareholders failed to participate in the decision-making process.

Virginia Held warns us that: "Women should clearly not agree, as the price of admission to the masculine realm of traditional morality, to abandon our own moral concerns as women."[261] As women continue to succeed in the male domain of the corporate and political hierarchies, they will bring a different perspective, derived from their collective experiences as the caregivers of society. With this perspective will come moral as well as practical concerns that can transform the structure of corporations to foster connections between and among those that are affected by them. An important role for feminist theory is to ensure that the response to women's participation is not merely an added benefit for child care or the inclusion of women on committees, but a fundamental change in the nature of powerful institutions based on an ethic of shared responsibility and caring for one another.

261. Held, *supra* note 61, at 327.