FEMINIST FOUNDATIONS FOR THE LAW OF BUSINESS: ONE LAW AND ECONOMICS SCHOLAR'S SURVEY AND (RE)VIEW

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ABSTRACT

The purpose of this Essay is to suggest frameworks and modes of inquiry for applying feminist legal analysis to business law and the related theory of law and economics. It does so in two ways. One is to assess works already written by feminist scholars in the business law arena, highlighting how those contributions have begun to pave the way towards enriching the scope of business law analysis. The other is to offer two new roles for feminist jurisprudence. One role is to define just (that is, fair) distributions of rights and the other role is to define social judgments of value, both within the context of law and economics' efficiency criteria for efficient allocation

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** This Essay is drawn from an earlier one written for the Feminist Jurisprudence Project at the University of Florida. The reader is referred to FEMINIST JURISPRUDENCE, WOMEN AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY (Betty Taylor, Sharon Rush & Robert J. Munro eds., forthcoming 1999). Contained therein are essays with accompanying bibliographies on how feminist jurisprudence has impacted on a broad spectrum of areas of law from discrimination to criminal law to tax issues.

and cost benefit analyses. As a result, this Essay demonstrates that feminist jurisprudence can find fruitful roles consistent with its moral goals through interaction with law and economics, particularly with regard to analyzing business law issues.

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I. INTRODUCTION

> [F]eminist methods are not only useful means to reach feminist goals, but also fundamental ends in themselves.
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> Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 832 (1990).

Feminist legal theory is usually viewed as a methodology designed to discern discrimination against disenfranchised groups, particularly women, and to demonstrate the unequal distributions of power and the barriers that exist against more equitable distributions. The focus is on the disenfranchised. A feminist is considered to be someone concerned about women's issues. Analyses extend to how women are harmed: harmed in the market place through discriminatory wages and job opportu-

nities, harmed in the place of employment through sexual harassment, harmed in the privacy of their own homes through domestic violence, and harmed in their economic rights through their treatment during divorce. The focus of feminist legal theory is on the consequences of sexism in its broadest definition.

In the efforts to demonstrate issues of women's concern and to promote greater understanding and appreciation of their complexities, feminist scholars have evolved techniques of analyses that are different from those used in more traditional legal scholarship. These techniques, however, prove not only to be very insightful for the problems that they were designed to address but are also powerful techniques unto themselves. One might ask whether these techniques of analyses can reach beyond the women's issues that spawned them to contribute significantly to social and political thinking in general. If so, feminist legal methods may serve wider applications in addition to the important contributions they have already made in understanding and characterizing gender disenfranchisement.

The study and development of feminist analysis is relatively new. It is particularly new in contrast to one of the oldest (and considered masculine) professions around — the study of business and its underpinnings, the theory of economics. Thus, whether the techniques of feminist analysis would have something unique to contribute to the understanding of economics in law (*i.e.*, the jurisprudence of "law and economics") and the discipline of business law in the legal context is an intriguing question. In general, just as "law and economics" (in its full range of political expression from liberal to conservative) has extended over time to issues beyond the traditional ones of the business market place,[1] one might wonder if the feminist legal method also can be applied to a variety of subjects apart from what is now considered traditional concerns of gender.[2]

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1. See, for example, *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982) *aff'd on reh'g*, 739 F.2d 993 (5th Cir. 1984), in which Judge Goldberg, in a concurrence, applies a law and economics analysis to justify punitive damages to deter police violations of civil rights and *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), in which Judge Posner denied prisoners' 42 U.S.C. § 1983 action for injuries sustained while in custody on the grounds that the prison officials failed to satisfy a law and economics definition of reckless behavior.

2. I realize, of course, that in one sense an application of feminist analysis to any area could be always considered of a gendered nature, since at the root of most feminist thinking is the notion that the existing social structure is patriarchal. In that view, any analytic contributions to nontraditional subjects would be ferreting out and addressing problematic aspects that perhaps would be by definition considered

The purpose of this Essay is to suggest frameworks and modes of inquiry for applying feminist legal analysis to business law and the related theory of law and economics. In particular, this Essay offers two new roles for feminist jurisprudence. One is to define just (*i.e.*, fair) distributions of rights and the other is to define social judgments of value, both within the context of law and economic efficiency criteria. The first concern, just rights distributions, merges with law and economics' analysis of efficient allocations and distributions of economic rights. The second concern, social judgments of value, merges with law and economics' cost-benefit analysis of efficiency. In both instances, this Essay demonstrates that feminist jurisprudence has the capacity to resolve particularly controversial aspects arising from law and economics' assessment of business law issues.

In the course of discussion, this Essay assesses works already written by feminist scholars in the business law arena, highlighting how those contributions have begun to pave the way towards enriching the scope of business law analysis. It is not typical in law, as it is in other disciplines, to engage in an analysis surveying the articles of other scholars to gain insight into an emerging field.[3] More often one sees an analysis surveying the opinions of several courts or the judicial opinion of one court. Other disciplines find reviewing and assessing scholarly efforts in a new area an extremely useful enterprise.[4] Not only is it possible to extract common themes from disparate insights, but such endeavors can recognize, suggest, and lay the foundation for new directions im-

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patriarchal in nature. I choose here, however, not to label legal areas not normally associated with women's concerns as subjects of gender. This Essay shows that feminist analysis can extend indeed beyond patriarchal concerns. Alternatively, for a statement characterizing feminist theory as being — at its core — about women, see Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1990):

> Although [feminist critical theories] differ widely in other respects, these theories share three central commitments. On a political level, they seek to promote equality between women and men. On a substantive level, feminist critical frameworks make gender a focus of analysis; their aim is to reconstitute legal practices that have excluded, devalued, or undermined women's concerns. On a methodological level, these frameworks aspire to describe the world in ways that correspond to women's experience and that identify the fundamental social transformations necessary for full equality between the sexes.

3. More commonly one sees an essay examining the work of one scholar or even more typically, a review of one book by an author.

4. In economics, for example, a whole journal, *The Journal of Economic Literature*, is dedicated to this enterprise. To be invited to make a contribution is considered a mark of distinction and often the survey's analytic contributions causes the article to become one of the seminal pieces in the field.

portant for future scholarship to explore. Given the increased number of new jurisprudences that examine legal issues from entirely different perspectives (*e.g.*, critical race theory, feminist jurisprudence, law and economics, communitarianism, and post–modernism), analytic surveys of those efforts at various stages of development ought to prove useful, as case analysis already is, to the legal community.

The goal of this Essay on feminist jurisprudence as applied to business law is to serve just such a function. This Essay observes the challenges other authors address, demonstrates the insights they have in common, and suggests new directions while laying the intellectual foundations for future consideration. In particular, this Essay demonstrates that feminist jurisprudence can find a fruitful role consistent with its moral goals through interaction with law and economics, particularly with regard to analyzing business law issues. When one recalls that feminist theory on the one hand, and business law and law and economics on the other, typically are viewed as diametrically opposed to one another, particularly politically, then it is not surprising that bringing together these disciplines in a synergistic way not only suggests difficult obstacles to surmount, but also offers the potential for innovative and constructive possibilities as well.

Section II of this Essay introduces the reader to some of the foundations of feminist thought. Section A distinguishes three major schools of feminist thinking and Section B outlines analytic tools developed in feminist analysis originally for the purpose of addressing women's concerns. Those tools now prove to be useful in analyzing business law problems. Section III analyzes the first efforts of feminist scholars to apply their framework to business law concerns, and to define a general theory of feminine jurisprudence in business law and in law and economics. Section IV discusses in some detail a published interchange between a feminist scholar and a law and economics scholar evaluating the emerging market economy in China. This interchange serves as the springboard for this Essay's first contribution of a new role for feminist thought. That role is feminist jurisprudence's capacity to define justice in rights distributions in a law and economics efficiency context.

Section V explores the first two articles to apply feminist analysis to specific business law issues. In that context, Section VI suggests a second significant role for feminist jurisprudence in business law analysis and that is to define social values for the

purpose of law and economics efficient cost benefit analysis. Through the discussions in Sections IV and VI, this Essay shows that feminist analysis has the capacity to address issues that are far removed from women's concerns and thus offers broader prospects then previously thought. This Essay then closes with a conclusion in Section VII and is followed in Section VIII with a bibliography of the articles applying feminist analysis to business law available at the time of this Essay's publication. Also included in the bibliography are some articles on feminist jurisprudence in general that a reader new to the subject might find useful.

Feminist thought, with its richness and varied perspectives, has had a significant effect on the way we think and talk about a number of gender-related issues such as reproductive freedom, sexual harassment, domestic violence, and equality of access to social and economic independence. The introduction of feminist legal methods to areas not specifically focused on women's questions should also prove to be insightful since new tools will address long-standing topics in novel and interesting ways.

II. FEMINIST JURISPRUDENCE: AN INTRODUCTION

A. *Schools of Thought*

As generally held by most scholars in the field,[5] the three most widely recognized schools of feminist jurisprudential thought are the liberal feminists, the cultural (or relational) feminists, and the radical feminists, though other perspectives exist as well.[6] The liberal feminists are typically characterized as calling for the equal treatment of women and men. They argue against using women's differences as a basis for discriminating against women. For example, they would argue against corporations being allowed to use the fact that women have children and tend to

5. It is impossible in the context of this Essay to describe feminist jurisprudence fully. Better discussions can be found in other essays and articles, some of which are listed in the bibliography in Section VIII of this Essay. What are presented here are some introductory aspects of feminist jurisprudence helpful in understanding the recent developments in business law. Much of what follows in this section is drawn from Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990), Rhode, *supra* note 2, and Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

6. The postmodern school of feminist thought is one such example. *See generally* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990).

be the primary caretaker at home as a basis for not hiring them in important positions.

The cultural (or relational) feminists are usually thought of as those who wish to celebrate the differences of women and acknowledge that those differences bring something positive rather than something negative to the community. In the business context, this means that women can deal with the same jobs, issues, roles, and creative expressions as men, but women may approach the tasks differently and in a manner that enhances society.

Another approach to acknowledging and celebrating the differences of women combines the celebratory perspective with a perspective that views the prevailing social structure as embodying a system of subordination. This approach views the issue of gender politics as one of both power inequality and conflicting values, in which the conflict in values is a conflict between a feminist ethic of care and a "masculinist"[7] patriarchal ethic of dominance. According to this feminist perspective, the masculinist value professes to support individual autonomy by basing social and political decisions on an "objective" evaluation of individual rights, the goal of which is to promote individual freedom circumscribed only to protect one individual from annihilation by the actions of another.[8] But a feminist evaluation sees the masculinist approach as in fact alienating, isolating, and depersonalizing the individual. This patriarchal vision that purports to promote equality for all is, at its core, hierarchical in orientation and focuses on the depowerment of individuals through debilitating their access to knowledge and shared cooperative enterprise.[9]

In contrast, the feminist value is concerned with needs, nurturing, and connection with others, often referred to as the ethic

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7. I first encountered the term "masculinist" in Catharine MacKinnon's discussion contained in Lecture, *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFF. L. REV. 11 (1985). It is used here as one of the many variations of terms used in feminist literature to characterize what is frequently referred to as the dominant "male" perspective. *See generally* West, *supra* note 5, at 58–70. "Masculinist" is appealing because, in its symmetry to the word "feminist," it reminds us that the social mode viewed as mainstream is in fact a perspective on social order of a particular group — that is, men. Though the perspective is considered mainstream, it is not universal.

8. *See* West, *supra* note 5, at 5–11.

9. *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, 554 (1985) (citing KATHLEEN FERGUSON, THE FEMINIST CASE AGAINST BUREAUCRACY (1984)).

of care and connectedness.[10] It seeks what it believes is true equality, one which acknowledges differences among individuals, offers solutions to problems through collaboration of all concerned, and promotes values that envision the needs of the community as a whole and not values focused solely on creating isolated spheres of individual autonomy. Since the masculinist view is inherently hierarchical in nature, changes within the system to redress any particular ills towards women will only be patchwork in nature. Since the heart of the system is patriarchal, its engine will inevitably grind towards continued oppression that will merely be expressed in other ways. The only remedy for this is to replace the core masculinist values with those of the feminists. In other words, to "include" the female voice requires a systemic change at the core of values, not an issue by issue band-aid approach.

Many feminists who support this view classify themselves as cultural or relational feminists. Reflecting the diversity among feminist thinkers, some who adopt this view classify themselves as radical feminists. Some do not classify themselves at all.

Other feminists who often are considered radical feminists take a much stronger approach than that stated above. Their analysis about the exclusion of women rests primarily on an analysis of power. For some, the "female" ethic of care and connectedness itself is seen as a trap for women. They argue that it is women's sense of connectedness that seduces women into caring for others and subordinating their own needs. The female ethic of care actually sets w\omen up to be oppressed: oppressed in their bodies through the rigors of childbearing and invasive sex, in their minds through limitations on their intellectual endeavors, in their emotions which are discounted as irrelevant, and in their relationships, in which they are always subordinate to men. These relational aspects need to be limited so that women can develop their own autonomy. The only way a woman can be free of this oppression is to become autonomous, independent, and in complete control over her own life, physically, spiritually, and morally. Some radical feminists take the position that this requires a complete separation from men. Others view that any contact with men is automatically oppressive. The strategy then

10. *See* West, supra note 5.

is separation and not collaboration, and the focus is on the removal of patriarchal values in order to liberate women.[11]

All of the above feminist approaches are gendered analyses. That is, though the conclusions of each school differ, each of the analyses are based on the differences that gender creates, whether it is with respect to the treatment of women or with respect to the values social institutions incorporate.

One question that is natural to raise when examining the potential for a feminist jurisprudential analysis of business law is whether a gendered analysis can provide useful insights in the business law forum when the focus is not specifically about women's issues but on issues concerning disenfranchised groups in general.[12]

A second, broader question to raise but perhaps more difficult to answer is whether feminist analysis can encompass more than a gendered approach. That is, do the tools and techniques of feminist legal theory still yield insights if they are applied in a nongendered context and beyond issues of group disenfranchisement?[13]

As will be seen in the articles discussed below, the authors to varying degrees answer the above questions either directly or indirectly when addressing business law issues. It may take, however, considerably more experience with applying feminist analysis to specific business law problems before a general role can be abstracted for feminist jurisprudence in that forum.

B. *Analytical Approaches*

Over time, feminist writers have developed certain concepts and tools to use when engaging in feminist analysis. Though they designed these tools to render unambiguously clear the disenfranchisement of women in the prevailing social order, the writers discussed in this Essay have applied these same concepts and

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11. *See id.* at 28–29.

12. Martha Minow has already demonstrated the use of feminist analysis in understanding the concerns of other disenfranchised groups based on characteristics such as race, ethnicity, and age. *See* Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 57–95 (1987).

13. *See* David Cole, *Getting There: Reflections on Trashing From Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59, 79 n.82 (1985) (explaining that analysis of feminists is from the perspective of a marginalized group, and affords them the advantage of valuable insights).

tools to the business law issues they address. A brief discussion of these concepts and tools here is therefore useful.[14]

The *feminist ethic of care* is probably the single most important paradigm used in feminist reasoning. Almost all other tools and approaches have this principle as their underlying premise. The feminist ethic of care serves to contrast with what feminists view as the masculine ethic of autonomy.[15] Feminist analysis concludes that the masculine ethic of autonomy in fact leads to domination and subordination of individuals in a hierarchical structure that is indifferent to individual needs. This hierarchical structure is often referred to as a *patriarchal* structure.[16] The feminist ethic of care holds that concern for others is of paramount importance. In a macro sense, the needs of *all* members of the community are equally important and decisions should be made based on those collective considerations. On a micro level, one's individual actions should be guided by their impact on others.

Separation or *dichotomies* are concepts used specifically in feminist reasoning to characterize the destructive compartmentalization of various aspects of individuals' lives that they experience when living in a patriarchal society. For example, feminists often discuss the imposed separation of the public and private spheres in which the individual's work life is isolated from his or her personal life and vice versa.[17] As a result, one's personal (and family) needs are not permitted to be considered in one's working environment, which sometimes can lead to crushing experiences. *Reintegrating*[18] separate spheres or dichotomies is a position feminists often advocate. The feminist ethic

14. For a good foundation in feminist concepts and reasoning, see generally Bartlett, *supra* note 5, Rhode, *supra* note 2, and West, *supra* note 5.

15. *See* Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1385 (1986).

16. *See* Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 40 (1990); *see also* Patricia Smith, *Introduction: Feminist Jurisprudence and the Nature of Law, in* FEMINIST JURISPRUDENCE 3, 3–4 (Patricia Smith ed., 1995).

17. "The essence of this [patriarchal] ideology was that the world was naturally divided into two parts, or spheres: one, a public sphere, of work and politics, inhabited by men; and the second, a personal or domestic sphere, encompassing home and family life, which was deemed the realm of women." Diane Polan, *Toward a Theory of Law and Patriarchy, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 294, 298 (David Kairys ed., 1982).

18. *See* Kathleen A. Lahey, ". . . *Until Women Themselves Have Told All that They Have to Tell. . .*," 23 OSGOODE HALL L.J. 519, 533 (1985).

of care asserts that the work place must take into consideration its workers' personal needs.

The *excluded voice*, the *voice of the other*, or the "*other*," reflects feminists' realization that, historically, the woman's perspective of her own experience had been completely excluded from legal, social, or other political considerations, even in those circumstances in which women were harmed. Effectively, legal evaluations and policy decisions were based on the man's subjective experience and concerns. Fairness and justice were defined in terms of what seemed fair to him. If a woman's subjective experience deviated from the man's, the woman's perspective did not enter into the analysis. Thus, the man's subjective experience became the "objective" one and the woman's experience was relegated to a "no-man's" land, unseen, unheard and unconsidered. Thus, the woman became the "other," that is the "other" to the centrality of man. And as the "other," the woman and her "voice" (*i.e.*, her perspective) were excluded from any consideration. Hence, the feminists concluded that the woman's voice was the "excluded voice."[19]

For example, for a long time the crime of rape was tried in court by examining the woman's behavior or conduct to see if the man's forced penetration of her was justified from the man's subjective experience. Often the conclusion was that the man's conduct was justified because (from his perspective) she was "asking for it." Whether this was indeed her intent or whether she even construed her conduct to convey this was rarely, if ever, considered. Her "voice" was completely excluded from the legal analysis. The weight of whatever resistance the woman might have offered paled in comparison to the weight given to the man's perception of the surrounding circumstances. ("What part of 'no' do you not understand?" was not a question posed before feminist consciousness was raised.)[20] Similar analysis extended to the treatment of domestic violence in the home and sexual harassment in the work place. Recognizing and "hearing" the excluded voice, the voice of the "other" is a major contribution of feminist thinking.

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19. "To keep its operation fair in appearance . . . the law strives for rules that are universal, objective, and neutral. . . . [T]he law [must] comprehend that women's definitions have been excluded and marginalized, and to show that the language of neutrality itself is one of the devices for this silencing." Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 896 (1989).

20. *See, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

In order to facilitate hearing and understanding the excluded voice, feminists developed the techniques of *narrative* and *context analysis*. *Narrative* is a technique in which the excluded voice, typically the woman's, tells her story. We learn then what the subjective experience is,[21] and in our *concern for the "other"*[22] which is motivated by the *ethic of care*, we can determine what the individual's needs are and how we can address them. The narrative technique is now used in various arenas of legal discourse.[23]

Context analysis recognizes that the prevailing social paradigm may not be meaningful for those individuals whose voices are excluded. The analysis of their circumstances only makes sense in the context in which the events occur.[24] For example, the requirement that an individual can only use force equal to the threat posed to protect oneself from an attacker is meaningless when a petite woman faces a muscular male who intends to rape her through his own physical strength. Since he is using nondeadly force, she is limited to nondeadly force. But clearly her capacity to defend herself through her physical prowess is in itself quite futile. A knife or gun may be the only means by which she can protect herself effectively, yet this would legally constitute the use of deadly force. An understanding of her motives and dilemma, whether or not one concurs with the validity of the action itself, can only be reached by examining the circumstances in context.[25] Feminists have used context analysis to illuminate a number of scenarios that appear to be applications of

21. "Through consciousness raising [narrative], women grasp the collective reality of women's condition from within the perspective of that experience, not from outside it." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 536 (1982).

22. "The female voice is associated with a self connected to others, intimacy, care, and responsiveness to relationship." Carrie Menkel-Meadow, Portia *Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 80 (1994).

23. Note its current use in the hearings held by the Truth and Reconciliation Commission in South Africa. *See, e.g.*, Nelson Mandela, *Reconciliation Still the Task For All South Africans*, HOUS. CHRON., June 16, 1999, at 27. *See also* Thabo Mbeki, *Haunted by History: Race and National Reconciliation in South Africa*, HARV. INT'L REV., Summer 1999, at 96, 95; Pumla Gobodo-Madikizela, *White People Just Don't Get It About Racism*, L.A. TIMES, JULY 12, 1999, at B5 ("America could learn a lesson from South Africa about the healing power of confronting its ugly past.").

24. "[I]ndividualized factfinding is often superior to the application of bright-line rules[:] . . . reasoning from context allows a greater respect for difference and for the perspectives of the powerless." Bartlett, *supra* note 5, at 849.

25. *See* Christine R. Essique, Note, *The Use of Deadly Force by Women Against Rape in Michigan: Justifiable Homicide?*, 37 WAYNE L. REV. 1969, 1978–86 (1991).

equal justice in the abstract, but prove not to be just at all when placed in the context of a woman's subjective experience.

Though other tools and concepts exist in feminist analysis, the ones mentioned here are the primary ones encountered in the feminist literature on business law discussed below.

III. TACKLING BUSINESS LAW

> Feminist theory generates challenging new perspectives for analysis of legal phenomena generally, even in the unlikely area of corporate law.[26]

A. *Introduction*

This section presents first those articles that examine the impact feminist jurisprudence can have in the development of business law reasoning. As might be expected, the feminist analysis found here primarily levels significant criticism at the prevailing allocations of power in business law and policy structure. Extrapolating from these criticisms however, one can discern a more powerful, broader role for feminist scholarship that is not readily anticipated. That role is to affect business law's and law and economics' deliberation of the socially optimal allocation of property and other economic rights. Feminist analysis can serve to define social justice within the context of economic efficiency. As demonstrated below, economic efficiency does not define a unique optimal economic state; it in fact only defines a range of choices. Feminist jurisprudence can serve to determine which of those choices are socially just.

This section of the Essay then continues with an analysis of the first two articles to apply feminist principles to resolve specific business law problems. As a result of this examination, another avenue for the development of feminist jurisprudence in business law reveals itself. Feminist analysis can affirmatively address the question of what levels of socially risky enterprise conduct society wishes to tolerate in exchange for economic advancement. This question is usually considered solely within the purview of law and economics which, through the application of cost-benefit analysis to business situations, often reaches conclusions some find unsettling and unhappy. Feminist theory can here redefine ambiguous cost-benefit parameters more in accordance with social notions of justice and fairness.

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26. Lahey & Salter, *supra* note 9, at 569.

Readers may well know the significant role that law and economics has played in understanding questions of allocations of economic rights and judicious levels of enterprise risk. Though surprising, this Essay demonstrates a synergistic effect of combining two disparate and seemingly antithetical disciplines, feminist jurisprudence and law and economics, to resolve more satisfactorily business law issues. As a result, feminist analysis proves its capacity to uncover and illuminate conundrums not addressed or adequately unraveled in areas unconcerned with gendered issues.

B. *The First*

Kathleen A. Lahey and Sarah W. Salter's article *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*[27] is one of the first to recognize that feminist analysis could be used constructively in an area that was not normally thought of as a woman's issue. The article also serves as an interesting foundation for a discussion about the ways in which feminist theory might be used to address concerns about corporate conduct.[28]

Reviewing the literature they consider relevant to a feminist analysis of corporate law, Lahey and Salter portray a progression of feminist consciousness about the corporate world. It begins with a liberal approach emphasizing the goals of equal treatment and success for women comparable to that enjoyed by men in the business environment. Addressing first the "survival" manuals (*i.e.*, guides for women on how to succeed in the corporate world), Lahey and Salter show that even in the context of seeking equal treatment for women in the work place, the scholarly development in that arena inevitably turned to a critique of the work place itself and its negative effects on the individual.[29] What the authors observe about analyses of gender concerns in the business world parallels the development of feminist thought itself as it moved from the liberal goals of equal treatment for women to a general critique of our social structure that emerged in both radical and what subsequently came to be called cultural or relational feminism.[30]

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27. Lahey & Salter, *supra* note 9.

28. As this is a Canadian piece, their emphasis is on Canadian literature but their analysis would probably hold as well for U.S. scholarship.

29. *See* Lahey & Salter, *supra* note 9, at 544–45.

30. *See generally* Bartlett, *supra* note 5; West, *supra* note 5.

Arguing in favor of continuing the progression of critical analysis of the working environment, Lahey and Salter set forth an agenda for feminist thinking about corporate law. Publishing in 1985, midst a prolific and prodigious period of feminist jurisprudential thought in general, the authors distinguish three feminist schools: liberal, socialist, and radical. They characterize the liberal school, as others since have, as one that emphasizes strategies to overcome barriers to equal workplace treatment for women. The socialist perspective discerns and critiques the corporate culture itself for its appropriation of the individual's sense of self and the corporate demands on the individual to subordinate his or her individual and familial interests in favor of corporate needs. The authors feel, however, that it is left to the radical feminist perspective to pick up the gauntlet of corporate law analysis because this perspective is the only approach with the capacity to address what they consider to be the core issues.[31]

The radical perspective requires us to examine how the current corporate structure is supported by the legal system that generates it and what ethical and moral values drive that legal system. Lahey and Salter view the legal system as embodying the dominant ethic of patriarchy that drives the system's social ills. Feminist theory is especially adept at recognizing those ills and understanding patriarchal dominance and only radical feminism will explore the implications of that ethic fully.[32]

Applying radical feminist analysis, the authors observe that there are two dimensions of corporate structure that render it problematic: its structural mode and its ethics, both of which are driven by "masculist"[33] patriarchal values. The corporate structure mode is one of centralized hierarchy. This creates an atmosphere of isolation, depersonalization, and separation among the individuals connected with the firm. By limiting an individual's access to information, the corporate structure disempowers individuals at all levels of the hierarchy, manifesting dominance over them. Such an atmosphere not only discourages cooperative efforts to the benefit of all, but also fosters among other ills ethnic and gender discrimination.

Lahey and Salter argue, however, that changing these corporate behaviors is not enough since many corporations have al-

31. *See* Lahey & Salter, *supra* note 9, at 544–57.

32. *See id.* at 555.

33. *Id.* at 543. Lahey and Salter prefer the term "masculist" as opposed to "masculinist" used by other feminist authors.

ready adopted alternative forms of organization — job rotation, ethnic and gender diversity, and group cooperation. Yet we observe that they still retain their "essential character." What Lahey and Salter charge is that the core of the corporation — its *moral* value — has to change as well. The ethics of the corporation must replace the masculist values of separation, abstract rules, rights, and entitlements with the feminist ethic of care, connectedness, and responsibility.[34]

Thus, the role of feminist theory in general — and radical feminist analysis in particular — is not to address solely women's concerns in business law. Feminist theory instead can reach for more fundamental solutions, being uniquely capable of providing a systemic critique of the business law structure as it affects society. In particular, it can assess what the ethical core of corporate law is and what it ought to be in order to enhance the welfare of all members of the community as a whole.[35]

Lahey and Salter wrote during a period in which the growth of feminist insight was rapid. The division of feminist thought into distinct perspectives was still in process. Today, as those classifications are more distinct, adherents to the different perspectives often see their view as not only preferable to others but also adverse to them. In retrospect, one can look back at what the authors describe as the behavioral manifestations of corporate culture, the hierarchical structure, as an analysis of the role of dominance that came to be the focal point of what is now classified as radical feminism. The authors' assertion of the need to change the ethical core to the ethic of care, however, is an analysis that is currently identified with cultural or relational feminists. In fact, the authors cite directly to the works of Carol Gilligan and Nancy Chodorow as their sources for the feminist ethic of care — two authors who are now distinctly identified as cultural feminists.[36] Thus, though Lahey and Salter identified themselves as radical feminists, their analysis in fact contains the salient elements of what are now considered two distinct schools of thought.

More recently, those who identify themselves as radical feminists focus almost exclusively on the issues of dominance and changing or at least modifying the behavior that that attitude

34. *See id.* at 548–49.

35. *See id.* at 555, 569–72.

36. *See id.* at 556.

brings.[37] Some radicals actually reject the relational aspects of the feminist ethic of care because they see it as a trap.[38] Cultural feminists on the other hand, though they acknowledge the importance of addressing dominance, emphasize the importance of the ethic of care. They advocate persuading the mainstream that the ethic of care is a better ethic and makes for a better community.[39]

An implication of Lahey and Salter's work is that at the very least we should adopt the feminist goals of both today's radicals and culturalists, that is, to end dominance behavior and substitute the ethics of care for society's morality. There is even the suggestion that culturalists' goals are more essential. Modification of dominant behavior will only be patchwork; only if the moral core is changed will there be a fundamental change.[40] As self-identified radical feminists in 1985, Lahey and Salter posit the importance of substituting alternative values as well as ending dominance behavior. One wonders if the synergistic force of feminist analysis has suffered as feminist thought refined into the separate and distinct schools of radical and cultural feminists.

Lahey and Salter argue that feminism can inform corporate law (and, by extension, business law) analysis in a powerful way. They suggest that a feminist approach can do more than look at issues of gender and discrimination; feminist thinking can provide the framework by which business law itself can be revamped for the benefit of all.[41] Feminist analysis cannot only uncover inherent problems, but it can also provide the medium and basis for remedying those ills of business culture that cause society and all its members to suffer.

C. *Dormancy*

One might expect, given the clarity of groundwork that Lahey and Salter laid out with respect to corporate law in particular and the fertility of ideas in feminist jurisprudence in general, that others would have picked up the gauntlet readily to further address business law issues. There have been, however, at the time

37. *See, e.g.*, ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS (1988); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

38. *See supra* text accompanying note 5.

39. *See* West, *supra* note 5, at 65–66.

40. *See* Lahey & Salter, *supra* note 9, at 555.

41. *See id.* at 569.

of this Essay, only two more articles on the role that feminist analysis can play in business law generally and their publication did not occur until nearly ten years later in 1994: Ramona Paetzold, *Commentary: Feminism and Business Law: The Essential Interconnection*, 31 AM. BUS. L.J. 699 (1994), and Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line)*, 2 Am. U.J. GENDER & L. 1 (1994).[42] Three other articles, also recently written, take a feminist perspective on law and economic analyses of the economy as a whole: Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L.J. 1 (1993), Sharon Hom and Robin Paul Malloy, *China's Market Economy: A Semiosis of Cross Boundary Discourse Between Law and Economics and Feminist Jurisprudence*, 45 SYRACUSE L. REV. 815 (1994), and Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L. & POL'Y 861 (1995). These three are of interest even though they are not about business law specifically. Instead, they analyze the environment in which business law operates — the economy — and they do so by evaluating law and economic approaches to the economy, a perspective that has informed much of the changes in business law analysis over the last three decades. Finally, two other articles, published just prior to the ones mentioned above, apply feminist principles to tackle two specific, decidedly business law questions: The first, Leslie Bender's *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibility* (1990 DUKE L.J. 848), addresses the mass torts crises, and the second, Theresa Gabaldon's *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders* (45 VAND. L. REV. 1387 (1992), questions the role of limited liability in American enterprise and suggesting modifications. These seven articles, two that discuss a general theory of a feminist approach to business law, three that discuss an evaluation of the business law environment, and two that discuss specific business law problems are the ones

42. This is not to suggest that other scholars have not taken a feminist approach to business law before then. For notable exceptions, see Theresa Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992), and Leslie Bender, *Feminist Re(Torts): Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (1990). These articles (discussed below), however, address the very specific issue of corporate liability for harm and do not engage in a discussion of the role of feminist jurisprudence in business law in general.

to be discussed here. They are useful to examine for the insights they provide as to the role feminist analysis can play in business law issues.[43]

One might ask why there is such a paucity of feminist analysis of business structure, particularly since feminists (among others) have long noted that the seat of power of our society resides in the business environment. The business environment provides the engine that drives and supports the role of domination in our system.

An almost too easy explanation is that the concerns of feminist legal scholars have focused on those issues about which gender bias has the most immediate negative impact on women: rape, domestic violence, and impoverishment due to marital dissolution. Those subjects have taken feminist scholars into areas of law far removed from the topics of business.

Feminist legal scholarship has for some time, however, extended beyond the parameters of physical and sexual assault and the financial havoc created by the break-up of the traditional nuclear family. A more subtle explanation for the lack of a developing feminist jurisprudence with regard to business law is that many aspects of business law that directly affect women have been addressed in other legal arenas. Feminist analyses of wage and employment discrimination, sexual harassment in the workplace, and even child-care issues all reflect on the business environment. But each of these topics tends to be analyzed from the perspective of civil rights, labor law, and family law. Though more theoretical feminist analyses of social structure and systems often have their genesis in specific gender questions, if the legal framework examined is other than business law *per se*, the theory will extend itself to that other subject area.[44]

A more disturbing explanation for the lack of feminist scholarship may be the gender discrimination that women have suffered in the business law fields themselves. Until recently, it has been difficult for women academics to gain attention and for their work to be taken seriously in the traditionally male fields of

43. Only the most recent of years have seen an increase in the number of other business law articles with a feminist slant. Those articles have been included in the bibliography in Section VIII of this Essay.

44. The best example of this is Leslie Bender's work on mass torts. Bender addresses the mass tort problem that arises in corporate law. Though she addresses remedies within the corporate law framework, her analysis is couched primarily within the framework of tort law rather than business law. *See* Bender, *supra* note 42; *infra* text accompanying notes 111–31.

business. Though the progress for women in legal academia has been slow, it has been even slower for women in the business-oriented fields. Women have been much less likely to be invited to present their work at conferences, they have been less likely to be appointed to leadership positions in the business-oriented academic disciplines, and they are less likely to be hired in academic positions for business subjects than they are in other legal fields.[45] Indeed, academic women who have moved forward into business law areas note not only the difficulty in getting their work recognized within their areas of discipline, but also the lack of support from their sister colleagues whose own work has been focused on the more traditional gender issues.[46]

Women are most likely to examine what feminist jurisprudence offers any particular discipline. If women are discouraged from succeeding in business-oriented fields, it probably has had the secondary effect of discouraging the development of a feminist analysis of business law.[47] Therefore, the recent increase in the number of women writing in business law areas probably explains the very recent increase in the number of articles in the area with a feminist perspective.[48] Thus, we probably can look forward to an increase in the insight that feminist jurisprudence

45. For example, examining *The AALS Directory of Law Teachers* over several years shows that the number of women teaching Corporations for one to five years increased dramatically in recent years. In 1988–89, the number was 61. This increased to 81 in 1991–92, to 95 in 1993–94, and to 103 in 1994–95.

46. To address this concern, the Section on Women in Legal Education of the American Association formed the Committee on Women Faculty in Business Law Areas in 1991, and there have been significant strides since then.

47. One would hope that a suggestion made by Theresa Gabaldon as to why the lack of feminist jurisprudence in the area — that business law is so dominated by male values "that feminist inquiry simply has no immediate response other than generalized invocation of the concept of 'oppression' — would only be true in the short run. Gabaldon, *supra* note 42, at 1415. Certainly, though such a circumstance is quite daunting, it is not unique to business law. The domination of male values is exactly what feminist scholars have sought to overcome in the areas of rape, domestic violence, and sexual harassment. Though the battles have been hard fought, the measure of success has not been small. Gabaldon's own path-breaking article demonstrates that inroads into the (male dominated) field of business can be made, and, as Gabaldon ably shows, the contributions of feminist jurisprudence to the area can extend beyond observations of oppression. Her other suggestion "that feminists . . . have realized that addressing a corporate law audience . . . would be . . . a sublime waste of time" indicates the courage it takes to move scholarly inquiry in this direction. *Id.*

48. For a discussion of a similar effect on the corporate world itself with the increase of women in the business hierarchy, see Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line)*, 2 AM. U.J. GENDER & L. 1, 33 (1994).

has to offer business law in the future. Towards that end, this Essay discusses what some scholars have had to say thus far.

D. *Towards a General Theory*

Ramona Paetzold, in her article, *Commentary: Feminism and Business Law: The Essential Interconnection*,[49] suggests that "an ultimate test of the feminist impact on law . . . will be whether feminist perspectives come to be addressed throughout typical 'business law.'"[50] She puts forth what she considers the essence of feminist theory to critically evaluate business law. She stresses the importance of moving beyond specific legal issues of women's concern and towards recognizing that all law is gendered.[51] Feminist theory is an analysis of power and in particular the power engendered by patriarchy. One significant change resulting from the application of feminist analysis, she suggests, will be that judges shift from a detached, "objective" approach, usually identified with patriarchy, to one that is empathic and *care*ful (emphasis mine) of those who are powerless.[52]

Her call for feminist thinking and the reasons for its need echoes what Lahey and Salter asserted ten years earlier, but Paetzold has the advantage of ten more years of development in feminist thought in feminist jurisprudence. The analytic themes suggested by Lahey and Salter of the mode of dominance and the ethic of care have been bolstered by feminist legal methods to uncover imbalances of power, excluded voices, and to usher forth a concern for the "other." In advocating analysis of power and the concern for the "other," Paetzold suggests that business law use feminist methods such as context analysis, the narrative form and the development of new language. Business law should at least adopt the feminist recognition that the traditional language may fail in its communication of the experience of the oppressed because it embodies the perspective of the oppressor.[53]

Paetzold is concerned also about how feminist jurisprudence is taught. Organization by areas of interest to women's issues such as women and work, women and the family, and women and their bodies, may give the impression that feminism is solely

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49. Ramona L. Paetzold, *Commentary: Feminism and Business Law: The Essential Interconnection*, 31 AM. BUS. L.J. 699 (1993).

50. *Id.* at 700–01.

51. *See id.* at 704.

52. *See id.* at 712–14.

53. *See id.* at 714–15.

about women's issues when in fact it is a systemic analysis of our legal foundations.[54] Feminism needs to be approached as a coherent theory of *all* law, and discussions should turn on aspects of what feminist jurisprudence implies for remaking law.[55]

Paetzold argues for advancing feminist jurisprudential analysis of business law beyond the specific confines of women's concerns in business. She does, however, still anchor the feminist jurisprudence potential along gender lines: "*all* law . . . is a feminist concern[,] . . . our entire legal system is gendered."[56] Her perspective is certainly understandable because the dominant focus of feminist jurisprudence has been the patriarchal (read: male) values of our legal system.

This leaves open the question as to whether the analytic framework and techniques developed by feminist analysis can transcend even the patriarchal/feminist dichotomy it has focused on thus far. Such transcendency certainly is not necessary for feminist analysis to make a significant contribution to business law. Paetzold suggests what feminist analysis can offer business law within a gendered framework. Even within Paetzold's own discussion of feminist jurisprudence, however, lie the seeds of a larger, more global perspective for feminist thought and that is as an analysis of power and its allocation. An analysis of power does not need to be anchored to an analysis of how patriarchy allocates power. An analysis of power should be able to address all forms of allocations. Patriarchy is just one form of allocation. Thus a new question arises: Does feminism have the power to address allocations in general?

Ronnie Cohen's article, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line)*,[57] published in the same year as Paetzold's, focuses more on the potential role for the feminist ethic of care in business law. Cohen addresses the potential impact of the feminist ethic of care on corporate conduct (as Lahey and Salter suggested). Cohen first notes that the philosophical perspective underlying current

54. *See id.* at 704.

55. Books published since Paetzold's article in fact take the approach of combining an analysis of specific women's legal issues within an explicit feminist jurisprudential framework. *See* KATHARINE T. BARTLETT, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY (1993); MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY (1994); FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993).

56. Paetzold, *supra* note 49, at 704.

57. Cohen, *supra* note 48.

corporate law parallels quite remarkably the "masculine" liberal view of the law pertaining to the individual.[58] Liberal analysis sees the individual as self-interested, accumulating for his own welfare, and naturally aggressive towards others. The law serves to place limits on behavior to the extent necessary to protect individuals from one another's pursuit of happiness. Cohen observes that the current view of corporations is analogous: corporations are seen as wealth accumulating profit-maximizers, aggressive in the market place and towards competitors, and "[c]orporate law provides a check on corporate behavior in the same way that criminal and civil law provides checks on individual behavior."[59]

Cohen asserts that just as current corporate law tracks the liberal view of the individual, feminist critiques of corporate law ought to draw from feminist critiques of the liberal view of the individual. Just as feminist jurisprudence criticizes the liberal view of man for not recognizing the social element of individual behavior, corporate law similarly fails to recognize the social component of the corporation in its role in society. Social concern, she says, should be the primary focus of a feminist examination of corporate law. Her premise is that given the "enormous collective power" of the corporate entity, the legal justification for the corporate form must be "the advancement of social good as well as the enhancement of . . . profit."[60] "A feminist theory of corporations would . . . be a theory of corporate social responsibility."[61]

The concern Cohen then raises is how to render a corporation socially responsible.[62] Scholars writing from other jurispru-

58. *Id.* at 22–23. For an expansive analysis of the "masculine" liberal view, see generally West, *supra* note 5.

59. Cohen, *supra* note 48, at 23.

60. *Id.* at 23.

61. *Id.* at 24.

62. Cohen notes that the issue of corporate social responsibility does not arise for the first time with the application of feminist principles; it is not even a new query stemming from current critics of the legal economic system. *See id.* at 12. Concern regarding the corporation's role as a socially responsible entity has surfaced repeatedly throughout the history of legal and economic debates on the proper definition of a corporation. Cohen observes that not only have scholars such as Adolf Berle, Gardiner Means, and E. Merrick Dodd expressed great concern in the 1930s for the need to impose a corporate regard for public welfare, but even the great entrepreneur, Henry Ford himself, had to defend in court his view of corporate social conscience. *See id.* at 12–15; *see also* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (articulating Ford's arguments that the corporation's success came with a responsibility to use its profits to employ more men and build up their lives, as

dential perspectives who find the corporation's social obligation to extend beyond its level of productivity typically feel baffled as to how to motivate corporate social sensibilities.[63] Cohen states, "[i]t is here that feminist theory can make its greatest contribution to the discourse."[64] Drawing on aspects of relational and radical models of feminism, Cohen suggests quashing the separation between private and public spheres,[65] and emphasizes the need to articulate and focus on how people are connected to one another.[66]

To achieve that end, Cohen draws on the work of others.[67] She argues that those individuals ruling the corporation should participate directly in the consequences of the corporation's actions rather than merely relieving its burden through monetary dispensation. This personalized experience might induce the managers to create an environment in which the feminist ethic of care could develop at the corporation's core.[68] Cohen notes that recommendations to create that empathic connection are the threads that run through the work of other feminist writers in the

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opposed to distributing those profits to shareholders in excess of "normal" dividends).

63. *See* Cohen, *supra* note 48, at 17. Debates over corporate social responsibility have led to the American Law Institute's fifteen-year study on the proper role of corporate governance and to its publication of PRINCIPLES OF BUSINESS GOVERNANCE: ANALYSIS AND RECOMMENDATIONS IN 1992. One of the goals of the treatise was to establish principles that take into account both laissez-faire and social value concerns. *See id.* at 117 n.113 (citing Geoffrey C. Hazard, Jr., *Foreword* to PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS at x (Proposed Final Draft 1992)).

As further evidence of the struggle over how to inject social responsibility into the corporate model, Cohen notes that although Professor Christopher Stone concludes that corporate morality should be defined by personal morality, he is at a loss as to how to imbue the corporation with that moral sense. *See id.* at 19–21 (citing Christopher D. Stone, *Corporate Social Responsibility: What It Might Mean, If It Were Really to Matter*, 71 IOWA L. REV. 557, 559–60 (1986)).

64. *Id.* at 21.

65. For other authors who discuss this typical feminist approach, see *infra* note 67.

66. *See* Cohen, *supra* note 48, at 21.

67. JUDY WAJCMAN, FEMINISM CONFRONTS TECHNOLOGY (1991); Bender, *supra* note 42; Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C.L. REV. 481 (1992); Gabaldon, *supra* note 42; Helen B. Holmes, *Reproductive Technologies: The Birth of a Women-Centered Analysis*, *in* THE CUSTOM-MADE CHILD? WOMEN-CENTERED PERSPECTIVES 1 (Helen B. Holmes et al. eds., 1981); Lahey & Salter, *supra* note 9; Gillian Lester, *Toward the Feminization of Collective Bargaining Law*, 36 MCGILL L.J. 1181 (1991).

68. *See* Cohen, *supra* note 48, at 34.

business area.[69] Cohen offers some interesting suggestions of her own to induce the ethic of care in corporations.[70]

Cohen's work suggests a three-prong approach for feminist scholarship to affect business law: a method of analysis, an establishment of policy goals, and recommendations for the type of actions that implement those goals. Her method of analysis is to extend the feminist jurisprudence criticisms of the law of the individual to the law of corporations. Drawing on feminist jurisprudence in general and focusing on the feminist ethic of care in particular leads her to the policy goal of rendering corporations socially responsible beyond issues of economic productivity. Cohen then suggests a strategy for imbuing the corporation with that sense of social responsibility by requiring individuals responsible for corporate conduct to be personally involved in redressing the conduct's consequences.

Though Cohen offers a concrete strategy for feminist theory to have a positive impact on the social and legal treatment of corporate matters, the extent to which her analysis is and is not gendered is not that clear. Certainly her focus on the ethic of care, social responsibility, and collaborative approaches emerges from the gendered critiques of the patriarchy system. So in one

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69. For example, Cohen believes that Theresa Gabaldon's suggestion — limiting shareholder's limited liability to encourage shareholders to take a more active role in reviewing corporate managers' decisions — moves in the right direction, because the shareholder would presumably bring to bear a greater sense of personal responsibility to corporate actions. *See id.* at 25–26 (discussing Theresa Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992)). Lahey and Salter's suggestions of more collective and cooperative organizations within the enterprise to allow connectedness and feminist values to emerge supports Cohen's perspective on how to bring moral responsibility to the corporate climate. *See id.* at 27 (discussing Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985)). Finally, Leslie Bender's assertion that compensation beyond monetary damages by making those who were responsible for the corporate decisions that caused the harm have a nondelegable duty of caring for the victims "would bridge the gap between personal and political action" is completely consistent with the strategy Cohen advocates. *Id.* at 29 (discussing Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (1990)). *See also infra* text accompanying notes 132–58, 111–31.

70. One is to give shareholders the right to criticize management for their failure to be concerned for societal interests. A second more intriguing idea is to modify the business judgment rule, the standard by which directors' conduct is judged. One modification would be to impose on directors the duty to be aware of the social consequences of their decisions. Another would have the business judgment rule serve to protect directors if they take an action that is adverse to the interests of the shareholders but is in the interest of the public good.

sense, Cohen's analysis can be viewed as anchored in gendered approaches. On the other hand, the specific behavioral changes she suggests — involving corporations with the victims of their harm, imbuing shareholders and management with a personal sense of responsibility, and revamping typical adversarial business situations into co-operative ones — are not generalizations of women's issues. They are not generalized from specific women's concerns such as equality of pay and opportunity, health benefits, and child care. Cohen's policy concerns are more transcendently about human concerns, questions that affect both men and women. Thus her work can be seen as having one foot in a gendered analysis and one foot beyond it.

Paetzold's and Cohen's articles represent the first forays towards a general theory of feminist analysis of business law, building on the foundation laid ten years earlier by Lahey and Salter. Each foray focuses on a different dimension of feminist thought: one on the allocation of power, the other on the ethic of care.

E. *Evaluating the Evaluations of an Economy's Success*

The next two articles do not address how feminist theory can affect business law specifically. They comment instead on the Western view of the economic environment, that is, what the prevailing perception is of the economy and how to measure its performance. *Women and the Global Economic Order: A Feminist Perspective* by Shelley Wright[71] and *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory* by Jeanne M. Dennis[72] focus on selected aspects of current economic analyses that the authors feel need to be changed or at least modified by feminist understanding.

Since businesses operate in the economic environment, and business law is designed to enhance business functioning, how one assesses the economic environment will determine how one evaluates the success of business law and, moreover, how one defines business law's goals. Both of these articles examine different aspects of evaluating the economic environment and the issues that feminist concerns would raise about those evaluations and their implications.

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71. Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U.J. INT'L L. & POL'Y 861 (1995).

72. Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L.J. 1 (1993).

Shelly Wright's article, *Women and the Global Economic Order: A Feminist Perspective*,[73] critiques the prevailing analyses of developing economies through a liberal feminist perspective while drawing on aspects of cultural feminism. Wright criticizes the "Western" notion of economic rights for failing to include as fundamental the right of all human beings to a standard of living that provides sufficient food, shelter, and medical care. This truncated vision has three causes. One cause is the exclusion from consideration the experiences of women to whom, in developing countries, concerns for family life necessities are often relegated. Denying women's economic reality permits analysts to remain unconscious of the dire consequences of insufficient standards of living.[74] The second cause is the Western treatment of economic rights, along with social and cultural rights, as secondary in importance and subsidiary to the primacy of political freedom. Finally, when considering economic rights, the Western perspective focuses on the right to access capital, to employ labor at the lowest wage and to operate freely in the marketplace.[75]

To counter the Western view, Wright draws on the feminist analysis of destructive dichotomies. The separation between economic and political rights is equivalent to separating public and private spheres. Just as the latter need to be reintegrated to prevent exploitation and oppression of the family by the workplace, so is the reintegration of economic and political rights necessary to overcome the impoverishment of the poorer strata of society. Assessing the availability of political rights without a concomi-

73. Wright, *supra* note 71.

74. *See id.* at 867–73. Wright points out how women are in fact more oppressed than what figures tell us about low income people and that the negative effect of Western development on low income individuals impacts more significantly on low income women than on the population as a whole. She observes that the current measure of economic well-being does not recognize the work that women do as "work" because it is not wage-earning work. Consequently, analyses understate the degree of negative impact on women. Furthermore, she notes that even though there are international bodies that espouse progressive standards consistent with feminist values, those standards' failure to recognize how women are peculiarly oppressed will prevent the application of those standards from providing women with rights comparable to men.

75. *See id.* at 873–74. By making economic rights a second class concern, Wright shows that this facilitates the Western approach to exploit low income women even more so than others. Economic cutbacks typically occur in areas such as education, health care and social assistance, the burden of which is borne by women, because the responsibility usually falls to them to provide these essentials in the home. *See id.* at 882. Thus policy makers are in fact relying on women's unpaid labor to make up for reductions in public spending when attempting to reduce a nation's debt.

tant evaluation of economic rights tends to ignore the true inequities of living.[76] Thus a redefinition of economic rights and a reintegration of those rights in parity with political rights is what feminist scholarship should call for.

Though Wright focuses primarily on specific needs of women, she offers a theoretical critique of the prevailing analytic framework for evaluating economic success in general. Economic rights concern all human beings, not only women. Though Wright's analysis is highly gendered, she nevertheless lays a foundation for a feminist approach for evaluating economic well-being and, by implication, business law goals.

Jeanne Dennis, in *Lessons of Comparable Worth*,[77] also tackles the notion of economic rights but this time for more advanced industrial economies. Dennis defines deindustrialization (*i.e.*, corporate down-sizing) as a shift in economic circumstances from when a head of household earns "decent wages and good benefits" to circumstances in which people have little economic security.[78] Using the technique of feminist narrative, Dennis relays the stories of two laid-off workforce women and their economic hardships, severe frustrations, and the great fear they have and will continue to endure. She thus conveys the real life horror of layoffs due to deindustrialization.[79] These stories create a feminist law and economics motive to address the deindustrialization problem.

Feminist law and economics offers an alternative to the inherent cruelty of the prevailing mainstream neoclassical law and economic characterization that rationalizes economic conditions in the abstract and "objectively" considers downsizing as an indication of being "at the center of one of the great, exciting moments in mankind's economic history."[80] A feminist law and economics analysis recognizes that law shapes economic power,

76. For reasons stated in earlier footnotes, those inequities impact women more heavily.

77. Dennis, *supra* note 72.

78. Dennis' definition contrasts with those that emphasize a shift in production. She gives as examples the *MIT Dictionary of Modern Economics*' definition which is a shift in Gross Domestic Product (a measure of a nation's annual output) towards services (and away from goods), and Bluestone and Harrison's definition which views deindustrialization as a disinvestment in "productive capacity." *See id.* at 2 (citing THE MIT DICTIONARY OF MODERN ECONOMICS 100 (David Pearce ed., 3d ed. 1983); BARRY BLUESTONE & BENNETT HARRISON, THE DEINDUSTRIALIZATION OF AMERICA 6 (1982)).

79. *See id.* at 30–31.

80. *Id.* at 32 (quoting Robert L. Bartley, editor of the *Wall Street Journal*).

that the evaluation of the economic well-being of a society should be the distribution of income, and that a measure of an economically stable economy is one which maximizes the number of individuals who can earn a "decent wage." In contrast, neoclassical law and economics views law as merely serving to facilitate the economic efficiency of the market and insists that an economy should be evaluated by its aggregated national wealth. As a result, neoclassical analysis concludes that the measure of a stable economy is its rate of growth while ignoring any notice of the number of poor or the standard of living among the many.[81]

Neoclassical law and economics views the market as efficient and values only certain end results of the market economy, that is, an increase in aggregate output and advancement of economic growth. Dennis argues that neoclassical theory therefore offers no solutions to deindustrialization. Because feminist law and economics has different goals, those of equitable economic distribution and maximizing the number of people earning a living wage, it can suggest policy alternatives. Feminist law and economics can focus on the excluded voice, a primary technique used in feminist analysis. In the case of deindustrialization, the excluded voice consists of the workers for whom deindustrialization has been a disaster, rather than the shareholders or corporate management for whom deindustrialization has been profitable.[82]

Dennis' use of feminist analysis tackles a decidedly nonfeminist issue: corporate downsizing. She ascertains the existence of an excluded voice. She uses narrative technique to convey the horrors experienced by that excluded voice, creates a theoretical framework, or at least guidelines for goals principled upon the feminist ethic of care (economic rights to include the right to earn a decent wage), and then makes a policy recommendation in pursuit of those goals. In the process, she points to the inadequacy of mainstream theory to address these issues and contrasts the goals of the mainstream approach with what she thinks should be the goals of a feminist law and economics critique.

Though Dennis' analysis is motivated by the story of two women victimized by corporate downsizing, these stories are not

81. *See id.* at 28–29.

82. *Id.* at 35.

peculiar to women. These stories could be told equally of men suffering comparable losses. And though she does critique the mainstream approach as being one of dominance, her feminist theoretical framework, however much in opposition to the mainstream, is not anchored in a counterpunch to patriarchy. Dennis offers principles based on equitable economic distribution that are independent of whatever the mainstream analysis might contain. Thus, Dennis' work demonstrates that feminist analysis can expand beyond the more typical feminist concerns of patriarchy and therefore can address business law issues that are not premised on patriarchal structures.

IV. THE SYNERGISM OF FEMINIST JURISPRUDENCE AND LAW AND ECONOMICS: A DEFINITION OF JUSTICE IN RIGHTS DISTRIBUTION

A close examination of *China's Market Economy: A Semiosis of Cross Boundary Discourse Between Law and Economics and Feminist Jurisprudence*, by Sharon Hom and Robin Paul Malloy,[83] enables us to glean a new role for feminist analysis in business law, one yet to be discussed or explored. That role emerges from feminist jurisprudence's interaction with law and economics and it is feminist jurisprudence's capacity to define what constitutes a just (or fair) distribution of rights. Feminist jurisprudence, however, cannot only define just rights distributions *per se*, but can do so within the context of efficiency where efficiency is measured by law and economic standards.

Efficient distributions, as well as efficiency in general, is a subject long viewed as solely within the concerns of law and economics jurisprudence. Policy recommendations arising from law and economic analysis, however, have been the subject of controversy for many decades. As will be demonstrated, feminist jurisprudence is able to address those concerns and still remain within the parameters of law and economics' efficiency goals.

China's Market Economy is an interchange between a feminist theorist and a law and economic analyst about the emerging market economy in China. Their discussion not only reflects both a law and economics and feminist jurisprudence evaluation of the success of a newly-forming market economy, but also dem-

83. Sharon K. Hom & Robin Paul Malloy, *China's Market Economy: A Semiosis of Cross Boundary Discourse Between Law and Economics and Feminist Jurisprudence*, 45 SYRACUSE L. REV. 815 (1994).

onstrates the influence that one jurisprudence can have on another.

An analysis of Hom and Malloy's exchange presents an interesting interplay of a number of ironic contrasts occurring at the same time. These contrasts serve to show another universal nongendered role for feminist thought, one that is different from allocations of power. To fully appreciate these contrasts, it is important to keep in mind that unlike much of feminist analysis, law and economics jurisprudence mainly extols the advantages of the free market system and favors the capitalist ideology. Typically its analysts seek to extend law and economic (or "free market") analysis to contexts beyond the marketplace such as criminal justice and civil procedure,[84] viewing the unfettered market approach as the most efficient means to maximize social welfare in almost any context. Over time law and economics has had wide-ranging influence in law.[85] As indicated in the discussion of Jeanne Dennis' work above,[86] however, law and economics analysis also has been criticized for its patriarchal orientation and its failure to incorporate human values and moral goals. It appears to substitute efficiency criteria for social policy.

Not all law and economics scholars though, apply law and economic reasoning as a pure market efficiency analysis. The pure market efficiency analysis is typically viewed as mainstream law and economics and usually labeled the "Chicago School" approach. An increasing number of law and economics scholars are nevertheless very much concerned with the presence of value-choices implicitly or explicitly in law and economic analysis. Though this is a minority voice, it is a growing one.[87]

On its face, *China's Market Economy* consists of an exchange of letters between a feminist theorist, Hom, and a law and economic analyst, Malloy, that occurred while they were both teaching at the China Center for American Law Study in Shang-

84. *See, e.g.*, Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985) (en banc) (applying Learned Hand's cost/benefit formula to justify a warrantless search); White Lake Improvement Ass'n v. City of Whitehall, 177 N.W.2d 473 (Mich. Ct. App. 1970) (applying Coase's transactions cost analysis to determine when to invoke the primary jurisdiction doctrine).

85. *See, e.g.*, Gregory S. Crespi, *Teaching the New Law and Economics*, 25 U. TOL. L. REV. 713 (1994).

86. *See supra* text accompanying notes 77–82.

87. *See, e.g.*, LAW AND ECONOMICS: NEW & CRITICAL PERSPECTIVES (Robin Paul Malloy & Christopher K. Braun eds., 1995).

hai during two consecutive summers. The subject of their discourse is the emerging market economy in China.

What in fact Hom and Malloy present is a commentary on the nature of the market economy that is emerging in the largest nonmarket (that is, centrally planned), anticapitalistic (that is, Marxist, communist, or socialist) nation in the world. Hom is a Chinese-American woman born in Hong Kong and raised in the heartland of market capitalism, the United States. Her sensibilities are those of a feminist critical of the treatment of women in China, a nation not based on Western-styled democracy or patriarchy.[88] The other commentator, Malloy, a male born and raised in the United States, is a law and economics scholar who is a noted voice in the growing law and economics perspective that does indeed pay attention to the moral values in Western-styled free markets.[89]

The interchange is between a feminist, critical of China in her concern for human political rights, and a law and economics scholar critical of Western market analysis in his concern for value goals in law and economic reasoning. Both evaluate the emerging private market in the fundamentally communist political economy. One might think, given both writers' concern for moral values, that there would be considerable confluence in their assessment of the circumstances in China. But as will be seen, quite the opposite is true.

An underlying question in this dialogue is whether feminist analysis and law and economic reasoning have anything to offer each other. To the extent that feminist reasoning extends beyond women's issues, there is not only the question of whether feminism can analyze allocations of power beyond patriarchal allocations of power, but also the question of whether feminist analysis can encompass more than allocations of power *per se*. In particular, one may also ask whether feminist analysis can inform other analyses and also be informed by other analyses, as opposed to merely critiquing and being critiqued by them. This is a particularly interesting query for feminist thought, since one of its major

88. *See* Sharon K. Hom, *Does Real Estate Syndication Provide a Viable Financing Strategy for Low Income Housing?*, 50 BROOK. L. REV. 913, 914 (1984); Sharon K. Hom, *Female Infanticide In China: The Human Rights Specter and Thoughts Towards (An)Other Vision*, 3 COLUM. HUM. RTS. L. REV. 249, 254–61 (1992).

89. *See* Robin Paul Malloy, *A New Law and Economics, in Law and Economics: New and Critical Perspectives* 1, 21–27 (Robin Paul Malloy & Christopher K. Braun eds., 1995).

contributions to social understanding is to signify the importance of operating from a collaborative perspective rather than an adversarial one. It is also an interesting query for law and economics because of the increasing concern for moral values. Regardless, an enlightening synthesis between powerful reasoning tools can be transcendent of the tools themselves, and Hom and Malloy's semiotic exchange represents a first effort to explore such territory.

As one begins to read the letters, what is most immediately striking, given Malloy's concerns for values expressed in market structure, is his focus instead on the imperfections of the Chinese market itself. Initially he is struck by the manner in which the government imposes a peculiar dual Chinese currency — one for foreigners and one for locals — that forces foreigners to pay more for goods and services in China than the Chinese do.[90] Thus the Chinese small businessmen have an incentive to sell their goods and services to foreigners over locals in order to obtain the foreigners' more valuable Chinese currency. Furthermore, when the Chinese businessmen give change in a transaction with a foreigner, they usually give it (in a somewhat disingenuous manner) in the less valuable currency for locals.[91]

Malloy is offended by this blatant exploitation of foreigners. He resents being rendered into a "commodity" and being seen only as a supply of the more valuable nonlocal Chinese currency.[92] His first reaction, however, is not to bemoan the commodification of individuals that a free market method of allocating goods and services stimulates, as a feminist might argue and as Hom indeed does. Nor does he examine — initially, at least — the value implications of the particular market structure in China that he is witnessing, as might be expected of a law and economics scholar concerned with value choices. Instead, he focuses on the "defects" of the Chinese market as measured by Chicago-styled law and economics; he scrutinizes the "impedi-

90. *See* Hom & Malloy, *supra* note 83, at 822. On Malloy's first trip, he finds that China requires foreigners to exchange their own currency for a Chinese currency that is marked nonlocal and different from the local Chinese currency. Though within the local Chinese markets for goods and services, the nonlocal currency is used interchangeably with the local currency, banks will exchange the nonlocal currency for more foreign currency than they will for the local currency. *See id.* at 821–23.

91. China abandoned this two-tiered currency policy by the time Malloy and Hom returned the next year. *See id.* at 835.

92. *Id.* at 822–23.

ments" to a Chicago-idealized conception of an unfettered market.[93] Such impediments would be, for example, differentiated currency that is not based on differences in value. Chinese currency has no greater intrinsic value merely because it is held by a foreigner — unless the government imposes an artificial difference.

Noting other market-constraining aspects that he finds troubling, Malloy observes that there are "signs of controlled and limited choice" throughout Chinese markets that he feels counter the full functioning of a market economy. "Merit and innovation must rise above status and personal relations." Characterizing these restraints as walls, Malloy writes, "[w]alls are barriers to markets"[94] and concludes that because of these walls China is unlikely to develop a free market.[95]

Hom, on the other hand, does bemoan the commodification of individuals that seems to be taking place as a result of the emerging market mentality. She recalls with some dismay when her own five-year-old son so thoroughly integrated into the Beijing community that he was treated as a local, and requested that the tooth fairy leave his reward in "U. S. Dollars."[96] She notes the public/private dichotomy, a dichotomy that feminists typically deplore, that is being created in China as a result of the creation of private markets in a publicly-controlled state. She wonders how the privatization process might in fact be exploited by those individuals in choice public positions who can then channel state-owned resources into the private hands of family and friends.[97]

Malloy expresses his belief that free markets and the competitive process itself produce an environment for the advancement of human rights. Free markets, he argues, empower people to pursue their creative interests and advance social progress.[98] Hom's concern is whether the introduction of the market will cause human rights to be lost. Since human rights have no economic value, they are not sought after by those economic actors who are primarily concerned with and successful at accumulating

93. *See, e.g., id.* at 831 (discussing on how property rights generated the feudal economy that was transcended by the development of contract).

94. *Id.* at 831.

95. *Id.* at 838.

96. *Id.* at 825.

97. *See id.* at 824–25.

98. *See id.* at 837.

economic wealth. Both Hom and Malloy are concerned with the private/public dichotomy but for different reasons. Hom is concerned that the creation of the private/public dichotomy arising from the privatization of the market place will cause social values to become invisible.[99] To the contrary, Malloy's concern is that the division between market and state will not be strong enough. A healthy division creates a healthy competitive tension between public and private sectors that will serve to check and balance each other so that neither one will become too powerful. This explains Malloy's concern that at home in the United States there is undue emphasis on an unfettered private market and his concern in China that there is too much state interference in the market.[100]

Hom and Malloy's point of disagreement with respect to China's privatization efforts appears to hinge on the connection between the private market and the role of the state in preserving human values. One author fears too much interference, and the other fears inadequate support from the state for human values. Both seem to agree that, regardless of their differences as to whether ensurance of human rights shall arise, from within the market structure or from without it, China itself does not support human rights as both authors define it. Malloy, however, believes that the Chinese government's interference in the market prevents those human rights from emerging,[101] whereas Hom believes that the Chinese government is merely not interested in supporting the brand of human rights in which the authors are concerned. In her view, the separation between public and private aspects brought on by the emerging private market as well as the market approach itself makes human rights matters even worse.[102]

There is, however, a common ground between the two writers, subtle and unspoken. Its elements are expressed intermittently throughout the semiotic discourse, which is perhaps the point of semiotic discourse. There is a venue of commonality between a law and economics scholar concerned for moral values in the market place and a feminist scholar concerned that the

99. *See id.* at 844–45.

100. *See id.* at 837–39. For further explication of Malloy's arguments about the need for competitive tension between the public and private spheres, see Robin Paul Malloy, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT 30–37 (1991).

101. *See* Hom & Malloy, *supra* note 83, at 839.

102. *See id.* at 844.

means and methods of the political economy support human rights. That commonality lies in the region of rights distribution.

Rights distribution, whether property, economic, or political rights, is the foundation from which any market proceeds. One of the key flaws of the original Chicago school approach in its quest for purity of market was to fail to recognize that every market is, in a sense, efficient, regardless of its "impediments," which in fact all markets have. This is true whether it be societal laws that define economic and property rights or a more primitive environment in which "might makes right." In other words, every market moves to an efficient outcome in the legal structure in which it is embedded. Outcomes of different efficient markets are very likely to vary, depending on each market's "impediments." The most important point is that there are many outcomes that are efficient. The Chicago view, as it originally was put forth (and fairly strong remnants of which remain), treated economic outcomes as a group arguing that there was only one unique efficient outcome — the "wealth-maximizing" outcome. Furthermore, proponents asserted that not only would this efficient outcome be the one that would maximize social welfare, but it would be achieved only if policy-makers would follow the Chicago adherents' advice and "remove" all those impediments (as they defined them) to the unique efficient market.[103]

Contrary to the initial Chicago perspective,[104] there are in fact a multiplicity of efficient outcomes. Which efficient outcome arises is premised on the initial distribution of rights. That is, the fundamental distribution of economic (including property) rights among the populace, determines the scope of the possible economic outcomes when looking at the market mechanism for allocating resources, goods, and services. Similarly, the distribution of political rights determines the nature of political freedom when taking the market approach to political outcomes.[105] Of

103. For the most classic representation of this view, see generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

104. I use the term "initial" Chicago perspective because over time as various scholars have attacked with great credibility aspects of the Chicago analysis, the Chicago view has been modified considerably. Though the direction of modification may not be readily apparent, it is clear upon closer examination that even the Chicago perspective is moving closer to the recognition of the multiplicity of efficient outcomes within the framework of initial rights distribution that appears in the discussion following this footnote.

105. For an extensive discussion of the multiplicity of outcomes and the significance of the initial distribution of rights on market outcomes, see Barbara White,

course, in reality, economic and political rights are intermingled as are their relative impacts on outcomes. Though the process of the market, as people trade on their rights, may change the relative positions of individuals, the possible changes are constrained by the initial rights that the individuals possess. This limits what people can or cannot trade, whether it be goods and services or, for lack of a better term, political favors. The problem grappled with by so many law and economics scholars concerned with value choices is that this distribution of rights is often unstated, often unseen, and often changed unknowingly by policy pronouncements. Often, policies focus on immediate end goals without realizing that they also alter the long run rights-redistribution as well.

Rights distribution is the flip side of the marketplace; one does not exist without the other. Changes in rights distribution changes what funnels through the market process and what comes out the other side. What resonates throughout both Hom and Malloy's letters are concerns that actually relate to the distribution of rights.

Thus, the dual Chinese currency system that so jarred Malloy is actually the equivalent to a decision regarding the distribution of certain resources on the Chinese government's part that is different from the more common mode in other developing countries. Many countries impose artificial exchange rates to extract more money from foreigners than would occur if the market place set the rate of exchange and reflected the true demand by locals for foreign currency and ultimately foreign goods. Typically, however, it is the nation's central bank that reaps the rewards. The financial benefits usually end in some fashion in the state's hands to pursue policies. The Chinese method presents an alternative distribution of those financial gains. The two-tier currency allows that profit to move directly to the citizens of China, at least those involved in the local markets in which foreigners make their purchases. Those citizens of China who accumulate the most are those who work the hardest and who possess the greatest entrepreneurial skill, an outcome to which a free-market analyst could hardly object.

Of course Malloy is quite correct that the artificially inflated exchange rate is an impediment to a free market that is maximiz-

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Coase and the Courts: Economics for the Common Man, 72 IOWA L. REV. 577, 595-99, 603-11 (1987).

ing global social welfare from the exchange of goods. This is true of any trade barrier. Viewing China, however, as a developing country that is pursuing an exchange rate policy common among developing countries, the particular form the policy takes has a certain egalitarian caché, at least for the Chinese citizens. The exploitative aspects of the artificial exchange feel very uncomfortable, however, and almost insulting when the impact is experienced personally as with Malloy. Clearly what is from one view an impediment to free markets is from another view a decision on economic distribution. What Malloy was experiencing first hand was a *re*distribution of assets — money — away from his hands to those of the local Chinese traders.

The question that is repeatedly raised throughout the authors' discussion is whether this Chinese market fosters a kind of commodification of human beings that is alien to a notion of human rights and political freedoms. Malloy's concern for "walls" that will impede human rights is seen by Hom as representing efforts to preserve, negotiate, and shatter a multiplicity of Chinese values.[106] But the walls, these negotiations over a multiplicity of Chinese values, are really discussions about the distribution of rights. Discussions about values, political rights, human rights, and economic rights are in reality a discussion about how those rights are being distributed. Just as Dennis' discussion of the economic right of individuals to earn a living wage as compared with the economic right of an individual to employ another at the lowest wage possible is a discussion about the distribution of economic rights between those who employ and those who earn, so is the discussion about the role of the state in the market place a discussion about the distribution of rights, all rights, in a political economy.

It is the state and its attendant social structure that determines and upholds the distribution of rights in society through its laws and traditions. We cannot rely on the market place to do this. The market place has nothing to say about what the initial distribution of rights is or ought to be. It merely processes people through their decisions and with their rights distribution to some outcome, the scope of which is limited by the initial rights distribution. To leave the initial rights distribution unexamined is in fact to make a choice for the distribution as it is, observed or unobserved; the problem is then that the choice is unknown.

106. Hom & Malloy, *supra* note 83, at 833.

This is implicit in Hom's assertion in her last letter critiquing certain aspects of Malloy's free-market arguments:

> I do not understand where your implicit . . . faith . . . in the potential of the market[ ] . . . derives from. . . . [N]othing suggests that democracy and human freedom will be VALUED by the individuals who may take advantage of the opportunities presented for building a new and different social order. I think your argument . . . conflates an institutional choice [*i.e.*, the marketplace] for implementing value/goal choices (e.g., human rights, individual liberty and freedom) with the value/choices themselves.[107]

Though Malloy maintains that the market place is where freedom will arise, he does acknowledge the role of values in the market place. He comments on the repeated observation by Chinese participants in his program that America is "rich, free, and violent."[108] They want China to be as rich but without America's "immorality and violence." Some question whether Americans could consider themselves free when they fear encountering crime so much. Noting his own sense of safety in China at anytime, day or night, Malloy concludes that every society has its problems. Though Malloy states that he believes the U.S. crime problems stem from its ideological drift from free market values, he also states that "too many of us don't want to talk about values, morality, responsibility, commitment, and community[,] *necessary prerequisites to a free market*. These are 'messy' subjects. Let's just talk about getting rich — that is easy discourse."[109] In that criticism, Malloy is indicating that markets are premised on values. And as discussed above, values concern the distribution of rights.

In the dialogue between Hom and Malloy, each approaches the other through a common concern for values. And within that common concern lies the opening of a possibility of what feminist jurisprudence and law and economics scholarship might offer each other. That opening consists of a discussion of the distribution of rights. As already discussed, economic analysis can elucidate what rights distributions exist in various market and nonmarket economies, what rights distributions might be possible, and certain aspects of some of the consequences of different rights distributions. But law and economics as economic analysis cannot comment on which rights distributions should be chosen.

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107. *Id.* at 845.
108. *Id.* at 840.
109. *Id.* at 840–41(emphasis added).

That is a discussion of values, a discussion that properly belongs to another jurisprudence. That jurisprudence can very well be feminist jurisprudence.[110]

V. To The Applications

> [W]e must make our legal system consistent with our chosen personal values and priorities. We err if we maintain two sets of values — one for our personal relationships and one for our activities in the business world.[111]

Two other articles, Leslie Bender's article, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibility*,[112] and Theresa Gabaldon's *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*[113] focus on applying feminist analysis to specific business law issues. They are among the first to do so and their work is ground-breaking.[114]

Both authors apply feminist analysis to address particular social ills caused by corporate conduct that mainstream analysis has yet to adequately resolve. The attention is on the harms corporate activity inflicts on third parties. Both Bender and Gabaldon focus on the corporate decision-making process and its underlying ethics (or lack thereof) and conclude that it is the root cause of problematic third party harms. Each author suggests that revising the corporate legal environment in a manner that will imbue the corporate decision-making process with the feminist ethic of care will resolve many of these issues. Each author, however, takes a markedly different approach as to how to achieve that end.

A. *For Example: The Mass Tort Crisis*

In her article, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibility*,[115] Bender applies

110. Deborah Rhode already notes that the common goal of feminist critical theories is "to challenge existing distributions of power." Rhode, *supra* note 2, at 619. Though Rhode is addressing distributions of power between men and women, there is no reason why such analysis could not be applied to distribution of economic and political power in general.

111. Bender, *supra* note 42, at 853.

112. Bender, *supra* note 42.

113. Gabaldon, *supra* note 42.

114. Since this survey was first written, a number of other articles applying feminist analysis to specific business law issues have been published. They are included in the bibliography in Section VIII of this Essay.

115. Bender, *supra* note 42.

feminist analysis to question both the allocations of power and ethical values to the growing controversy surrounding mass torts. She disputes the contention that the mass tort crisis is the result of greedy plaintiffs and unreasonably plaintiff-sympathetic juries. She argues instead that mass torts (and their current legal and economic conundrums) arise from imbalances in our social system's distribution of power over risk-creating activities and the value choices thus evoked. The problem begins with the corporation's power to decide unilaterally on beneficial (and therefore profitable) activities that also may put some members of the public at risk of harm. Those decisions are made without the scrutiny of public debate or support by social consent.[116] The crisis evolves because in a court of law the now-injured plaintiffs are often severely disadvantaged for presenting their claim, both in terms of financial resources and access to information, particularly when they face a large corporate defendant. The crisis solidifies, if indeed the corporation is found liable, by virtue of the solely monetary nature of remedy the court awards the plaintiffs. Monetary compensation does not provide the injured with the full emotional and social support they now need. Furthermore, monetary compensation absolves corporate decision-makers themselves from any sense of a deeper level of responsibility beyond a pecuniary one, thereby making it easier for them to undertake such risk-imposing decisions again. Thus monetary penalties for the corporation undermine the deterrent effect liability judgments are believed to have on future conduct.[117] Having demonstrated that legally permissible decisions risking torts are skewed in favor of corporate financial interests[118] and do not reflect broader ethical values that society might choose, Bender then applies feminist approaches to recommend policy changes. She argues that corporate risk-taking activity be put to public debate rather than remain a private undertaking, implying that the public's willingness to undertake risk for progress may be different from the corporation's and reflect different value choices that ought to be respected.[119] Presumably, Bender believes that

116. *See id.* at 859–60.

117. *See id.* at 860.

118. *See id.* at 861 n.35.

119. Bender notes that the size of some liability awards may reflect jury members' frustration with the corporation's unilateral imposition of risks on other people's lives. Certainly, activities pursued only upon *a priori* public debate and knowing public consent would provide some measure of relief from such frustration.

those public values will coincide more with the feminist ethic of care than those implied by market-driven choices.

Bender also advocates leveling the playing field in the courtroom, particularly when a large powerful corporation is involved. Using the feminist values of equal access to information and power (in this case, financial resources), she recommends a policy that shifts the burden of proof from the injured plaintiffs to the corporate defendant. She suggests that upon a limited showing by plaintiffs that an injury has indeed occurred and is related to the corporation's activities, shifting the burden of proof then to the corporation is far more likely to be fair.[120] Her principle is to place the burden of proof on the party most able to demonstrate their position.[121] Eschewing the more traditional standard of "neutral, objective" judicial noninterference (a liberal approach that is typically viewed by feminists as preserving a patriarchal hierarchy), Bender argues that only equal empowerment of the parties through judicial intervention ensures true justice.[122]

Finally, she recommends (and is the first in feminist literature to do so[123]) that those individuals involved in the corporate decisions that led to the plaintiffs' harms should be directly involved in some fashion in the care of the injured. They should not be allowed to escape experiencing the consequences of their actions by dismissing the event from their venue merely because monetary disbursements bring legal closure. If corporate decision-makers become more conscious of the impact of their decisions on others, the empathic nature of the experience may cause them to pause and consider larger human ramifications than merely the corporate bottom line when making similar decisions on risky conduct in the future. Through the aforementioned means, Bender hopes to imbue the corporate hierarchy with the feminist ethic of care.

We can use Bender's observations on the current power dynamics to demonstrate how the mass tort crisis feeds on itself.

120. *See* Bender, *supra* note 42, at 880.

121. Bender's proposition is an interesting contrast to Coase's recommendations that disputes over property rights be resolved by allocating the rights to the party most willing to pay for it.

122. Bender does note at the end of her article that in fact the "neutral, objective" approach has its merits and that what would be desirable would be to draw on the best of both "equal justice" and the feminist ethic of care and equality of empowerment. Bender, *supra* note 42, at 909.

123. It is from Bender's article that Paetzold gets her ideas of direct connection. *See supra* text accompanying notes 49–56.

Since the corporation makes its decisions unfettered by public opinion and according to its ultimate goal of financial profits, this combination easily leads the corporation to choose its actions on a cost-benefit basis.[124] Cost-benefit analysis allows the corporation to measure risks and gains of a particular venture in purely monetary terms, which may in fact understate the true cost to society.[125] Thus, if a venture is risky, the corporation will evaluate the likely financial gains against current and possible future costs to the corporation alone. The probability that the injured will prevail in a lawsuit and that monetary awards might then occur, not the possible number of individuals harmed, affect the calculation of potential costs to the corporation. In the process of weighing financial benefits against possible costs, the corporation decides what risk of harm to which it exposes the public. That decision is driven solely by the corporation's financial bottom line.[126]

Thus the mass tort crisis has as its seeds in the weighing and balancing of public risk against public benefit measured not by the public's willingness to make such trade-offs but by the corporation's private risks and benefits to its balance sheet. The crisis continues to evolve because the one measure of public harm that the corporation is forced to consider, the risk of lawsuits, is skewed down in impact as a result of the legal obstacles facing plaintiffs in court. Embedded in this legal and business structure are rapidly advancing technologies, each with their own concomitant benefits and harms, along with the capacity to affect increas-

124. Bender herself notes that the monetization of damages lends the corporate decision-making process to cost-benefit analysis. *See* Bender, *supra* note 42, at 875–76.

125. For a discussion of how cost-benefit analysis can be expanded to encompass values beyond monetary ones, see Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand That Hides?*, 32 ARIZ. L. REV. 77, 115–24 (1990).

126. Of course there are those who argue that this self-interest profit motive leads to decisions that actually maximize social welfare. But there are a significant number of criticisms of that line of reasoning. For a general discussion of these issues, see generally HERBERT HOVENKAMP, ECONOMIC, AND FEDERAL ANTITRUST LAW 1–39 (1985), EDWIN MANSFIELD, MICROECONOMICS: THEORY and APPLICATIONS 259–330 (8th ed. 1994). For a discussion demonstrating that although the cost-benefit process itself is separate from any particular value choice that a user may apply, the results of the analysis are dependant on the user's value, see White, *supra* note 125, at 111–115. That article also demonstrates that cost-benefit analytic process can incorporate more than merely monetary assessments and, in that context, addresses many of the same policy issues that Bender raises here in the feminist jurisprudence context.

ingly larger sectors of the public. Under such circumstances the explosion of the mass tort crisis is all but inevitable.

The inadequacy of more mainstream suggestions to the mass tort crisis evidences less than satisfactory solutions. Currently, most mainstream recommendations advocate placing a financial cap on damages or suggest that implicated firms seek refuge in bankruptcy reorganization. These proposals do not solve the crisis but merely limit further consequences of torts on the tortfeasor. Coupling these "solutions" with tort victims' difficulties in achieving redress in court,[127] it is not difficult to envision the incidence of mass torts spiraling upwards, with the number of victims (and uncompensated victims in particular) rising with it.

Bender's approach for finding solutions to the mass tort crisis is to shift the focus away from cutting victims off from compensation and towards defining the origins of the mass tort. By looking for the source of the crisis rather than attempting to curb acknowledgment of the consequences, Bender opens the possibilities of circumventing the incidence of mass torts at its genesis.

We can draw lessons for applying feminist technique to business law problems by examining Bender's methods of arriving at her proposals. Bender's primary analytic premise is based on compassion for the "other," in this case the hapless victim of corporate malfeasance. Looking at the experience through the eyes of the victim (the "excluded voice"), directs Bender's inquiry to the tort's origin and uncovers how the engine of mass tort dynamics perpetuates the crisis that it creates. For developing policy proposals to effectuate change, Bender in effect engages two feminist principles: one an analysis of power and the other the feminist ethic of care.

Bender's observation that the victims in most cases had no power of informed choice leads her to recognize implicitly the asymmetry of the risk-taking decision process. Those who create the risk — the corporate decision-makers — are not those who truly bear the risk — the customers or neighbors to the corporation's production process. Her observation of the suffering and frustration of the victims during the often drawn-out legal process that may or may not result in legal rectification leads her to recognize the asymmetry of legal resources to litigate a claim.[128]

127. Bender, *supra* note 42, at 882–83.
128. *See id.* at 876 n.72.

Both observations recognize an asymmetry in the allocation of power that excludes the "other" — the victims. This leads Bender to recommend policies to correct the imbalance. She proposes "opening up" risk-taking discussions to public debate and realigning burdens of proof to create equality in courtroom battles.

In addition to the feminist power analysis, Bender also invokes the feminist ethic of care to guide policy recommendations as well. She notes that the decision-making process fosters a compassionate indifference of corporate leaders to the victims of the corporate actions. That indifference affects several stages of the development of the mass tort: the corporate decision to undergo the risky behavior on the basis of its financial bottom line, its strategy to avoid or at least delay responsibility for the tort in the legal proceedings, and the dismissal (in the tortfeasor's mind) of the consequences of its actions once the corporation pays monetary damages.[129]

Bender suggests strategies for undoing that indifference. The goal is to bring forth in corporate decision-makers a sense of "connectedness," empathic responsiveness to the needs of others, and a recognition of the importance of *all* members of society, in particular, those the corporation injures. This cognition is necessary to imbue the corporation with the ethic of care and to discourage those decisions that lead to the mass tort crisis. Bender therefore recommends policies to counteract the corporate lack of the ethic of care: public debate before risky corporate undertakings, corporate payment of victims' injury expenses during the course of the trial, and requiring corporate decision-makers to become directly involved in the victims' recoveries after the event.[130] Each of these policy recommendations is designed to infuse the situation with the ethic of care, either by imposing it from outside the corporate walls (through public debate or paying for victims' injury expenses during trial) or by encouraging its development from within (through corporate decision-makers direct involvement in victims' recoveries).

By applying the feminist ethic of care and the feminist analytic approach to power to discover the underpinnings of the mass torts crisis, Bender has gone further than other contemporary writers to show the effectiveness of feminist jurisprudence.

129. *See id.* at 897–99 (discussing the lack of corporate responsibility for injuries sustained by consumers).

130. *See id.*

She has shown that feminist jurisprudence can constructively evaluate an issue that has *no* discernable gender aspects to it. Clearly, mass torts is not particularly a woman's issue. More interestingly, it is not even a gendered issue, or even a group disenfranchisement issue in the broadest sense of that concept. As already demonstrated earlier in this Essay,[131] the principles of feminist analysis can be applied not only to women's issues but to issues of any disenfranchised group, for example, minorities or certain workers. But the victims of mass torts do not belong to any particular excluded group; mass torts can strike anyone regardless of their socio-economic status, gender, race, or ethnicity. The socio-economic make-up of the victims of one mass tort may share no characteristics with those victims of another mass tort. Thus Bender has shown that feminist jurisprudence is an analysis sufficiently powerful that its applicability and insightfulness is likely to cover questions from the full spectrum of law.

B. *For Example: Limited Liability*

In her article, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*,[132] Gabaldon also focuses on the conscience, or lack thereof, in the corporate decision-making process. She attacks, however, the role that limited liability plays in corporate decisions that induce third party risks. She questions the legal and economic rationales for shielding owners of corporate enterprises with the limited liability veil. She is skeptical of limited liability's supposed efficaciousness because it enhances even further the separation that already exists between enterprise owners and responsibility for corporate business actions.[133] She posits two alternatives for reducing the incidence of corporate induced third party harms. One is a characterization of an enterprise in an ideal feminist world and the other is a set of pragmatic suggestions to impose on enterprise structures to imbue them with a greater sense of the ethic of care.

The current corporate form is designed to induce individuals to invest in larger, riskier enterprises by offering them limited liability shields from the debts of the corporation. In exchange for limited liability protection, states require that shareholders

131. *See supra* text accompanying notes 5–13.
132. Gabaldon, *supra* note 42.
133. *See id.* at 1391–92.

surrender direct control of the corporation and elect instead individuals to a Board of Directors with the fiduciary responsibility of running the enterprise.[134] It is this separation that gives rise to Gabaldon's primary objection to the corporate form. Engaging in or endorsing activities for one's own benefit that may simultaneously impose harm on others is antithetical to feminist sensibilities. Gabaldon observes that many corporate activities, in the search for profits on behalf of shareholders, often do exactly that: impose risks on third parties.[135] This violates feminist principles of connectedness, community, and responsiveness to the needs of others. Limited liability only compounds this ethical violation by then relieving the shareholder of personal liability for the negative consequences that occur to others.[136]

Gabaldon questions two primary justifications for the role of limited liability.[137] One is a traditional legal argument. Justice requires that individuals be held liable only for harms for which they are culpable, and culpability requires some measure of control over the offensive conduct. Since for legal (and pragmatic) reasons shareholders do not have direct control over corporate conduct, holding them personally liable goes beyond the bounds of justice.

The second justification for limited liability is an economic or "law and economics" one:[138] a policy of limited liability is efficient and economically beneficial for society. Limited liability, it is argued, is necessary to encourage people to invest in corporate enterprises that may otherwise result in exposure to significant financial losses. Individuals will not invest in an enterprise if they risk more than they want to or if the liability exposure may consume their entire personal assets if the corporation fails to

134. The most notable exceptions are the following: if the corporation's by-laws require shareholder approval for specific issues, the shareholder is elected to the Board, or as in most states, closely-held corporations (*i.e.*, corporations in which all outstanding shares are owned by a few individuals, such as friends who go into business together or family members) that are allowed by state statute or common law to dispense with many of the formalities of a ruling Board of Directors. Even when the last is not possible formally, closely-held corporations may in fact have most or all shareholders on the Board and in that way be directly involved in the corporate decision-making process.

But, presumably, for Gabaldon's purposes here, she has in mind the large corporations in which the number of shareholders are diffuse and many.

135. *See* Gabaldon, *supra* note 42, at 1400.

136. *See id.* at 1430.

137. *See id.* at 1403–04.

138. *Id.*

cover its debts.[139] Without limited liability, shareholders will monitor corporate decisions more intently to protect their personal assets. This is an inefficient use of time and resources particularly if a board of directors must respond to hundreds, perhaps thousands, of shareholders, each with different opinions as to proper corporate conduct. Furthermore, limited liability allows the corporation to undertake riskier projects by effectively reducing the losses if the projects fail without mitigating the benefits if they succeed. Experimental research and development increases the rate of technological advance to the benefit of society overall.

To counter these arguments, Gabaldon first suggests an ideal world based on feminist values which would eliminate the need for limited liability. First, extensive community support would be in place, assuring everyone of their essentials for living life in the way of home, hearth, and healthcare, regardless of their circumstances. This would reduce a potential investor's fear of risking investment and becoming impoverished. Second, though Gabaldon agrees that eliminating limited liability would increase shareholder monitoring, she sees advantages to the result. Corporate enterprises would tend to be smaller, allowing for more integration between home and work, enabling the corporate structure to be more responsive to individual and community needs. Shareholders would be more likely to bring to the corporate table their own sensibilities, which may include a more personal ethic (consistent with the feminist ethic of care), rather than just an eye looking solely towards the expansion of corporate profits at any cost.[140] Hopefully the effect would be to lower the likelihood of decisions that impose third party risks. The standard Gabaldon would like to see applied is one of "the utmost care."[141] Furthermore, increased shareholder involvement should allay the concerns of jurists with regard to shareholder culpability without control. In a community consistent with feminist values, society's well-being should be so greatly enhanced in the absence of limited liability policies, that any reduction in the

139. *See id.* at 1408.

140. *See id.* at 1436.

141. Gabaldon uses as an example the question of whether we the readers would, as shareholders, approve the exploding Pinto gas tanks. *See id.* at 1431.

rate of technological advance that might result would be well worth the trade-off.[142]

We do not live in a society premised on those values, however, and realistically, limited liability's elimination is unlikely. In the alternative, Gabaldon suggests we aggressively pursue policies that respond to the reality that individuals are increasingly put at risk because of corporate activities. To stem that tide, she focuses on reforms that empower shareholders to get more involved in corporate decision-making and require corporations to have adequate insurance to support those who fall victim to corporate harm. Her advocacy of greater shareholder involvement is, for reasons stated earlier, the hope that shareholders will bring a stronger personal ethic to corporate decisions. Towards that end she recommends reforms that facilitate communication among shareholders[143] and enlarge shareholder rights to include proposals in management proxy solicitations.[144] Greater investor involvement would weaken the basis for limited liability policies in the future.

Despite problems inherent in any insurance environment, Gabaldon also sees a number of benefits in requiring adequate insurance.[145] First, defining what constitutes adequate insurance could steer the measure away from a profits and loss calculation

142. Gabaldon would like to see research focused on improving health and the environment. *Id.* at 1438.

143. In the laws of many states and under federal statutes, communications among shareholders are significantly constrained. Such communications are often treated as solicitations and those may run afoul of both federal and state mandatory disclosure requirements under both federal and state securities regulations. The efforts to conform to those regulations in the way of proper filings of information are substantial and failure to do so can invoke significant penalties and potential criminal liabilities. Such circumstances have significant chilling effects on shareholder efforts to operate in any concerted fashion.

144. Typically, the management is required to hold annual shareholder meetings that allow for the elections for members of the Board of Directors and votes on other matters that require shareholder approval. In large publicly-held corporations, it is unlikely that many of the shareholders will be able to attend the meetings. Since a shareholder meeting requires a quorum, management will typically mail out proxy solicitations with candidates for the Board of Directors and the various proposal to be put before the shareholder. These proxy solicitations allow the shareholders to vote on the issues and then return them to management. Certain laws require management to include in these proxy solicitation proposals that a shareholder may wish to have other shareholders vote on issues that relate to corporate conduct. The permissible subject matters of these shareholder proposals, however, are currently severely constrained, preventing shareholders from having significant impact.

145. For example, the unavailability or expense for certain types of torts insurance, the immorality of measuring lives in terms of dollars, and moral hazard problems. *See* Gabaldon, *supra* note 42, at 1449–50.

to more of a community standards value. This could be achieved by establishing a community review panel to define and apply a standard of reasonableness.[146] Holding management personally accountable for failure to secure adequate insurance would motivate them to seek outside review which could easily be made by the community panel. This would serve several ends. One, it would bring an evaluation of the adequacy of insurance *a priori* as opposed to *post hoc* when the injuries have already occurred and there may not be adequate insurance or any other source of funds to alleviate the damages. Second, it would raise the community's awareness as to what kinds of risks the corporation is contemplating and provide an opportunity for some form of public debate.[147] Third, the managers themselves would be forced to contend with the seriousness of the implications of potential harm to actual individuals instead of turning a blind eye to that reality and looking solely at the dollars and cents calculations of measuring the risk.[148] Finally, the introduction of mandatory adequate insurance would bring a new monitor to corporate activities: the insurance companies. In contrast to the corporate client, insurance companies face their own financial bottom line. Insurance companies are more likely to seek reductions in incidence and magnitude of harms than the corporations they insure whose activities are buffeted by limited liability and insurance. Gabaldon hopes this will lead to the standard of care she favors, one of "utmost care."[149]

Thus, Gabaldon, like Bender before her, uses feminist analysis to uncover a source for the contentious issue of corporate-induced third party harms. She too feels that the problem arises from the corporate decision-making process and its focus on monetary evaluations of benefits and costs. In an effort to bring

146. *See id.* at 1450.

147. *See id.* at 1453.

148. *See id.* at 1454. "[What appears to management] to be no more than an offsetting loss on a financial statement may look quite different to a community volunteer. Simply reminding management of that fact may have a moderating influence. Thus, an executive might think more than once before announcing to an insurance panel, 'We know that our infant seat restraints will fail at X rate, so we will carry Y amount of insurance.'" *Id.*

Gabaldon also discusses the political problems that can arise with any review committee, from overzealous community advocates imposing unreasonably high insurance requirements, to a committee that has been "captured" by the corporate community and becomes unreasonably deferential, as well as a number of other implementation problems. *Id.* at 1451–54.

149. *Id.* at 1452-53.

the broader perspective of the feminist ethic of care into these decisions, she focuses on one particularly noteworthy stumbling block to that end: limited liability for shareholders. To counter the impact, she proposes two approaches. One is to demonstrate an economic world in which limited liability would not be needed, and that world is premised on the feminist principles of the ethic of care, connectedness to the other, and being responsive to the other's needs. The second is a more pragmatic approach, offering suggestions to undo the negative effects of limited liability. Those suggestions are practical ones. Some encourage greater shareholder involvement in the corporate decision-making process and some ensure adequate funds to care for the needs of the victims of corporate harms. Both proposals serve the possibility of imbuing corporate decisions with a greater ethic of care. Increased shareholder involvement follows the feminist principle of reintegrating dichotomies and, as a result, has the possibility of bringing different shareholders' ethics into the corporate decision-making process. Requirements for adequate insurance follow the feminist principle of obliterating distinctions between public and private spheres. These requirements lead to greater community review of intended corporate activities and greater conscious awareness of the corporate decision-makers themselves of the more human dimensions of their decisions.

Like Bender's analysis, Gabaldon uses the feminist approach to uncover an important aspect of a business law issue and to recommend remedies. Once again, Gabaldon's work demonstrates the power of feminist jurisprudence to address issues that have no particular correlation with women's concerns or those of disenfranchised groups in general. Moreover, her work is not concerned with patriarchal hierarchies. Her use of feminist analysis addresses a problem of concern to everyone.

VI. FEMINIST VALUES, LAW AND ECONOMIC ANALYSIS, AND CORPORATE DECISIONS: REFLECTING THE PUBLIC'S CHOICE

Both Bender and Gabaldon are concerned with the apparent indifference to human harm built into the corporate decision-making process. They see that indifference arising from an empathic disconnection between the decision-makers and the human consequences of corporate activities that result from the decision-making process itself. Though each author recommends

different policies, their common goal is to inject feminist ethical values of care to override the decision-making process' outcome. Underlying their analysis, however, is a fundamental distrust of the corporate decision-making process itself: the cost-benefit analytic technique.[150]

Feminist analysis explains why both Bender and Gabaldon are troubled by the separation of the beneficiary (that is, the shareholder or manager) from the consequences of actions taken on his or her behalf or direction. It fosters an atmosphere in which inculcating third party risks are made with less reservation. One of feminism's significant contributions is the recognition that in the name of "objectivity," current social structures encourage their participants to think of others in the abstract rather than as individual sensate human beings. In the case of cost-benefit analysis, for example, this can translate human harm into abstract numbers or statistics. In such an environment, psychologically it is far easier to undertake courses of action that can inflict great suffering among individuals when the decision is thought of in abstract terms.[151]

One might argue that the emotional or psychological dimension embodies those ethical values of "concern for others" that are lost if an abstract approach, such as a purely monetary evaluation, is adopted. Feminists indicate that different decisions will be made when full cognition of the consequences are involved. Full cognition triggers a moral dimension in the decision-maker that he or she will bring to bear in the evaluation process, presumably one that will more properly conform to society's values and choices. Purely abstract reasoning, on the other hand, allows decision-makers to close their eyes to the horrors their actions may create for those who are impacted. As a result, except for the limited risk of lawsuits,[152] the full impact of the potential

150. "My critique of mass tort law primarily focuses on its over reliance on an economic, cost-based analysis of liability and its acquiescence in traditional legal understanding of corporations and their uses of power." Bender, *supra* note 42, at 851. "[Economics'] assumptions about rational self-interest as a laudable motivating force represent a world view that is jarringly inconsistent with that of . . . feminism." Gabaldon, *supra* note 42, at 1426.

151. This is not unlike experiences in the Vietnam War, when members of the armed services found it easier to drop bombs from jets onto radar blips of villages labeled as strategic targets than to walk into the village and, while face to face, kill old men, young boys, women, and children.

152. For a more detailed discussion of this concept, see *supra* text accompanying notes 111–31. The faultiness of our legal system to adequately account for corporate torts is eminently exemplified by the history of tobacco litigation. The current con-

harm does not enter the corporate decision because the decision-maker incorporates no personal sense of identification or responsibility for the impact on the victims. The decisions, as a result, weigh the positive effect on corporate profits more heavily.

Though neither Bender nor Gabaldon address how the separation between beneficial and negative consequences affects specifically the decision-making process itself, they do observe that not bearing responsibility for the full consequences of actions is antithetical to feminist values. Thus their objections to the current corporate structure is that lack of culpability encourages a lack of responsibility.

The question must be asked then: What about the corporate decision-making process itself? Is it so morally bankrupt that the only remedy is to bring in moral values that *override* its choices? This inquiry causes us to further examine the manner of corporate decisions.

As economists have long shown, there is no question that corporate decisions are based on a cost-benefit reasoning, whether explicitly or implicitly; if the benefits exceed the costs, the venture is typically deemed worthy. As demonstrated earlier in the discussion of Bender's article,[153] when the only values taken into consideration are monetary ones, and if the monetary measures do not capture the full ramifications of the costs (or perhaps even the benefits) to members of society, often the corporation's decisions seem to be heartless.

Does this imply, however, that the cost-benefit decision-making process itself is the problem? Or is it the adequacy of the values entering into the cost-benefit "equation"? As a society, we would be hard pressed to deny that we all engage in cost-benefit analyses on a continuous and daily basis. It is not hard to recognize that some level of risk is always present in any endeavor. People make choices all the time to undertake risks, particularly because the benefits of the activity outweigh its risk of negative consequences. People make this choice the moment they walk out the door and face the risks of the everyday world: drive a car and risk an accident, bring electricity into the home and risk electrocution. One could not move in any dimension of

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troversy surrounding the potential tobacco companies' settlement, in which the dollar amounts are truly staggering, are recognized as being only marginally painful to the tobacco companies' future profits on the dissemination of a drug that is now finally openly acknowledged as highly addictive and singularly life-curtailing.

153. *See supra* text accompanying notes 111–31.

life if one was not willing to accept a certain level of risk. Perhaps many of us avoid the paralysis that acknowledging such risks would cause by adopting some denial state thinking: "This won't happen to me." Nevertheless, we undertake various kinds and degrees of risks all the time and we do so because we want the benefits those activities bring along with their risks. Thus there is no question that weighing and balancing is not only an acceptable but a necessary decision-making mode for everyone, not just corporations alone.

The moral pangs seem to arise when there is a separation of those who decide the activity and its level of risk, from those who end up bearing the risk. The examples of risk-taking cited in the previous paragraph might feel more comfortable than corporate conduct because they appear to be choices made by individuals to impose risks on themselves and their loved ones. The corporate decision to the contrary clearly imposes risks on third parties.[154] What seems to offend is that the corporation is making profits by producing something that has a level of risk that falls on others.[155]

There is no question, however, that society prefers to have the benefits of industrial productivity: automobiles, airplanes, and advances in medical technology. Even Gabaldon acknowledges that we do not want to go without them to absolutely avoid the risk of harm. Society has in effect made the decision to accept that risk, even the risk of death, not knowing upon whom the harm will befall.[156] The true questions we face are the fol-

154. This seems to be of particular concern to Gabaldon. *See, e.g.*, Gabaldon, *supra* note 42, at 1430. For example, the corporation who manufactures airplanes, determining the acceptable level of safety, and therefore risk, to impose on passengers (with the help of governmental agencies) may find its own executives, even those who had made the safety level decisions, killed in a plane crash due to the accepted levels of risk built into some design factor.

155. In point of fact, even when one is deciding to put oneself and one's loved ones at risk to undertake a risky endeavor one inevitably imposes risks on others. For example, choosing to drive a car puts the driver and others around him at risk. Bringing electricity into the home creates the risk of fire there and to one's neighbors.

156. John Rawls has posited the socially optimal distribution of risk (and benefits) in his book, A THEORY OF JUSTICE (1971). In it he argues that people should select their own favored state of risk and benefits without knowing where on the spectrum of well-being they will personally fall when the state is realized. Thus, people will be choosing what their preferred trade-off between risks and benefits is. The collective social choice on this trade-off, Rawls argues, is society's optimal risk-benefit choice, reflecting society's collective value on risk relative to benefits. *See generally* JOHN RAWLS, A THEORY of JUSTICE (1971). This is setting aside the more practical and extremely legitimate issues of whether justice and the economy have

lowing: given that risk of harm is unavoidable, what is the "acceptable" level of risk, what are considered reasonable efforts to avoid harm, and how will the injured be compensated when harm inevitably occurs?

Once we ask such questions, we are automatically in the realm of cost-benefit analysis. Just as one can make a personal assessment as to what level of risk one wishes to absorb, society can and must make such an assessment with regard to activities that affect general well-being. Issues of military protection, medical advances, and environmental concerns all involve questions of risk of injury and death. They are also all considerations that must be addressed at the societal level. Industrial productivity is merely one of the areas in which decisions must be made regarding what levels of risk the society as a whole wishes to bear for deriving the benefits that taking industrial risks will bring.

When such cost-benefit decisions are made at a societal level, the nature of the parameters does not change. If there is a risk of harm, when a large number of people partake of it, some will suffer losses. Nevertheless, if society concludes that the benefits outweigh the harms, its decision-makers will elect to tolerate the harms confined to a portion of the population to reap the benefits. And in some instances that may even mean a decision to tolerate the risk of death. Society already makes such decisions in tolerating the manufacture and sale of automobiles.

It is evident, however, in this entire discussion of cost-benefit analysis, that there are at least two stages of decision-making. In addition to the weighing and balancing process itself, is the critical question of *how* to evaluate the costs and benefits. When an individual engages in the cost-benefit process, though the evaluation of the costs and benefits may be complex, the evaluation nevertheless rests on the individual's private sense of values and morals. In contrast, when a society makes this determination, the evaluation process reaches an exponentially higher level of complexity for a whole host of reasons. Two reasons are the disparate range of values that different members of society hold, and the fact that those who benefit are not always those who bear the cost. Nevertheless, society must determine in some fashion what the value of the benefits to society truly are and how severe society considers the various costs.

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been structured so that the harm is more likely to fall on the less advantaged or less empowered in society.

A solution of maintaining a standard of "utmost care," as Gabaldon suggests, is not very effective for this question. Of course we would want all enterprise participants to take the utmost care not to inflict harm on others through the activities in which the enterprise engages. The implications of Gabaldon's analysis, however, are that there should never be any activity that knowingly may inflict harms on others. Given that nearly all industrial activities engage in a certain level of risk of harm and that this is known, such a standard suggested by Gabaldon would cause all productivity to stop. To the contrary, it is the increased level of knowledge that facilitates reducing risks to consumers that also facilitates knowing what the risk will be. Ironically, that knowledge is critical to ascertaining what level of risk we should tolerate.

How to evaluate benefits and costs are questions that the law and economics movement, particularly the one out of Chicago, has attempted to answer subject to much criticism. In addition to importing cost-benefit techniques from economics to apply to the weighing and balancing process in law, the law and economics movement as dominated by the Chicago School also has imported the economists' typical mode of evaluating costs and benefits. The measurement they recommend is using market prices.

Those hostile to the law and economics movement usually criticize and reject the entire process of cost-benefit analysis. This is in large part because the resulting policy recommendations from the Chicago law and economics perspective so often seem to the critics as unvaryingly unfair.[157] A significant source of the controversy surrounding the Chicago School analysis, however, stems in fact from the market price methods the Chicago School uses for evaluation. For reasons explained below, these are methods of evaluation to which feminists (as well as others) would rightly object. Though criticism of the Chicago School approach tends to focus on the decision methodology itself, that is the use of cost-benefit reasoning, it is the use of market prices in making those weighing and balancing decisions that in fact is the real culprit.

Market prices do not adequately measure the true cost to individuals and to society of the harms that are at risk of occur-

157. For a discussion of these concerns, see Gabaldon *supra* note 42, at 1429.

ring.[158] Market prices merely reflect an aggregation of choices made by individuals when each is considering his or her pocketbook and tastes alone. Because it measures people's willingness to spend on certain commodities and services, the preferences it reflects tends to be skewed in favor of the rich because they have more to spend. Because the choice of purchase made by an individual reflects decisions concerning only him — or herself — the resulting market prices fail to consider larger social consequences of aggregative actions. The marketplace's failure to address a large range of social concerns has long been recognized. Individual and public safety, the environment, defense, research, and development are all often used to justify governmental regulation, taxation, and expenditure so as to assure consumer confidence, safeguard the public, and promote long term economic growth.

With some reflection, it becomes obvious that market prices cannot serve as our sole measure of value to society of benefits and costs. There are dimensions beyond an individual's private willingness to pay for a good that must enter into the weighing and balancing decision-making process when considering activities that impact at a societal level. The question becomes then: "What are those added dimensions and how do we include them into the cost-benefit equation?"

This suggests in part what is problematic with the corporate decision-making process as it is now structured. The corporate decision-making process by focusing solely on the corporate bottom line essentially relies on market prices. Market prices determine the amount of revenues that the firm receives (that is, the selling prices of the firm's goods or services) and market prices determine the firm's costs (that is, wages and costs of other materials and services used). The corporation's use of market prices for its financial decisions are tempered only by the probability of lawsuits, the probability of losing and the likely payout if losing occurs, the effect of which, as Bender so ably demonstrates, does not capture the full measure of the cost of the harm created to others. The question with respect to the corpo-

158. This is of course a debatable issue among various schools of law and economic thought as well as among economists themselves. Within economic circles, however, the flaws of using market prices to reflect accurately social values are pretty much well accepted now. It is still used nevertheless in practical applications of cost benefit analysis by economists primarily because of its convenience and the fact that it does measure to a large extent individual choice with regard to commodity purchases.

rate decision-making process then is the same as the question for cost-benefit analysis in general. Given that the corporation ought not rely solely on the financial aspects when making its decisions, what other dimensions should they include and how should they incorporate them?

It is this aspect of monetary evaluation used in the corporate decision-making process that is really at the heart of what Bender and Gabaldon, as feminist scholars, seek to address in the cost-benefit analysis evaluation dilemma. Viewing their policy suggestions in this light, it becomes clear that their recommendations for change offer a means of social evaluation of costs and benefits that will hopefully include the extra dimensions of morals and values that eludes a purely monetary approach. Through their suggestions of *a priori* extra-corporate review of corporate decisions, they suggest a means to bring in a public sensibility of the relative values of the costs and benefits to society of various corporate undertakings. Their suggestions of personal involvement of corporate enterprise participants will introduce the human conscience into the evaluation of the cost to others. This hopefully will bring to the corporate decision-making process the subjective evaluation the decision-makers would apply in their own individual circumstances.

Thus what Bender and Gabaldon provide are both a means and a measure to include those additional dimensions of human evaluation and care into the corporate decision-making process. As a result, they demonstrate another critical role that feminist jurisprudence can play in resolving business law issues: a means for addressing the ethical conundrums inherent in law and economic analysis of risk, particularly as it manifests itself in law and economic reasoning of business law concerns. Just as feminist jurisprudence can interact with law and economics to define a just distribution of rights, as described in Section IV above, feminist jurisprudence can advise a proper means for the social evaluation of gains and that ought to enter into law and economics cost-benefit analysis.

VII. Conclusion

It is evident then that feminist analysis can address issues far broader than solely women's concerns. It is also clear that feminist analysis is not limited to gender concerns, group disenfranchisement, or analyses of patriarchal hierarchy and dominance. This Essay has demonstrated this in two ways. One

is through analyzing the works of feminist scholars addressing business law issues. That analysis shows that the principles of feminist reasoning — recognizing the excluded voice, the perspective of the other, dichotomization of social order into different spheres — can be used to uncover core problems in business law that have nothing to do with traditional gender issues. Similarly, analysis of those authors' articles shows that by using the techniques of narrative form, contextual analysis, and the reintegration of separate spheres, one can dissect the nature of business law quandaries. This Essay also shows how those authors invoke the fundamental principle of the feminist ethic of care in conjunction with promoting a sense of connectedness and collaboration among all members of society to form the basis for resolving many of the social conflicts that arise in the business law arena. Thus there cannot be any question whether the feminist method is analytically equipped to address legal issues other than feminist concerns; clearly it already does.

Equally intriguing, however, are the roles suggested by this Essay that feminist jurisprudence can play in interacting with another jurisprudence that has had broad impact in the legal arena: the discipline of law and economics. This Essay's analyses demonstrate two important areas of interaction: the distribution of economic and political rights and the collective decision on social risk-taking. Though one feminist author asserts that law and economics and feminist jurisprudence have no common ground,[159] the discussions on rights distribution and social risk-taking in this Essay suggest otherwise. In fact, each discipline most probably can learn considerably from the other. Certainly in the areas of risk-taking and rights distribution, more can be learned from mutual investigation. Almost as certainly, there will be other areas in which law and economics and feminist jurisprudence will comment on each other.

Feminist jurisprudence and law and economics seem in fact to meld together particularly well. Law and economics is a discipline and discourse focused on moving from one socio-political scenario to another efficiently and for the maximum benefit of society. Feminist analysis is a discipline focused on evaluating what socio-political scenarios currently exist and what goals society might like to achieve. The synergistic effect of the two disci-

159. *See generally* Gabaldon, *supra* note 42.

plines operating in concert augurs well for addressing significant socio-political concerns in the future.

VIII. BIBLIOGRAPHY

The bibliography includes articles that either take a feminist perspective or apply analyses consistent with feminist perspectives on specific business law topics. For the reader's convenience, articles discussing feminist jurisprudence generally are included at the end as well. The large number and the variety of feminist analyses of business law issues demonstrate the fruitfulness of this approach. One would surely hope to see continued development of scholarship along these lines.

FEMINIST ANALYSIS OF BUSINESS LAW ISSUES

After All the Effort, Why Do We Still Lose Our Best Women Partners?, VT. B.J. & L. DIG., Oct. 1994, at 14.

Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017 (1992).

Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

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

Book Note, *Stakeholders as Shareholders,* 109 HARV. L. REV. 1150 (1996) (reviewing MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995)).

Elizabeth Barker Brandt, *Community-Property Treatment of the Increase in Value of a Separately Owned Business*, 27 IDAHO L. REV. 195 (1990-91).

Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor,* 6 UCLA WOMEN'S L.J. 457 (1996).

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

Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies*, KAN. J.L. & PUB. POL'Y, Summer 1994, at 26.

Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903 (1994).

Lynne L. Dallas, *The Control and Conflict of Interest Voting Systems*, 71 N.C. L. REV. 1 (1992).

Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle and Means*, 22 U. MICH. J.L. REFORM 19 (1988).

Amy E. Decker, *Women in Corporate Law: Rewriting the Rules*, 4 AM. U.J. GENDER & L. 511 (1996).

Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L.J. 1 (1993).

Claire Moore Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm*, 22 FLA. ST. U. L. REV. 955 (1995).

Paula Dressel et al., *The Dynamics of Homosocial Reproduction in Academic Institutions,* 2 AM. U. J. GENDER & LAW 37 (1994).

Linda S. Eads, *From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof*, 79 CA. L. REV. 1421 (1991).

Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993).

Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1 (1995).

Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992).

Karen Gross, *Revision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506 (1990).

Geoffrey C. Hazard, Jr., *Ethics and Politics in the Corporate World*, 6 YALE J. ON REG. 155 (1989)(reviewing ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988)).

Thomas Lee Hazen, *The Corporate Persona, Contract (and Market) Failure, and Moral Values*, 69 N.C. L. REV. 274 (1991).

Sharon Hom & Robin Paul Malloy, *China's Market Economy: A Semiosis of Cross Boundary Discourse Between Law and Economics and Feminist Jurisprudence*, 45 SYRACUSE L. REV. 815 (1994).

Christopher C. Joyner & George E. Little, *It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 B.U. INT'L L.J. 223 (1996).

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

Nancy K. Kubasek et al., *Comparable Worth in Ontario: Lessons the United States Can Learn*, 17 HARV. WOMEN'S L.J. 103 (1994).

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

Gerald A. Madek & Christine Neylon O'Brien, *Women Denied Partnerships: From* Hishon *to* Price Waterhouse v. Hopkins, 7 HOFSTRA LAB. L.J. 257 (1990).

Marleen A. O'Connor, *Corporate Malaise–Stakeholder Statutes: Cause or Cure?*, 21 STETSON L. REV. 3 (1991).

Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's* Principles of Corporate Governance, 61 GEO. WASH. L. REV. 954 (1993).

Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993).

Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

Marleen A. O'Connor, *A Socio-Economic Approach to the Japanese Corporate Governance Structure*, 50 WASH. & LEE L. REV. 1529 (1993).

Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681 (1993).

Terry A. O'Neill, *Reasonable Expectations in Families, Businesses, and Family Businesses: A Comment on Rollock*, 73 IND. L.J. 589 (1998).

Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646 (1992).

Terry A. O'Neill, *Toward a New Theory of the Closely-Held Firm*, 24 SETON HALL L. REV. 603 (1993).

Laura Oren, *Protection, Patriarchy, and Capitalism: The Politics and Theory of Gender-Specific Regulation in the Workplace*, 6 UCLA WOMEN'S L.J. 321 (1996).

Ramona L. Paetzold, *Commentary: Feminism and Business Law: The Essential Interconnection*, 31 AM. BUS. L. J. 699 (1993).

E. Michelle Rabouin, *Walking the Talk: Transforming Law Students into Ethical Transactional Lawyers,* 9 DEPAUL BUS. J.L. 1 (1996).

Nancy B. Rapoport, *Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783 (1995).

Linda J. Rusch, *Bankruptcy Reorganization Jurisprudence: Matters of Belief, Faith, and Hope-Stepping into the Fourth Dimension*, 55 MONT. L. REV. 9 (1994).

Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7 (1996).

Kim Lane Scheppele, *"It's Just Not Right": The Ethics of Insider Trading*, LAW & CONTEMP. PROBS., Summer 1993, at 123.

Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649 (1995).

Peter Sevareid, *Increase in Value of Separate Property in Pennsylvania: A Change in What Women Want?*, 68 TEMP. L. REV. 557 (1995).

Jana B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARV. J. ON LEGIS. 43 (1993).

Hedwig C. Swanson, *United States Corporations Operating in Saudi Arabia and Laws Affecting Discrimination in Employment: Which Law Shall Prevail?*, 8 LOY. L.A. INT'L & COMP. L.J. 135 (1985).

Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1 (1994).

Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994).

Andrew C. Wicks, *A Feminist Reinterpretation of The Stakeholder Concept*, 4 BUS. ETHICS Q. 459 (1994).

Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U.J. INT'L L. & POL'Y 861 (1995).

Paul J. Zwier & Dr. Ann B. Hamric, *The Ethics of Care and ReImagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383 (1996).

FEMINIST JURISPRUDENCE IN GENERAL

Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990).

Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989).

Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265 (1993)(reviewing FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rose Kennedy eds., 1991)).

Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1987).

Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990).

Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989).

Kathleen A. Lahey, ". . . *Until Women Themselves Have Told All that They Have to Tell* . . .," 23 OSGOODE HALL L.J. 519 (1985).

Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751 (1989) (reviewing CATHARINE MACKINNON, FEMINISM UNMODIFIED (1987)).

Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982).

Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992).

Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994).

Martha Minow, *The Supreme Court, 1986 Term–Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLINE J. PUB. L. & POL'Y 199 (1994).

Cheryl B. Preston, *This Old House: A Blueprint for Constructive Feminism*, 83 GEO. L.J. 2271 (1995).

Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39 (1994).

Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980).

Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE J.L. 1373 (1986).

Patricia Smith, *Introduction: Feminist Jurisprudence and the Nature of Law, in* FEMINIST JURISPRUDENCE (Patricia Smith ed., 1995).

William J. Turnier et al., *Redistributive Justice and Cultural Feminism*, 45 AM. U. L. REV. 1275 (1996).

Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).