

The Gender Implications of Corporate Governance Change

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ABSTRACT

Current scholarship on corporate governance has largely ignored the gender effect of corporate decisions, particularly as capital moves outward into global markets. This article represents a tentative effort at analysing corporate governance utilizing a law and economics and feminist analysis. Through the lens of gender, it examines the continued legacy of the shareholder wealth maximization norm and the myth of value neutrality in the nexus of contractual relations conception of the corporation. It assesses the normative underpinnings of efficiency norms and suggests that there is a need for a shift in the current governance paradigm to take account of gender. This can be accomplished by beginning to account for and capture the values and costs attributable to the generation of surplus value for the corporation and by according the appropriate control rights in recognition of such investments.

- I. Introduction
- II. Gender and the Continued Legacy of the Shareholder Wealth Maximization Norm
 - A. Contractarian Theory, Historical Gender Privilege, and Value Neutrality
 - B. The Need for a Specific Feminist Voice in the Corporate Governance Discourse
 - 1. Women as Workers
 - 2. Women as Investors
 - C. Feminist Corporate Law Scholarship—Making Gender Visible
- III. Corporations and Gendered Notions of Efficiency
 - A. Efficiency is Normatively Defined
 - B. Reconstructing Costs, Benefits, and Investments in the Corporation
- IV. Shifting the Paradigm to Take Account of Gender in the Boardroom, the Workplace, and Our Collective Consciousness
 - A. Law, Economics and Feminism in the Boardroom
 - B. Women’s Contribution to Economic and Social Wealth
 - C. Our Collective Consciousness
 - D. Women’s Participation in Corporate Governance
- V. Accountability by Corporate Decision Makers
 - A. Boardroom Demographics
 - B. Board Accountability
 - C. Gender in Other Corporate Governance Regimes
 - D. Cross-Cultural Accountability
- VI. Conclusion

I. INTRODUCTION

At a recent film festival screening in Toronto, Canada, my daughter Samantha, aged 21, was the director. When she was introduced to the audience of several hundred, she dedicated the film to her mother, because, in her words: “my mother always taught me that I could do anything, or be anything, that I choose.” Needless to say, I felt unbelievably touched as a mother. She is my first of three children, very much her own person, feminist, artist, theorist, and caregiver. Yet in this special moment, I could not help but note that while women have come a long way in terms of economic and social choices, it is but a few frames in the footage that will play out before there is

full equality. It is unlikely that a film that discusses gender inequality as historical artefact will be made in my lifetime. A few months later, as if scripted, the multinational corporation that owns the television network where she was an Associate Producer cancelled her news and current affairs program on gays and lesbians. The rationale was profitability, that the network could use reruns of the program and meet its broadcast licensing requirements while putting its resources to more immediately profitable programs. The decision to maximize short-term return to investors resulted in the loss of numerous jobs and the loss of an important alternative source of human rights news for the public. This type of corporate decision is played out daily in the sense that corporate decisions to maximize shareholder wealth do not fully take account of other costs, benefits, and investments in corporate activity.

As a corporate law scholar, I have rarely discussed issues of gender and corporate law. My feminism clearly informs my scholarship, as does my law and economics background. Yet the failure to articulate the gender effects of corporate law may itself be a function of the place of feminism in the hierarchy of economic and corporate law theory. This article represents a tentative effort to put some thoughts on paper. It works within the existing framework of market economies and thus, by definition, is a narrow project.

Corporate governance includes both the internal governance mechanisms of the corporation and the broader public regulatory framework in which corporations operate. Governance is the mechanism whereby decisions are made to cost-effectively raise and utilize capital in the efficient generation of wealth, and by which corporate officers are held accountable to those investing in the firm.² Governance also includes the relationship of corporate decision makers with the broader community in which the corporation operates, in respect of issues such as environmental impact or local economic activity. The governance debates of the past decade have revolved primarily around contractarian and communitarian approaches, with “socio-economics” more recently drawing from both of these theoretical approaches. The reader is well advised to consult the wealth of literature on all of these

approaches, however, for the purpose of this article, their willingness or failure to make visible the particular situation of women is highlighted.

In the continuing proliferation of corporate law literature, scholars are occupied with convergence theory, optimal governance principles, the role of corporate norms, and the cross-cultural domestic influences on corporate governance. This debate has received even more attention with the recent failures of Enron and other publicly traded companies and resultant losses to investors, workers and creditors. At the heart of these debates are several underlying themes: the continued legacy of the shareholder wealth maximization norm; normative conceptions of efficiency; and issues of control and accountability by corporate decision makers. Within these debates, one aspect that receives little attention is how corporate governance fails to account for women.

To briefly set a context, convergence theory suggests that there will be functional or formal convergence of corporate governance norms due to global capital market pressure. A countervailing approach path dependence theory suggests that governance is shaped by pressure from the diverse economic, social, and political systems in which corporations operate, and thus complete convergence is unlikely. Both approaches have to date failed to explicitly acknowledge where women are situated within the corporation. Most theoretical approaches to corporate governance are modelled on strong historical notions of property and thus on a particular distribution of economic power that is highly gendered within the marketplace. They generally fail to articulate and value the experiences and contributions of women to the economic and social life of corporations, and thus the distributive effects of various governance models.

This article will highlight some of the problems within corporate governance. However, it is a preliminary attempt to do so, and further empirical and theoretical consideration of the issues and a greater exchange of ideas is required. In this respect, this project is but a modest beginning.

Part II of this article examines the continued legacy of the shareholder wealth maximization model through the lens of gender. In particular, it

examines the myth of value neutrality in contractual relations and suggests that there be a recasting of corporate objectives to one of enterprise wealth maximization. There is a need for a specific feminist voice in the corporate governance discourse and this part explores some of the feminist corporate law scholarship that has emerged in recent years. Part III then examines gendered notions of efficiency, assessing their normative underpinnings in terms of how one measures costs, benefits and investments in the corporation. Different theoretical approaches offer a wealth of analytical tools in designing optimal governance practice. Part IV suggests that there needs to be a shift in the current paradigm to take account of gender in the corporate boardroom, the workplace, and in our collective consciousness. By developing a notion of corporate governance that takes account of multiple investments in the firm, applying both law and economics and feminist insights, one can begin to articulate a model that more accurately measures costs in the generation of surplus value for the corporation, and articulates a vision of corporate governance that begins to redress some of the current inequitable distributional trends in corporate law. Part V examines accountability by corporate decision makers with a look at boardroom demographics, cross-cultural implications of corporate decision making and a brief discussion of the treatment of gender in other corporate governance regimes.

II. GENDER AND THE CONTINUED LEGACY OF THE SHAREHOLDER WEALTH MAXIMIZATION NORM

The Anglo-American discourse in corporate law has been dominated by a shareholder rights paradigm. As a result, women as workers, small creditors, mothers, and small investors are largely ignored. While enhanced shareholder rights are an important aspect of international governance regimes, the narrow focus of the debate fails to fully explore other key issues raised by divergent capital markets and their governance structures. An important step in this exploration is to challenge the apparent neutrality of the shareholder wealth maximization norm of corporate governance and expose its normative content. Once this normative content is evident, the

debate becomes a matter of justifying one's normative choices rather than trying to justify interference in the operations of a "neutral" to "inject" feminist values.

A. Contractarian Theory, Historical Gender Privilege, and Value Neutrality

The dominant Anglo-American corporate law scholarship of the past decade has been a nexus of contractual relations approach to corporate governance. Contractarian theorists generally argue that contracts are the mechanism by which stakeholders, those having both implicit and explicit contracts with the corporation and its managers, exercise control over managers in order to protect their interests, including bargaining risk premiums and other mechanisms to control agency costs.³ This reasoning suggests that corporate directors should be accountable exclusively to shareholders because they are least able to bargain complete contracts to protect their interests, and as the sole residual claimants to the corporation's assets after all debts are satisfied, shareholders have the greatest incentive to monitor corporate decision making. To require corporate officers to account to any other stakeholder would, according to these scholars, result in managerial shirking or opportunism from a lack of accountability.⁴ Workers and other creditors are allegedly able to bargain complete contracts to protect their interests or, it is claimed, public law in the form of employment standards and credit enforcement systems will protect their interests.

The nexus of contractual relations approach has failed to explore the gender implications of this normative view of corporate governance. Capital is largely concentrated in the hands of men as a result of powerful historical, cultural, economic, and political norms regarding the ability of women to hold property, the value of women's labour, their unequal status as married and unpropertied women, and the caregiving role of women within the family (broadly defined) and in society. The contractarian model reinforces pre-existing notions of ownership and thus the imbalance in property relations between men and women. When contractarians express concerns about

the distributional effects of decisions to intervene in governance matters in the interests of multiple stakeholders, rather than “allowing the market to operate freely,” they are opposed to redistributive efforts to correct historical imbalances in wealth and power between men and women. Similarly, the shifting of any control rights to workers or tempering existing fiduciary obligations of directors are resisted as having distributional effects. This does not acknowledge that existing governance systems continue to shift value to property owners and hence primarily to men. A shareholder wealth maximization paradigm thus has distributional consequences that are made invisible using a purely contractarian analysis.

Another operating assumption of contractarians is that corporations are free to externalize numerous costs of decisions that create market efficiencies for the corporation, but may harm employees, communities and public welfare.⁵ Contractarian theory suggests that any harmful effects of corporate decisions should be left to public law or private contracting, that it is not a function of the corporation to take these costs into account in determining shareholder wealth maximization.⁶ Yet when externalized costs harm shareholders and creditors, as seen with Enron and other recent corporate failures, there is swift regulatory response to restore investor confidence in the capital market.⁷ Similar harms from violation of human rights, tort or environmental standards, or norms do not result in the same kinds of immediate public policy responses, although arguably, these also involve serious costs to productive corporate activity. Repositioning of corporate activity in global capital markets is also highly gendered. An example is the rapid and pervasive growth in contingent and secondary labour markets, in which workers, particularly women of colour and immigrant women, are exploited without adequate compensation, basic employment protections or job security.⁸ Contractarian theory suggests that these costs do not need to be accounted for by the firm, yet they provide a direct monetary benefit in that the firm can take advantage of these cost savings in competitive labour markets.

Yet with the move to global capital markets, the concomitant dismantling of social safety nets, imposition of work for welfare programs, and attack on

employment standards and labour relations legislation has left workers, particularly those at the bottom of the wage scale, vulnerable to exploitation by corporate employers.⁹ These trends are highly linked. The failure of public law to address these costs flows directly from the efforts of those who have the resources to lobby and financially support legislators who make the public policy choices on resources and social welfare or labour adjustment programs. The quantum of financial contributions by corporations to major political parties is evidence of this.¹⁰ Moreover, the need of many countries to attract multinational corporations to their jurisdictions means that the host nation is frequently unwilling or unable to enforce public laws for fear of loss of that corporate economic activity.¹¹ Yet there is some question as to whether the home nation has jurisdiction to enforce human rights or other public law violations by its multinationals operating overseas.¹² With downsizing due to market pressure and/or post-merger labour shedding, dislocation costs exist, even where they do not appear on the corporate balance sheet. They are increasingly borne by those disadvantaged by corporate restructuring, not by those who have been the beneficiaries of the wealth generated.

Women disproportionately bear the economic burden of both private law externalities and public law shifts away from national standards. Many women are less mobile because they are single parents and have caregiving obligations. Relocation costs rarely account for the social costs of changing schools, communities, friends, social supports, and the impact on children that women are left to cope with.¹³ Where women are in a two-wage family, the partner frequently earns more, based on longstanding inequitable pay practices, thus making women workers less able to relocate in order to find comparable employment. Immigrant women and women of colour disproportionately occupy the most economically disadvantaged positions in terms of employment conditions.¹⁴ This unequal status permeates across nations and their corporations with diverse capital structures. Externalities have a serious long-term affect on all workers, but in particular, there are harms to women that are not accounted for in the costing of corporate decisions.

Women continue to be the primary caregivers of our children and our rapidly aging population. As a result, women are less likely to have disposable cash because of disruptions to employment, which then carry an income penalty and employment choices, which are made to accommodate their caregiving responsibilities. Women are also justifiably risk averse because as mothers and daughters they bear the brunt of economic support of their families.¹⁵ Opportunity costs and risk assessment are undertaken differently.

None of these costs and considerations are included in the calculus employed by contractarians. Optimal corporate governance is measured by generation of surplus value, measured by externalizing all these costs. The indicia of effective governance then becomes short-term return to shareholders in the form of dividends or share price as the signal of market confidence in the governance of the corporation. The debate regarding optimal governance becomes more immediate with the move to global capital markets. Corporate governance is only one aspect of the larger framework of macroeconomic policies, competition, trade and tax policy, global capital, products and labour markets, and domestic cultural norms and ethics. Enhanced access to capital globally is dependent on the ability to offer corporate governance systems that are clearly articulated and adhered to within regulatory and legal frameworks that support contractual and ownership rights.¹⁶ Thus, with the emergence of global capital markets, the governance debate continues to situate itself as a purely property based regime, with private property viewed as a key means by which resources are used efficiently in our society. Discussion focuses on the need to protect those property rights under vastly differing legal and political regimes, correlating effective governance with shareholder protection, investor confidence, and developed external capital markets.¹⁷ Thus, there is emphasis on regulatory protection that safeguards equity and debt capital.

In this respect, the system is not a “free market” system, but rather, highly regulated to protect property as the underpinning of market activity, such as contract enforcement, debt collection regimes, and protection for equity investors from managerial self-dealing transactions. These considerations

are key to global capital markets and key to the ability of domestic corporations to participate competitively. However, they are not the only considerations. The issues of gender discrimination and harms caused by corporate transactions are not part of the governance debate, other than as an assessment of liability risk from human rights violations or tort claims. Given the recognized public and private law aspects of capital markets and corporate governance, the question is why public policy intervenes to protect property rights, but is not equally interventionist in setting standards of corporate conduct that make decision makers accountable for equality, employment standards, job security, human rights harms, unnecessary torts, and environmental protection. In this respect, feminist corporate law scholarship has an important contribution to make in developing insights about governance in global markets.

B. The Need for a Specific Feminist Voice in the Corporate Governance Discourse

Communitarianism and socio-economics, both alternative approaches to corporate law, have generally suggested that corporations, in generating wealth, should ensure that decision makers are accountable to communities in which the corporation operates, although these two approaches are grounded in different economic analyses of corporate law.¹⁸ Shareholder wealth maximization as an objective is tempered by corporate citizenship and for some scholars, enhanced labour participation in corporate governance to promote socially positive corporate behaviour.¹⁹ While the socio-economic and communitarian models are more likely to take account of women as workers at risk, this needs to be made more explicit.

1. Women as Workers

The needs of working women and men closely converge, especially at the lower end of the economic scale. However, women continue to face additional serious barriers at work including: wage and benefit inequality, lack of access to jobs, sexual and racial harassment, and pressure to sacrifice their caregiving responsibilities in order to advance in the corporation. Access to

pension plans depends on women's participation in the workforce in sectors that provide pension plans, and thus women are doubly disadvantaged by lack of pension income and by tax policies that subsidize such plans.²⁰ While unionization has frequently worked to reduce these disparities, the majority of working women in Canada and the United States are not unionized. Moreover, in numerous transition and developed economies, unions (if they are permitted) continue to be male-dominated and are not yet advocates on behalf of women's workplace and domestic equality. In some cases, unions have long recognized the link between workplace oppression and other forms of oppression against women, which is why in Canada, large segments of the labour movement have aggressively supported issues such as freedom of choice, universally accessible childcare, and employment and pay equity.²¹ However, these are far from universal norms.

2. Women as Investors

Moreover, even within the operating shareholder wealth maximization paradigm, while there has been growth in the activities of women as equity investors, notions of shareholder wealth maximization recognize and accord decision making power to particular classes of shareholders, and thus have a disproportionate effect on women as small investors. While contractarian theory recognizes the inability of small investors to bargain complete contracts, it fails to articulate who small investors are and where they are situated within the corporate hierarchy. Women earn less than similarly situated men and thus have far less disposable cash to undertake equity investment. This wage disparity also impacts their ability to purchase the Employee Stock Ownership Plans (ESOP) that have become so prevalent in the United States, or their ability to have secure pension investments.²² As less senior employees in many fields, they are vulnerable to "last hired, first laid-off" policies and thus are less likely to have capital available to make equity investments and diversify their risks. Moreover, there is a legitimate question as to whether the solution of the shareholder model is to encourage women to invest more of their scarce resources as equity

investors, particularly when these investors appear to be increasingly disenfranchised in the governance debate and more at risk from corporate misconduct than ever before.²³

Shareholder wealth maximization as the exclusive goal of corporate governance is inadequate in its analysis of corporate activity. While shareholders supply equity capital, there are other important investor groups, those who contribute debt capital and workers who contribute human capital. These investors are also frequently residual claimants, particularly at the point that a firm experiences financial distress and there is little or no equity remaining in the corporation. At this point, workers and creditors are the only residual claimants to the value of the firm's assets, yet the nature of this investment is inadequately accounted for in corporate decision making, even though it is frequently decisions made long before the financial distress that have prejudiced these interests. Whereas senior creditors can bargain more complete contracts to factor in the risk of firm failure or managerial misconduct, this is not the case with unsecured creditors and workers.²⁴ Thus many of the same reasons driving shareholder primacy, such as incomplete contracts and residual claims, should also drive recognition of these investors' interests in corporate governance.

Yet the goal of shareholder wealth maximization continues to permeate the collective consciousness of scholars and corporate decision makers. Obligations under corporate law statutes for directors and officers to act in the "best interests of the corporation," continue to be defined as best interests of shareholders, even though that is not the language of the statute. In the wake of corporate scandals such as Enron and WorldCom, the focus of securities regulators and legislators is on the failure in accountability to equity investors and debates about whether these are regulatory failures or merely a need to engage in more regulatory gatekeeping within the existing paradigm.²⁵ These are aimed at the narrow question of shareholder protection, which, while extremely important in a market-based economy, is certainly not the only harm identified with these failures.

C. Feminist Corporate Law Scholarship—Making Gender Visible

Recently, feminist corporate law scholars have drawn attention to the dominant theoretical approaches on the basis that they reflect a very male-centered view of corporate law.²⁶ These scholars are contributing feminist values to their analysis of corporate governance, resulting in a more textured and comprehensive approach to governance reform. Scholars such as Lynne Dallas, Marleen O'Connor, Kellye Testy, and Cheryl Wade are at the forefront of socio-economic and similar approaches to corporate law, providing a systematic and thoughtful analysis of governance failures, corporate board strategies, worker empowerment in corporate decision making, and elimination of racial discrimination through corporate social responsibility.²⁷ Theresa Gabaldon observes that while there are diverse definitions and theoretical approaches within feminism, feminist insights frequently converge in their objective of seeking to expose and eliminate women's inequality.²⁸ Feminist legal theory is a complex legal scholarship, grounded not only in race and class differences, but also in different norms regarding economic systems. This becomes particularly evident in corporate law, where scholarship ranges from working within the existing paradigm to much more fundamental reconceptualization of the corporation as the principle mechanism to generate wealth. While these are legitimate debates, their resolution is a far more ambitious project beyond the scope of this article. Yet, feminist legal scholarship shares, in Ronnie Cohen's words, a common understanding that law as oppression is insidious, because once a particular view of social ordering is incorporated into law, it is perceived as neutral, when in reality it represents normative choices regarding women's social and economic status.²⁹ Ramona Paetzold notes that feminist theory is aimed at exposing the language of business law that appears objective but which embodies and makes invisible the oppression of women.³⁰ The gender impact of current market-based theory is what needs to be made visible and remedied, and this project can benefit from feminist insights across a range of class, race, political and theoretical perspectives.

Kellye Testy has analysed the various approaches to greater social accountability of corporations. Using, as a starting point, Audre Lorde's concern that "the master's tools will never dismantle the master's house," she observes that the progressive law movement risks being domesticated and thus may fail to mount a significant challenge to the *status quo* of corporate activity.³¹ Moreover, there is a risk of commodification of corporate social responsibility in pursuit of shareholder wealth, with these commodity preferences easily retracted if consumer preferences change.³² Testy suggests that corporate power is neither inherently oppressive or one-sided, and that one should be willing to both work with the "master's tools" and to design new ones. Her conception of corporate law includes an objective of wealth dispersion, a reduction in subordination and discrimination based on gender, race and ability, environmental justice, and enhanced social democracy. Cheryl Wade's scholarship promotes a socially responsible corporate governance model through the combined efforts of shareholders, consumers, and community in holding directors and officers accountable for socially irresponsible decision making.³³ The persistence of racial workplace discrimination is the result of boards' unwillingness to acknowledge the existence of racism and shareholders' over-reliance on corporate boards to monitor managerial conduct in this respect.³⁴ She calls for social wealth maximization as an objective shareholder and consumer pressure to ensure public laws, such as labour standards, human rights, and consumer protection are complied with and judicial reconceptualization of the business judgment rule where the underlying policy reasons for particular corporate actions include systemic racism.

Ronnie Cohen has also suggested that corporate law would benefit from inclusion of feminist values in the area of corporate social responsibility, labour relations, and consumer, occupational, and environmental safety. In this, collective behaviour would replace investor passivity, and corporations could be structured to permit or mandate evaluation by investors based on responsibility in addition to profitability.³⁵ Cohen's approach would convert the corporate environment from one that is adversarial, self-interested, and

hierarchical into one that is co-operative and relationship building.³⁶ Cohen observes that while corporate law provides a check on corporate behaviour, its failure to recognize the social component of the corporation's role in society can be remedied by requiring those responsible for corporate misconduct to be personally involved in redressing the consequences of that conduct.³⁷ Others have suggested that corporate officers and perhaps even shareholders that engage in the risk/benefit assessments of corporate decisions should be held accountable for those decisions.³⁸ Thus, they should be required to be personally involved in remedying the harms caused by their tortious and other decisions, on the basis that monetary damages alone may not make corporate decision makers responsible for the full impact of the harm.³⁹ This scholarship is helpful in opening up a conception of the corporation and its governance mechanisms that more fully reflects complex corporate realities.

Feminist corporate law scholarship seeks to eliminate gender and racially-based discrimination and to make visible the interests and contributions in the firm that have not been previously recognized, including values of collaboration and care giving. It seeks to make these interests, costs, and power relations visible in order to both recognize and redress the disadvantage engendered by failure to value them. Feminist critiques face the same resistance that communitarian or corporate responsibility scholarship has faced, that claims for a revised conception of the corporation ignore "efficiency" requirements, and that employment equality and similar issues are a matter of public, as opposed to private law. Underlying the shareholder wealth maximization norm is an articulated definition of "efficiency" that continues to justify corporate decisions that advance the interests of equity capital owners to the exclusion of other investors in the firm.

III. CORPORATIONS AND GENDERED NOTIONS OF EFFICIENCY

"Efficiency" has become a principal objective of corporate activity and has been defined as raising capital in the least cost manner and deploying that capital to generate surplus value to the corporation, with a view to

maximizing shareholder wealth. “Efficiency” is cast as a neutral objective, a cost-benefit analysis that creates profits that eventually accrue to shareholders in the form of increased share price or shareholder dividends after all the costs of credit, labour and other production inputs, research, and expansion are accounted for. “Efficiency” is thus measured by return on equity investment, frequently, a short-term return on investment.

A. Efficiency is Normatively Defined

It is rarely acknowledged that currently “efficiency” is very normatively defined. As noted above, many costs are externalized and thus are not measured in the calculation of surplus value. As shareholder wealth maximization is the primary goal, efficiency is then measured against this benchmark. The failure to cost externalities creates a windfall gain for equity investors who become the beneficiaries of breaches of implicit deferred compensation contracts. This “efficiency,” normatively defined, continues to shift wealth to those already propertied and supports the shareholder wealth maximization paradigm.

Efficiency is thus not a neutral term; the values underpinning it are chosen and can thus be differently selected. I have suggested that the normative definition of efficiency needs to be recast away from the notion of shareholder wealth maximization to one of maximizing return to all those with investments at risk in the corporation.⁴⁰ This recasting requires accounting for all costs of corporate activity, including recognizing the full nature of workers’ investments, beyond the wage-labour bargain, by recognizing contributions to production synergies, customer and client loyalty, deferred compensation, and forgone decisions regarding family. This approach further recognizes costs that are currently externalized such as labour adjustment and the social costs of labour shedding. I have proposed principles for a formula for valuing such inputs that would give rise to claims on the corporation’s assets.⁴¹ In respect of workers, this formula would cost variables such as deferred wages, years of service, expected working life, expected future increase in wages and benefits, gross earnings that would

accrue to the corporation if it meets a promise of expected employment and earnings, discounted by factors such as probability of obtaining comparable employment elsewhere, immediate value of claims now and not deferred to a future date and other similar factors.⁴²

When these costs and claims on the value of the corporation's assets are accounted for, efficiency is necessarily recast in the way in which it is measured because surplus value or profits are measured more accurately and take account of costs currently externalized. Labour shedding would now be based on decisions that have an internalized economic cost attached, instead of such costs being externalized and thus counted as a benefit accruing to equity investors. In turn, this would create *ex ante* incentives to reduce these costs by considering whether there are more effective ways of using human capital contributions in corporate activity than labour shedding.

Similarly, one could create a value that recognizes gender within corporate economic activity. One can measure non-discriminatory employment practices not only in the savings from civil law suits in the United States or damage awards from government prosecution of human rights violations in Canada, but also in the quantifying of the value to human dignity for women workers and workers of colour. This approach can measure the costs of harm from discrimination, equitable pay practices, the social costs to children when women suffer the social and economic effects of discrimination, and the costs of child and elder care so that women can contribute their labour. As with human capital contributions generally, these costs can be measured and utilized in a new normative definition and calculation of efficiency. Until they are measured and valued, the efficiency debate will always result in maximizing equity capital to the exclusion of other costs and considerations. The link between capital markets and corporate governance, while important, does not reflect interests that are not defined as traditional property rights.

One can also measure efficiency and surplus value as including the generation of long-term value in environmentally sound corporate activity. This inclusion is an issue for feminists, not only as citizens and participants in economic activity, but as caregivers, because women will ultimately

bear the economic and social brunt of long-term health effects from environmental harms. This burden is evident not only from the massive tort claims of the past decade, such as the Dalkon Shield and the breast implant class actions, which overwhelmingly have involved harms to women, but other serious environmental harms as well such as asbestos poisoning, which has increased women's responsibilities in caring for terminally ill asbestosis victims.⁴³ Calculation of surplus value that more appropriately attributes the costs of environmental harm or prevention would require costing a number of factors including: the cost of compliance with environmental protection laws; the costs in taxes for strong enforcement mechanisms; the liability risk from direct environmental harms and a calculation of proportional responsibility of the corporation for harm from the long-term depletion of the environment; the costs and benefits of maintaining safe workplaces; the benefits that may accrue to the quality of air, land, or water in the communities that surround a corporation's production facility if the corporation engages in sound environmental management practices; and the benefits that may accrue to the community in terms of enhanced health outcomes resulting from a shift away from environmentally harmful corporate activities. While many of these costs are part of the public law calculus, they are frequently not part of the corporation's costing in terms of efficiency.

B. Reconstructing Costs, Benefits, and Investments in the Corporation

The language of "free market" is accompanied by calls for state regulatory control to protect private property and control transaction costs in corporate activity across national borders.⁴⁴ The same rationale is not, however, applied to regulation of corporate activity to take account of the contributions of women, workers, and communities to the economic life of the corporation. Investments in the firm beyond equity and debt capital are not considered property or valued as non-property inputs, notwithstanding the fact that these investments enhance firm value through innovation, loyalty, organizational skills, and the synergistic value generated when workers work collaboratively. Feminist legal scholars have challenged this omission.⁴⁵

Barbara Ann White has suggested that feminist legal analysis can assist with the cost/benefit analysis used by law and economics scholars by defining social justice within the context of economic efficiency and by examining distributions of economic rights.⁴⁶ White suggests that the evaluation of societal economic well-being should include the distribution of income, where the number of individuals who earn a decent living is maximized.⁴⁷ A key flaw in market theory reasoning is that initial distributions of property and political rights determines the scope of possible economic and political outcomes when one is looking at market allocations of resources, goods, and services.⁴⁸ Cost/benefit analysis is then measured from this starting point.

This critique does not require a complete rejection of the insights that are generated by market theory in trying to determine which corporate governance principles are optimal, rather it builds on these insights. The various theoretical approaches collectively offer a wealth of analytical tools in considering optimal governance principles. Elements of each can be utilized to enhance our notions of effective corporate governance. The nexus of the contractual relationship approach highlights agency costs and *ex ante* bargaining problems for negotiating complete contracts. However, its conclusion that shareholders are the only residual claimants needs revisiting, given that workers also have residual claims based on their human capital investments such as deferred compensation systems and inability to negotiate complete contracts. Equity investment, giving rise to the shareholder primacy norm, needs to be counterbalanced by recognition of debt capital, human capital investments, and local community investments in the infrastructure that supports the corporation's economic activities. For example, local trade suppliers frequently have investments in the firm beyond their fixed capital claims, particularly in smaller communities. The communities themselves may have made investments such as forgone municipal taxes, zoning by-law changes, or waivers of environmental remediation orders. These investments are of a longer term and residual nature. In addition, these investors, unlike senior secured creditors, can rarely bargain full contracts. Their claims to an interest in the corporation's decision making would give

rise to a notion of enterprise wealth maximization, as opposed to shareholder wealth maximization, as the more appropriate benchmark for corporate decision making. It should also give rise to more equitable distribution of corporate rents, as these interests would be entitled to a return on their input into corporate activities.

Communitarian and socio-economic scholarship adds the notion of social responsibility or corporate citizenship and makes the integral link between the public policy and private law aspects of corporate governance. However, public policy and private law frequently fail to explain why private corporate actors are better situated to make decisions that affect the interests of both the public and those with a direct interest in the corporation's activities. Some distinction is required to discern how private law mechanisms can be developed to more fully cost inputs and liability for corporate activity, and public law must be enhanced to better protect economically and socially disadvantaged groups and remedy ongoing inequitable distributions of property. Corporate social responsibility should not displace the role of public law in setting and enforcing equitable standards in employment, human rights, health and safety, tax, consumer protection and other laws designed to set minimum standards of protection and create a measure of corporate liability to ensure these standards are met. While the corporation is integrally linked to the social and economic life of the communities in which it operates, it should not, under the guise of corporate social responsibility, unilaterally set the normative standards of that responsibility. To solely entrust corporations with such responsibility creates the risk, as Testy has suggested, of failing to mount a significant challenge to the current corporate law paradigm.⁴⁹

The design of a feminist law and economics approach to corporate law and efficiency is intuitively appealing. It takes the best of all these ideas and conceptualizes a firm with gender and racial equality based on a costing that reflects value that does accrue to corporations. Such a model is unlikely to be implemented in my lifetime, if ever. As noted earlier, the current shareholder wealth maximization paradigm is a function of longstanding property relations. Those who are propertied, overwhelmingly men, are not going to

divest their holdings in support of a reconceptualization of the corporation. Power and property are never forfeited willingly, and feminist conceptions of the corporation challenge precisely those underpinnings. The “revolution” or “evolution” in corporate law is not around the corner, the block, or even the next country. If anything, as capital moves outward, global convergence pressure has meant that the most gendered effects of the current Anglo-American regime are being adopted in other countries. So why consider this topic at all? Feminism frequently includes optimism, often pragmatism, and definitely an inherent ability to adjust to social reality. Thus, while the picture may be *noir*, there is a normative conception of the corporation that is attainable in the interim which could ameliorate some of the inequities discussed above, if costs are fully accounted for, and if power in corporate decision making shifts to multiple parties implicated in the firm.

IV. SHIFTING THE PARADIGM TO TAKE ACCOUNT OF GENDER IN THE BOARDROOM, THE WORKPLACE, AND OUR COLLECTIVE CONSCIOUSNESS

One can begin to develop a notion of corporate governance that takes account of the continuum of interests implicated in the firm. These investments can be costed in such a way that firms would undertake decision making that maximizes firm wealth, if costs were fully accounted for as suggested above. Corporate decision making should value the interests of a broad number of individuals making investments in the firm, not merely those of equity capital investors. “Investors” or “stakeholders” can be broadly defined as those with an interest in the corporation, including creditors, employees, suppliers, consumers, and local communities. There continues to be inadequate analysis of governance structures that would best enhance these firm specific investments.⁵⁰ The Anglo-American paradigm has been that employees do not have investments in the corporation greater than the wage/effort bargain, and thus corporate decision makers should not be accountable to them. Performance incentives for employees are applauded with no concomitant rights attaching to their human capital investments.

While participatory mechanisms such as worker councils, ESOPs, and other equity investment initiatives are gaining recognition, these programs present some risk of further expropriation of workers' investments, unless a governance role accompanies these changes. Only more recently has there been a suggestion that the nature of human capital investment may be specialized, beyond fixed capital claims, such that their interests need to be accounted for in governance of the corporation.⁵¹

A. Law, Economics, and Feminism in the Boardroom

Absent clear duties imposed on corporate officers and effective enforceable remedies for those who have investments in the firm, an enterprise wealth maximization model will not shift the paradigm. Canada does not have any stakeholder statutes similar to those enacted in more than 25 U.S. states. However, the U.S. experience indicates that these statutes were a response to the active takeover market of the 1980s, not a recognition of diverse investments. Under all these statutes except one, the consideration by corporate officers of stakeholder interest is discretionary and there are no enforceable remedies under any of the statutes.⁵² The enterprise wealth maximization model suggested here would create enforceable remedies for investors, broadly defined. This model would include enforcement of duties to comply with public laws, undertaking a full accounting of costs and benefits of particular corporate actions, and broader representation of investor interest at multiple levels of the corporate decision making structure. Corporate officers should have a fiduciary obligation to undertake decision making in the best interests of the corporation, mainly those with interests and investments in the corporation.⁵³ The statutory framework for "best interests of the corporation" already exists; however, it needs to be normatively redefined to enterprise wealth maximization as opposed to shareholder wealth maximization. This model must include women in their multiple lives as workers, mothers, equity investors, and community members.

Interestingly, the norms debate, which has occupied the recent attention of law and economics scholars, seeks to explain particular corporate conduct

that does not easily fit into the pure market-driven conception of the corporation. It suggests that corporate officers engage in stewardship of the corporation influenced by norms that bridge the gap between corporate law, efficiency enhancing activity, and duties of care and loyalty.⁵⁴ Norms have been variously described as rules emanating from social forces, non-legally enforceable standards, and behavioural patterns or systems of co-operation driven by a common understanding rather than externally imposed laws.⁵⁵ Norms can be independent of or reinforce laws, they can be internally or externally enforced through market or other economic, reputational, or social sanctioning. And, depending on one's perspective, they enhance or detract from efficiency.⁵⁶ The debate takes the form of whether or not norms enhance corporate governance, such that the public regulatory framework need not intervene in creating standards of corporate conduct.⁵⁷ The norms debate also unpacks what activities or decisions are attributable to influences within the firm, as opposed to those largely attributable to market pressure, in discerning the most efficient combination of corporate decision making.

However, even with the explosion of literature on the influence of norms, the treatment of gender within the governance structure is negligible. In part, this is likely the result of the majority of corporate directors and corporate law scholars being male, and thus the gender implications are frequently not on their radar screens. It is also a result of the invisibility of women's contributions to the development of norms in the corporation's activities. These attitudes are learned behaviour in the home, school, and workplace. For example, today's corporate officers, business lawyers, and legal scholars are a product of a legal education system that emphasized competition, not collaboration;⁵⁸ emphasized maximizing shareholder wealth, not the recognition of diverse interests in the firm; and emphasized doctrinal learning, not expansion of existing approaches to corporate law.

What is required is a reconceptualization of the corporation, textured by feminism and law and economics. This is not a complete contradiction in terms. Law and economics offers a theorized account of how and why corporate decision makers act in addition to the economic incentives that

influence those actions. Further, it offers insights into where regulatory control must be added in order to create the appropriate incentives. For example, current regulation is aimed at enhancing transparency and reducing self-dealing transactions, although as noted above, there are some recent spectacular failures in this respect. Regulation should also create greater incentives to ensure that corporate decision making reduces and eventually eliminates gender and racial discrimination. That can only be accomplished by assigning some personal responsibility to the corporate decision makers for acts that are harmful and/or discriminatory. It requires codification of obligations in respect of how costs are to be accounted for in corporate economic activity. It could also be accomplished by placing limits on the amount of political influence corporations should have in policy making, or alternatively, requiring corporations to fund public and community based lobbying efforts consistent with their own lobbying efforts.⁵⁹

It should be kept in mind that factors such as the legal and regulatory regime, and its enforcement, also influence the ability of capital markets to act as an effective tool for channelling investments efficiently. There is counter-pressure to global convergence of norms because of the strong historical framework that operates to determine corporate governance practice.⁶⁰ The exhaustive literature on path dependency and market convergence has been helpful in understanding pressures against convergence by suggesting that governance models reflect the historical, legal, and political frameworks in which they operate.⁶¹ The same observation can be made about gendered views of the corporation and barriers to fundamental change. There may be a good business case to be made for long-term enterprise wealth maximization by according some governance role to employees and other residual claimants and to restructuring decision making to reflect feminist values and approaches, but it is unlikely to occur without intervention in the market. This market intervention is necessary because the transaction costs of accomplishing this restructuring may be viewed as too high, and the benefits of a redistributive nature (towards women, other workers, communities) too

great a challenge to existing property norms to be acceptable to major equity capital investors and their agents.

However, path dependence scholarship has for the most part failed to explore how the normative and regulatory frameworks in which corporate governance practice is determined have an inequitable impact on men and women. Social, political, and cultural attitudes towards women inform views regarding wage inequality, unequal access to jobs, training, and decision making roles within the corporate hierarchy. In Anglo-American systems, these tensions are measured against a benchmark of efficiency in maximizing shareholder value, and are therefore aimed at maintaining inequity. Strong historical conceptions of women operate to situate them at the low end of corporate hierarchies and to undervalue and make invisible their contributions. Women's work, including office work, cleaning, caregiving, nurturing, and service work is systematically undervalued or discounted. Moreover, much of the value generated for corporations from goodwill, administrative efficiencies, and effective time management skills are attributed to the managers for whom women are frequently the support workers. The first litigation in Canada under pay equity legislation made clear that the Anglo-American system of compensation generally attributes such work efficiencies to the supervisor, rather than the support staff member who organises that manager's time and activities.⁶²

B. Women's Contribution to Economic and Social Wealth

Women generally contribute to collaboration and productive workplace relationships, bring dispute resolution skills, and the ability to build firm loyalty. These skills, acquired in the home and community, are frequently applied in the workplace, creating value for the corporation. Women also have organizational and multi-tasking skills that are a function of the role they play in families. The image of women up early, laundry done, bills paid, lunches being made, breakfast prepared, organizing the family for school, work, sports and childcare, dealing with the school bus, permission slips, lost homework or lost socks, getting herself to work by 8 or 9 a.m., working

a full shift and continuing with a second family shift after paid work, continues to be a familiar image to most women today. These same skills are utilized but not necessarily recognized in the corporation. They are rarely explicitly accounted for in valuing women's labour, as is evident in the hard fight for pay equity, comparable worth, and employment equity struggles of the past two decades.

Moreover, there is an intricate link between public regulation and where women are situated in the corporation. While access to education has substantially improved in North America, young women continue to be streamed into particular fields of work in support, service, and caregiving. There continues to be resistance to the presence of women in decision making roles. This channelling supports corporate activities because women provide the underlying support structure, both in the workplace and the home, in terms of child and elderly care, office support services, health care, and teaching, thus allowing their male co-workers or domestic partners to fully participate in the governance of the corporation. These are costs that are rarely accounted for in the firm. Even public programs perpetuate gender bias. For example, social assistance agencies continue to stream women on welfare into service and "hairdressing" jobs and training, while men are streamed into skilled trades and technology based training as a condition of continued receipt of welfare payments.⁶³ Thus, there is a dual stream of value not accounted for, the costs borne by women in community and family, and the benefits accruing directly to the corporation through women's work.

The failure of public policy to require more systemic change means that public law reinforces current inequities and, in turn, is complicit in corporate law's failure to examine more comprehensive corporate decision making models. Unemployment insurance and other social safety net cutbacks, combined with inadequate childcare services, simultaneously prevent women from seeking employment and from fulfilling nurturing roles. Lack of unionization in sectors dominated by women exacerbates their economic vulnerability. Moreover, the pervasive nature of sexual harassment informs women's choices about work. Women assess opportunity costs in different

ways with family and social responsibilities trumping many considerations of promotion or advancement. The fact that firm and family loyalty are largely viewed as mutually exclusive, as opposed to complementary, creates a gendered view of opportunity costs. Corporate models that reward those who work long hours and socialize after regular working hours can be a direct sanction on workers with families, particularly women who are primary caregivers. Women tend to work highly efficiently and in a timely manner in order to leave work to meet their family obligations such as childcare closing hours and dual priorities and objectives. Women's family obligations continue to be viewed as failure to be committed to the productive life of the corporation. For young women who do not yet have families or have chosen not to, there is normative pressure to engage in the male model of competition, including working excessive hours, tolerating discrimination, and discounting feminist values.

One can anticipate the hue and cry from adoption of a model that recognizes these skills and contributions. As discussed in Parts II and III, contractarian theory suggests that any harmful effects of corporate decisions should be left to public law or private bargaining. It suggests that the current dismantling of social safety nets are not a matter for corporate law, and that shareholders are the sole residual claimants to the corporate assets and thus governance should be aimed exclusively in their interests. Yet, as discussed above, private bargaining continues to distort distribution of property and public law reform which, in itself, is inadequate to address the complexities of economic activity in a global economy. Claims that accounting for all costs would leave corporate managers unaccountable fail to acknowledge that investors generally, including smaller shareholders, currently face this problem. In general, the system needs to be more responsive to those with investments (broadly defined) in the corporation.

C. Our Collective Consciousness

Our normative and gendered conception of the corporation hinders our collective and individual ability to recognize the signs of ineffective gover-

nance. While recent scandals have illustrated the potential for harms to investors and creditors, it has not resulted in more fundamental rethinking about corporate activity as a potential site for the elimination of discrimination or distribution of wealth on a more equitable basis.

Corporations are not bearing all costs of society, nor would they under a wealth enterprise maximization model. What is suggested here is attributing costs that are a direct benefit to the firm or have a “nexus with the economic activity” of the corporation.⁶⁴ A comparable example is environmental law, where corporations can be found proportionately liable under Canadian law for environmental remediation based on a prior contribution to harm from particular use of land for its economic activities.⁶⁵ While all environmental costs are not internalized in the firm, particularly the costs to long-term sustainability, the current regime does take greater account of environmental costs within the firm than the costs of gender and race harms and the benefits of women’s contribution to generation of surplus value. If the costs of human rights compliance, labour shedding, and employment standards were internalized within the firm where there is a nexus with the economic activity of the firm, there would be different *ex ante* incentives created in corporate treatment of gender and race issues. If these changes were accompanied by reduced information asymmetries, enforceable remedies, an enhanced governance role for multiple types of investors, and a recasting of corporate objectives to enterprise wealth maximization, one would begin to see a slight shift in the corporate law paradigm.

D. Women’s Participation in Corporate Governance

Women should participate as decision makers at all levels of the corporate structure, in order to bring greater depth to corporate decision making in its analysis of the costs and benefits (social and economic) of corporate decisions. However, mere rights to participate are inadequate on their own. Several elements would have to be present in order for women’s participation in decision making to provide an opportunity for meaningful change. It requires collaborative efforts on the shop or service floor as well as in the

boardroom, and the ability to enforce public policy standards and fiduciary obligations to act in the best interests of the corporation, taking into account all those with investments in the firm.⁶⁶ It will be necessary to reconceptualize the underlying norms in corporate governance decisions in order to legitimize the taking into account and valuing of these other interests, including women's interests.

Clearly all women do not share the same values and goals, and their interests are separated by class and race. However, the almost complete absence of women's participation at senior levels of corporate decision making means an important set of governance perspectives is lost. Feminist values can enhance corporate governance. Women tend not to compartmentalize their lives, but rather bring innovation, collaboration and relationship building, all of which are valuable contributions to the enterprise. There is some discordance with the existing law and economics norms literature, which discusses the value generated through collaboration and corporate norms, in that it is generally silent on how women make these contributions. Change in many cases may require legislative amendment for which there may not be political or social will, given strong historical reasons for the current governance model.

Change of fiduciary obligations for corporate directors and officers should be accompanied by fundamental structural change in the workplace. This would include reduction of information asymmetries for workers; enshrining a culture of equity and diversity; according workers meaningful participation in the way that work processes are designed and delivered; and collective decision making power regarding restructuring that ensures where possible protection of job security, retraining and placement in new corporate activities. Such participatory work programs that simultaneously accord value and protection to workers' inputs will enhance the position of women, in particular, the working lives of women situated at the lower end of the economic scale. It will also contribute to the generation of wealth. However, workplace models that extract greater value from workers create a

risk of expropriation of this value, absent clear normative choices ensuring that value accrues to all those investing in the corporation's activities.

Even within a collaborative framework of internalized costs and shift of fiduciary obligation, power inequities will continue to inform corporate decision making. While the model would likely temper power imbalances, it is highly unlikely that it would eliminate them, given all of the external actors that influence governance norms, such as banks and other secured lenders, institutional investors, regulators, international trade organizations, and new forms of derivative securities that have insisted on a governance role as part of their investment. Thus, for women and other workers, unions and other labour and equality advocacy groups would continue to have an essential role in terms of advocacy and bargaining to redress imbalances in power.

Interest-based bargaining models also take shareholder primacy as a normative starting point, and these must therefore be recast as bargaining towards a more equitable distribution of wealth and decision making power. At Algoma Steel corporation, for example, while there are union appointed directors on the corporate board, the union continues to view its own role as essentially one of advocacy and representation, while the union nominated directors act in the "best interests of the corporation." Elsewhere I have discussed this corporate model.⁶⁷ Moreover, these private law shifts cannot be accomplished in isolation from public law shifts. Absent protections under law against human rights discrimination, improved labour standards, consumer protection, worker and environmental safety, much of the energy of participants would be directed towards normative struggles as to the content of socially responsible behaviour. These laws must be considered a minimum threshold of redressing the worst inequities, not the ultimate goal. However, the threshold itself needs to be redefined to eliminate some of the most devastating social and economic consequences of gender and racial inequality. Thus an integrated approach is necessary, albeit definitely a daunting agenda. Absent an understanding of how these issues are integrally linked, there will not be a recasting of the corporate law paradigm.

V. ACCOUNTABILITY BY CORPORATE DECISION MAKERS

A. *Boardroom Demographics*

In Canada, a survey found in 2001 that only 9.8% of corporate board seats are held by women.⁶⁸ The United States fares only marginally better, with 12.4% of board seats of Fortune 500 companies held by women.⁶⁹ The rationale used to exclude women from board seats is that directors require CEO experience. Yet the cyclical effect of this rationale is immediately apparent. Without a diversity of views in the corporate boardroom, it is unlikely that women senior officers will be appointed, as there are strong cultural norms of hiring someone that resembles the person doing the hiring. Without this job experience, there will not be access to the boardroom. The Canadian survey also found that corporations may look increasingly at women for board seats post-Enron because of a new awareness of the need for financial literacy skills on boards, an area in which women are occupationally represented. The need for financially literate board members may encourage boards to look for women directors because they are generally more financially literate, occupying accounting and auditing fields, and because they tend to pay more careful attention to financial details. These skills and abilities will enhance corporate governance.

It is important to note that women drawn from the ranks of the auditing and accounting profession are likely to be representative of the same privileged class as current directors. Thus drawing women from auditing and accounting professions will not necessarily create the wider diversity of views in corporate decision making that will enhance governance, as normatively defined above. Marleen O'Connor has written thoughtfully on the perils of "group-think," where homogeneity creates an inability to critically assess the activities of corporate officers.⁷⁰ Inadequate definitions of "independent" directors, group loyalty, and a lack of diversity on corporate boards all contribute to poor quality decision making. O'Connor suggests that even where boards appoint a couple of women, they tend to appoint women who share the same class and views as themselves, failing to create the heter-

ogeneity that would enhance board oversight. Thus new process controls on boards must be implemented.

B. Board Accountability

Outside of the classic weak owners/strong managers paradigm of Anglo-American ownership structures, corporate board theory frequently stops short of addressing key issues such as the factors that would require corporate boards to take into account the existence of gender inequality and other problems. Yet there are precedents in other developed economies where corporate boards are required to act in the best interests of the corporation, taking into account shareholders, employees, and the public good. Germany's co-determination model is just one example. Anglo-American theorists suggest that shareholders are vulnerable to co-determination boards because they are worker-dominated and create managerial opportunism in bypassing the board. However, what has not really been explored is the fact that the powerful alliance of blockholders and managers in Germany pre-dates statutorily imposed co-determination and that worker participation on boards was a response to this alliance. The fact that there has not been a shift in the power balance does not necessarily mean that the model could not effectively respond to concerns regarding effective board oversight, perhaps in combination with the development of a fiduciary responsibility of directors and officers to act in the best interests of the corporation in regard to the interests of shareholders, workers, and other investors.

Other models now being developed include notions of the director as a neutral referee and directors as trustees of diverse beneficiaries with an investment in the corporation.⁷¹ Lynne Dallas has proposed a relational corporate board model in which value is added to the corporation by extending board memberships, thereby improving access to advice and information, monitoring and direction, and providing legitimacy through representation by community.⁷² Dallas points to empirical data that suggests that the board is an effective means of acquiring resources, reducing environmental uncertainty, and ensuring that decision making takes account of the context in which

the corporation operates. She favours a board relationship that is not dependent on efficient markets, equity ownership, or equal bargaining strength among stakeholders. This theory of relational boards recognizes that there are skills and resources that stakeholders can contribute and diverse decision making approaches that could enhance corporate decision making through representation by gender, by race, and by class of interest.⁷³

Importing feminist norms into cost/benefit analyses engaged in by the corporate board could work to recast how corporate decisions are costed, including costs to workers, to communities and to the environment. Such board reform, in conjunction with shareholder activism, could encourage investors to move their capital to these corporations, ultimately sending a signal to the market regarding how corporations should engage in cost/benefit analysis, and how they should value diverse inputs. Relating back to the earlier discussion of how costs are measured, corporate decision makers should ensure not only compliance with the law, but with the spirit of laws aimed at elimination of gender and racial discrimination. Cheryl Wade has observed that the lack of board oversight of human rights compliance has led to enormous costs to investors from loss of civil anti-discrimination suits, citing Texaco and Coca-Cola as examples.⁷⁴ She suggests that racially toxic corporate activity is economically costly in terms of harm to employees, loss of goodwill, cost of fighting civil suits and in monetary losses to the corporate balance sheet. If the board is responsible for complying with public law, there may be enhanced socially responsible corporate behaviour.

A recent Canadian survey found that 72% of those surveyed wanted corporate executives to take social responsibility issues into account in corporate decision making.⁷⁵ This is particularly interesting because, unlike the United States or the European Union, the issue of corporate responsibility has not been visible as a topic of public discourse or as a topic of corporate legal scholarship in Canada. While the survey results are encouraging in terms of a growing awareness of the influence of corporate decision makers on social and economic activity, it is unclear how this can translate into effective investor preference expression. A couple of short-term challenges

are how to place the issue of women's equality on the agenda of investor preferences and how to import notions of collectivism into the corporate paradigm, so that capital will flow to corporations committed to decision making that properly assesses all interests and not merely short-term return on capital. Current investor education is aimed at the prevention of fraud and enhancement of investing skills, with little or no attention to skills that would allow investors to invest based on their own social, economic, and political preferences.⁷⁶

Lynne Dallas has observed that "exit," as a signal of market confidence in corporate activities, can send uncertain messages through imperfect markets to managers, particularly in regard to issues of social responsibility or environmental harms resulting from corporate actions.⁷⁷ She suggests that shareholder voting could provide shareholders with an opportunity for wider expression of preferences, ultimately enhancing the accountability of managers. In this context, voting on social responsibility issues is preferable to exit and may provide a more effective means of communicating investor preferences to corporate directors and officers. Dallas suggests that one could develop a system of voting rights based on the concept of constituency. She observes that where voice instead of exit is effectively used, the power imbalances between investors and managers would shift. Building on that notion, "constituency" would need to include voice by women and voice by others affected by the decisions of the corporate board. Otherwise, the distributional consequences that occur now would become more aggravated.

C. Gender in Other Corporate Governance Regimes

As capital moves outward, one question is whether there is another governance model in which gender has been adequately addressed. Other governance models include those promoted by international organizations and stakeholder oriented models such as those found in Japan and Germany. The optimal principles for corporate governance currently being promoted by the Organisation for Economic Cooperation and Development (OECD),

the World Bank, and other international organizations fail to deal with gender issues in relation to the corporation.⁷⁸ For example, transparency, a key governance requirement, refers to transparency in capital structure, accountability mechanisms, and prohibitions on insider trading and self-dealing transactions. Transparency requirements allow shareholders to monitor the use of their equity capital. With the growing diversity of capital structures, there are new risks which mean that transparency as an objective needs further conceptual development. In jurisdictions where there has been a culture of disclosure, as in the United States, there have been recent, very notable failures in transparency. However, transparency could also address human rights and environmental concerns, and the positioning and treatment of women within the corporation.⁷⁹ While this is important, absent the power to act on these disclosures, either internally, through exercise of corporate power, or externally through effective use of exit or voice, transparency is a laudable but inadequate measure in itself.

Disclosure is only one component of governance. It is aimed exclusively at protection of equity owners; it assumes that equity owners receive information on a timely and accurate basis allowing them to act on their preferences. Disclosure favours the current inequitable and gendered distribution of property, and it may exacerbate women's current vulnerability as equity investors themselves, as they are less likely to be able to withstand rapidly fluctuating market prices. Moreover, transparency as the key tool for corporate social responsibility assumes that with meaningful disclosure, shareholders would act on preferences that were more socially responsible, rather than short-term value maximization.

Even those systems considered primarily stakeholder driven suffer from a gendered view of the corporation. One example is Japan's corporate governance system, characterized by a system of cross-holdings, with *Keiretsus*, corporate groups, and powerful social and cultural relationships as a mechanism to foster corporate community.⁸⁰ The structure of ownership and debt historically resulted in little dependence on capital markets. While this led to underdevelopment of securities markets and minority shareholder protec-

tion, the bank-centered model also tempered the pure shareholder wealth maximization model, giving rise to corporate governance norms that emphasize protection of employee and creditor interests, considered at least as important as shareholder interests.⁸¹ The bank-centered model included a normative conception of long-time employment and incentives to invest in industry and firm specific human capital, in turn generating high loyalty and buy-in to the objectives of enhancing productivity and both employee and shareholder wealth maximization.⁸²

However, this has been a highly gendered view of the recognition of employees' contributions to the firm. Japanese laws do not adequately protect working women from discrimination.⁸³ Women are not given access to many jobs that provide long-term employment assurances, because there continues to be deeply imbedded norms dictating that women must make a choice between career and marriage/child bearing.⁸⁴ Sexual harassment, discrimination in wages, and hiring based on age and physical appearance continue to inform corporate hiring practices.⁸⁵ Recent laws addressing sexual harassment and equal opportunity in the workplace may begin to remedy these problems, but they inadequately address preventive strategies, broad equitable remedies and more systemic change.⁸⁶ If the Anglo-American experience in anti-discrimination laws is an indication, the existence of new laws will not fully address deeply imbedded cultural views of women as sexual objects and/or mothers.⁸⁷ Women in Japanese corporations face many of the same barriers and power relations as women encounter in Anglo-American corporate structures.

Interestingly, the value structure of Japanese corporations that has some intuitive appeal, such as its communitarian goals, collective process, and the non-adversarial resolution of disputes through social relations and collective process, arguably align with feminist notions of collaboration. These structures require enormous time commitments outside of working hours. Thus these structures often conflict with women's caregiving obligations frequently forcing women in Japan to choose between time commitments to the corpo-

ration and mothering.⁸⁸ Women are not yet viewed as valuable participants in decision making, and continue to face enormous barriers to accessing board positions and thus to influencing corporate governance. While these changes are slowly being addressed, they highlight the fact that non-aggressive and more co-operative models do not necessarily include women's voices.

Other jurisdictions may have generated corporate models that are more inclusive of women's interests and investments in the firm; however, there is a serious lack of empirical data in this respect. In countries with co-determination models of corporate governance, such as Germany, human capital contributions are recognized and valued. German works councils, situated at the production level, have the stated objectives of working collectively for the good of both the enterprise and the employees, imposing a model of collaboration and resolution of differences.⁸⁹ The gender implications of this and similar models, however, need further consideration.

D. Cross-Cultural Accountability

The notion of "equitable treatment" of shareholders or other interests differs normatively in different corporate cultures and thus there is a need for development of a cross-cultural theory to inform corporate governance norms.⁹⁰ Anthropological definitions of culture include factors such as social inequality, the relationship of the individual to the group, the social implications of gender, and dealing with uncertainty or risk capacity.⁹¹ Much further cross-cultural collaborative research is needed to fully understand these influences. Steven Ramirez has suggested that duty of loyalty principles should be extended to require corporate officers to recognize and value racial and other types of diversity, because powerful business arguments for diversity have frequently been ignored by corporate decision makers.⁹² This is still the case, notwithstanding the move to global capital markets requiring U.S. corporations to increasingly deal with multi-cultural and multi-racial constituencies of capital investors, workers, and consumers.⁹³ As with women, the voices of racial minorities are not represented on corporate boards and the value of their contributions are not visible or properly accounted for.

Women of colour are doubly disadvantaged in terms of how the corporation fails to value their contributions to productive activity.

Diversity can enhance corporate governance by: generating new ideas and new approaches to decision making and corporate activity; engaging in more rigorous monitoring and elimination of all forms of discrimination; implementing effective complaint resolution mechanisms for discrimination; and assessing managerial performance through the lens of diversity.⁹⁴ Moreover, the representation of women on corporate boards and at all levels of the corporate hierarchy could work to eliminate insidious forms of sexual harassment that appear to be pervasive in most corporate law regimes. As Caroline Forell has observed, men view sex in the work place as less injurious than women do and as a consequence, reasonable standards imposed by managers are those of the “reasonable man.”⁹⁵ By changing the decision makers and importing feminist approaches to the elimination of harassment, the corporation could prevent the harms caused by sexual and racial harassment. Elimination of these harms would not only enhance the quality of women’s working lives, but also ultimately enhance enterprise value through lower employee turnover and prevention of costly liability for failure to maintain a harassment free environment. This is one example of how changing the face, literally, of the corporate board, could enhance corporate governance.

Until some of the costs that are currently not accounted for, such as social and economic harms created by corporate restructuring, sexual harassment, gender and racial inequality, and the full costs of tort harms, are allocated to corporations and their decision makers in terms of statutory and/or judicially imposed liability, this shift in the normative paradigm is unlikely to occur. Moreover, implementation of these changes alone will not address the highly gendered way in which corporate decision makers engage in decisions, value the contributions of women, and assess costs and benefits to particular constituencies implicated in the corporation.

Claire Moore Dickerson observes that corporate social responsibility is a norm, not a truth. Due to globalization, all those affected by corporate

action, including the larger community, define the norm and thus it is no longer merely defined by corporate actors or the larger commercial community.⁹⁶ She suggests that corporate norms have thus been codified through an approximation of democracy and that human rights norms have a claim to legitimacy, bolstered by checks on abuse by either the majority or the minority. Using examples where public pressure based on human rights norms has altered corporate conduct of multi-national enterprises, Dickerson analyses “third generation” human rights that are collectivist rights. While unenforceable in the United States, internationally there is greater respect for observance of the international treaty system that supports human rights norms. She suggests that this treaty system, while imperfect, mirrors globally representative democracy and works to contain abuses through its international reach, in turn shaping corporate responsibility norms. Dickerson observes that while the system for identifying and codifying human rights is imperfect, it works toward enhanced participation of stakeholders, and that human rights norms describe how society wishes the allocation of resources.⁹⁷ Global capital markets and multi-national enterprises also provide an opportunity to compare the manner in which gender issues have been dealt with under different corporate law regimes.

VI. CONCLUSION

There are both public law and private law aspects to corporate governance, and recent scholarship has made more explicit a number of the operating assumptions in Anglo-American regulation of securities, corporate activity, and protection of equity capital investors. Within that recognition, the inherent tension between the public and private law aspects is evident. On the one hand, regulatory reforms are sought to facilitate the global movement of capital by ensuring protection of equity interests, particularly foreign capital and minority investors, in terms of recognition and enforcement of property rights. Regulation is also sought in terms of importing international accounting and auditing standards to enhance protection of financial institutions and other investors. On the other hand, deregulation is

sought to “free up” labour markets and to facilitate the movement of capital by investors, to encourage “free trade” and to generally discourage regulation that inhibits investment. Thus, regulation is sought to facilitate the global movement of equity capital while the same considerations are not part of the debate for human capital and non-capital investors, and in particular, women in their multiple roles.

The underlying assumption is that the optimal approach to a globally integrated economy is to maximize efficiency by facilitating the ability of corporations, investors, and lenders to compete in global capital markets and enhance return to equity investors. While there is no doubt that such competition is a prerequisite for continued economic growth, it casts the paradigm too narrowly. This is illustrated by the definition of efficiency discussed above and the operating assumption that efficiency is enhanced by externalizing costs wherever possible. These costs have clear gender biases, disproportionately affecting women in their diverse roles. In turn, these externalities raise the issue as to why those bearing the costs do not have their interests considered in these corporate decisions. Thus, only costs internal to the corporation are measured in determining efficiency, primarily through the measure of return to shareholders.

A model that suggests that capital, if given free movement and protection of property rights will move to the highest use, ignores a number of market and other realities. It completely bypasses the debate regarding why property in this context is a higher valued commodity than human capital or other investments, or why “commodities” themselves should be the driving force in global development. It bypasses any discussion as to whether social welfare maximization, the core objective of classical economics, needs to be recast to look at a more equitable distribution of wealth in order to redress historical inequities. It also bypasses any discussion regarding the maleness of corporate behaviour and the caring, innovative, and collective approaches that women can offer. These are deeply embedded normative notions that have distributional consequences without ever being explicitly acknowledged.

While enterprise wealth maximization may be the appropriate interim model for the corporation, it must be accompanied by a greatly strengthened public law framework in securities law, labour law, human rights protection, consumer protection, environmental law, and a range of other enforceable standards that temper the wealth seeking objectives of the corporation. Given current trends to devolve state activity to private actors and shifts from domestic to global decision making, this is a sizeable project. It will require energy on multiple fronts and more fundamental thinking about our current gendered view of corporate law before any substantive change will occur.

When my daughter's television program was cancelled, the viewing public lost access to an important set of voices in the equality discourse, but it did not lose her energy and skills. Her recent film on breast cancer survivors, her "Abode" project where she is working with authors to raise awareness and funds for homeless people, and yes, even a current film project interviewing feminist corporate legal scholars that will serve as a future teaching tool in corporate law courses, are evidence of the indefatigable energy of young feminists to use whatever available tools and resources in their quest for equality and justice. Collectively, as corporate practitioners, legal scholars, business people, and community members, we also need to make a contribution where we are able. While more fundamental change is highly unlikely in the short term, we need to utilize existing legal and theoretical tools in a way that begins to recognize and perhaps eventually remedy gender biases in corporate law and governance practice.

¹ Faculty of Law, University of British Columbia. An early draft of this paper was presented to the Feminism and Legal Theory Project, Cornell Law School, seminar on Feminism, Capitalism and Corporations, 2001. My sincere thanks to Martha Fineman and her co-organizers for creating a forum in which to discuss these ideas, and to seminar participants for their thoughts on this paper. Thanks also to Ron Davis for critiquing the draft of this paper, and to my children, Samantha, Danielle and Alexander, who continue to be my inspiration for thinking about the future of corporate law.

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³ M.C. Jensen & W.H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305–315 (1976); FRANK EASTERBROOK & DANIEL FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 36–38 (1991); see also JOHN BRAITHWAITE and PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

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⁷ See, e.g., the Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, § 1(a), 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7166 (2002)).

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¹³ M. Trebilcock & R. Howse, *Protecting the Employment Bargain*, 43 U. TORONTO L.J. 751 (1993).

¹⁴ Ho et al., *supra* note 8.

¹⁵ *Id.*

¹⁶ Ira M. Millstein, Remarks to the Global Conference on Corporate Governance (July 10, 2000) (transcript on file with the Seattle Journal for Social Justice), available at <http://www.gcgf.org/library.htm>; see, e.g., ORG. FOR ECON. CO-OPERATION & DEV., OECD PRINCIPLES OF CORPORATE GOVERNANCE (1999), available at <http://www.oecd.org>.

¹⁷ See, e.g., Rafael LaPorta et al., *Corporation Ownership Around the World*, 54 J. FIN. 471 (1999), available at <http://www.nber.org/papers/W6625>; TORONTO STOCK EXCH. COMM. ON CORPORATE GOVERNANCE IN CANADA, *Guidelines for Improved Corporate Governance in Canada, in WHERE WERE THE DIRECTORS? (THE DEY REPORT)* (Dec. 1994), available at http://www.ecgi.org/codes/country_documents/canada/dey.pdf.

¹⁸ Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 958 (1993); Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Morality*, 73 TEX. L. REV. 477, 501–503 (1995).

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²⁰ CLAIRE YOUNG, *WOMEN, TAX AND SOCIAL PROGRAMS: THE GENDERED IMPACT OF FUNDING SOCIAL PROGRAMS THROUGH THE TAX SYSTEM* (2000), available at <http://www.swc-cfc.gc.ca/pube.html>.

²¹ For example, see the policy statements and campaigns of the Ontario Federation of Labour and the Canadian Labour Congress. Available at <http://www.ofl-fto.on.ca/> and <http://www.clc-ctc.ca/> (both visited Oct. 31, 2002).

²² Sarra, *supra* note 9.

²³ David Millan, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1 (Lawrence Mitchell, ed. 1995).

²⁴ JANIS SARRA, CREDITOR RIGHTS AND THE PUBLIC INTEREST, RESTRUCTURING INSOLVENT CORPORATIONS (forthcoming 2003).

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³⁶ Cohen, *supra* note 29, at 2.

³⁷ *Id.* at 34.

³⁸ See, e.g., Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (1990); see also Galbadon, *supra* note 28 (analyzing the construct of limited liability for corporate shareholders through a feminist perspective).

³⁹ Bender, *supra* note 38.

⁴⁰ Sarra, *supra*, note 9.

⁴¹ *Id.*

⁴² *Id.*

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the Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343 (1995); RICHARD SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

⁴⁴ See, e.g., OECD PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 16.

⁴⁵ See MARGARET M. BLAIR, OWNERSHIP AND CONTROL; RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995); Barbara Ann White, *Feminist Foundations for the Law of Business: One Law and Economics Scholar's Survey and Re(view)*, 10 UCLA WOMEN'S L.J. 39 (1999).

⁴⁶ White, *supra* note 45, at 42, 51.

⁴⁷ *Id.* at 67. White discusses the use of narrative and context analysis in order to include previously excluded voices. *Id.*

⁴⁸ *Id.* at 74–75.

⁴⁹ Testy, *supra* note 31.

⁵⁰ However, Margaret Blair has made major contributions to this conceptual area of the law. See BLAIR, *supra* note 45.

⁵¹ Sarra, *supra* note 9; BLAIR, *supra* note 45.

⁵² Sarra, *supra* note 9.

⁵³ *Id.*

⁵⁴ See e.g., Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001).

⁵⁵ Mel A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1256 (1999); Marcel Kahan, *The Limited Significance of Norms for Corporate Governance*, 149 U. PA. L. REV. 1869 (1999); Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027 (2001); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power, Law, Norms and the Self-Governing Corporation*, 149 U. PA. L. REV. 1607 (2001).

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⁵⁸ Deborah Rhode, *Whistling Vivaldi: Legal Education and the Politics of Progress*, 23 N.Y.U. REV. L. & SOC. CHANGE 217 (1997).

⁵⁹ A requirement that corporations contribute capital in equal amounts to their political party or cause of choice and to a public fund to allow others to participate in public law development would quickly reveal the value assigned by the corporation to political lobbying in influencing public policy choices on a range of issues.

⁶⁰ See O'Connor, *supra* note 18.

⁶¹ Rhode, *supra* note 58; Curtis Milhaupt, *Property Rights in Firms*, 84 VA. L. REV. 1145 (1998); John Coffee, *The Future as History: The Prospects For Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641 (1999).

⁶² See the published reports of the Ontario Pay Equity Hearings Tribunal, available at <http://www.gov.on.ca/lab/pec/peht/> (last visited Nov. 8, 2002).

⁶³ In this respect, I was Vice-Chair of the Ontario Social Assistance Review Board from 1994–1996 and was amazed at the gender streaming still being done by social assistance administrators.

⁶⁴ This is a term borrowed from Professor Karen Gross who utilizes it in the bankruptcy context. KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* (1997).

⁶⁵ JANIS SARRA & RON DAVIS, *DIRECTOR AND OFFICER LIABILITY IN CORPORATE INSOLVENCY: A COMPREHENSIVE GUIDE TO RIGHTS AND OBLIGATIONS* (2001).

⁶⁶ Sarra, *supra* note 9; see also BLAIR, *supra* note 45.

⁶⁷ Sarra, *supra* note 9.

⁶⁸ CATALYST, 2001 CATALYST CENSUS OF WOMEN BOARD DIRECTORS OF CANADA, at <http://www.catalystwomen.org/> (last visited Nov. 24, 2002).

⁶⁹ *Id.*

⁷⁰ Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, U. CIN. L.REV. (forthcoming 2002).

⁷¹ See e.g., O'Connor, *supra* note 18; Sarra, *supra* note 9.

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⁸⁰ MITSUHIRO FUKAO, FINANCIAL INTEGRATION, CORPORATE GOVERNANCE AND THE PERFORMANCE OF MULTINATIONAL COMPANIES 99-100 (1995); Stephen D. Prowse, *The Structure of Corporate Ownership in Japan*, 47 J. FIN. 1121, 1126 (1992).

⁸¹ Masafumi Nakahigashi & Janis Sarra, *Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Structure and Norms*, LAW & POL'Y INT'L BUS. (forthcoming Dec. 2002).

⁸² See Masahiko Aoki, *The Participatory Generation of Information Rents and the Theory of the Firm*, in THE FIRM AS A NEXUS OF TREATIES 26-28 (Masahiko Aoki et al. eds., 1990); Masahiko Aoki, *Toward an Economic Model of the Japanese Firm*, 28 J. ECON. LIT. 1 (1990); Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508 (1999).

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⁸⁵ *Id.* at 107; see also Ryuicki Yamakawa, *We've Only Just Begun: The Law of Sexual Harassment in Japan*, 22 HASTINGS INT'L & COMP. L. REV. 523, 530-31 (1999).

⁸⁶ Fan, *supra* note 83, at 110.

⁸⁷ See Yamakawa, *supra* note 85.

⁸⁸ Fan, *supra* note 83, at 116.

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⁹⁰ Amir N. Licht, *The Mother of All Path Dependencies, Towards a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 157-65 (2001).

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⁹⁷ *See also* Davis, *supra* note 11.