

**Challenging the Corporate Law Tradition:**

**A Socialist Feminist Critique**

Submitted by: Veronica Wylie

Submitted to : Harry Glasbeek

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## **Introduction**

This paper offers a feminist critique of corporate law and corporations. It will discuss some of the more traditional legal theories of corporate law and argue that these theories are inadequate in evaluating the effects that corporations have on people because they do not question the political and economic context they exist in. These theories treat capitalism as a given and, therefore, they fail to explain the social relations that inform the dynamics and conflicts produced by corporations.

Feminist legal scholarship on the other hand, when applied to the study of corporate law, takes it one step further. Feminism places corporations within a patriarchal system of relations. It differs from traditional theory because it is a critical theory that grew out of women's own experiences. Feminist theory questions and challenges the status quo and offers suggestions for change. There are many types of feminist theory with each one offering a different perspective. However, this paper argues that socialist feminism is the best feminist theory to study corporations and corporate law because it questions both patriarchy and capitalism. This theory argues that women's oppression is a result of social, economic and political determinants and regards both gender and class relations as interwoven and does not prioritize either as being the primary cause of women's oppression. Therefore, this standpoint fully exposes two primary influences that inform corporate law.

This paper will use a socialist feminist lens when discussing and critiquing the work of earlier feminist legal scholarship on corporate law and corporations. Principally it will examine the work of radical feminists, Lahey and Salter; and relational feminists Cohen and Gabaldon. It will also examine the works of others as part of the critique. Lahey and Salter, and Cohen will be looked at and their feminist applications to corporate law will be critiqued. Gabaldon's analysis applied to the issue of shareholder limited liability will be examined. Each has something to add to a feminist critique, but each neglects the issue of women's oppression as it relates to capitalism and the shaping of corporate law under capitalism. Other authors, such as White and Hall, will be brought into the discussion by way of offering other viewpoints on the material.

This paper will also examine the capitalist bureaucratic corporate structure and how it is used as an instrument of social control. Known for its highly segregated division of labour, women

workers become alienated from the products of their labour and from other workers as well. The work of Simpson and Elis will be reviewed because these authors illustrate how the brunt of gendered corporate victimization is borne by working class women. Women are often the victims of corporate risk-taking, both as consumers and workers.

Finally, this paper will suggest an alternative to the corporate business legal form. Using a socialist feminist viewpoint, this paper suggests that worker co-operatives may offer a more equitable business form.

The paper is structured as follows: it is divided into eleven sections plus a conclusion. The first section will review traditional corporate legal theory and the second part will discuss the reasons for offering a feminist critique. Following this, the third section will define patriarchy, followed by a discussion in the fourth section of the various strains of feminist theory. The fifth part will examine socialist feminist analysis in depth. The sixth segment will start to look at corporate law through a feminist lens, first through the work of Lahey and Salter in the seventh section and then at bureaucratic capitalism in the eighth part. The ninth section will discuss the work of Cohen and Simpson and Elis. Gabaldon's work on limited shareholder liability will follow in the tenth segment. As a possible alternative to the corporate form, the paper will discuss worker co-operatives and look at one in the eleventh section.

### **Traditional Corporate Legal Theory**

Depending on one's viewpoint, corporations are vehicles to realize one's potential or they are oppressive organizations that exploit people and the environment. It is not enough to just categorize and explain them using legal theory, for to do so does not explain what they do and how they affect people. Moreover, there are problems in determining whether theories are purely descriptive or normative. For the most part, theories that do not question the context within which corporations exist purport to be descriptive but are usually normative in their assumptions about the preferred political economic system.

In the corporation as fiction or artificial entity theory, the state was the creator and regulator of corporations.<sup>1</sup> The organic or natural entity theory postulates that the corporation has a life of its own. The government is seen as an enabling agency.<sup>2</sup> Under this theory, it derives its power from shareholders that collectively constitute the corporate entity.<sup>3</sup> Therefore, as in restricting individual rights, the state should act with circumspection and under scrutiny. Cohen asserts that with this theoretical shift, statutes became more permissive.<sup>4</sup> As a consequence of this shift, shareholder interest became paramount and solidified the idea that profitability was the motivation for corporate action.<sup>5</sup> Subsequently, contractarian notions were attributed to the corporation. The relationship between shareholders and the corporation is based on a private contract.<sup>6</sup> As Glasbeek explains, one variant is that a firm is a bunch of contracts where people seek to maximize their opportunities.<sup>7</sup>

Although these traditional legal theories on the origins of the corporation explain how it survives and what it does, they do not go far enough because they provide an explanation that is narrow and inadequate. Inherent in these theories, even if not overtly discussed, is the normalization of the fact that corporations exist in a Western society that is inculcated with patriarchal norms, societal stratifications and capitalist preconditions. In other words they do not question certain social assumptions, but instead take them as given.

### **Beyond Tradition: A Feminist Critique**

Up until very recently, a paternalistic view of women dominated public discourse. Women were considered physically and mentally inferior, vulnerable, overly sensitive and emotional. Feminism recognizes that these attitudes and beliefs exist and disputes them. Feminist theory is

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<sup>1</sup> Ronnie Cohen (1994) *Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line)*. *The American University Journal of Gender & the Law* 2: Spring 1994: 1-36 at 12; and Harry Glasbeek (1995a) *Preliminary Observations on Strains, and Strains in, Corporate Law Scholarship*. In *Corporate Crime: Ethics, Law and the State*, Frank Pearce and Lauren Snider eds. Toronto: University of Toronto Press: 111-131 at 113.

<sup>2</sup> Glasbeek, *supra* note 1, at 114

<sup>3</sup> Cohen, *supra* note 1, at 13

<sup>4</sup> *Id* at 13

<sup>5</sup> *Id* at 14

<sup>6</sup> *Id* at 16

<sup>7</sup> Glasbeek, *supra* note 1 at 118

unique in that it grew out of women's own experiences and, unlike some political and legal theory, it is critical.<sup>8</sup> It provides challenges to views of authority, meaning and obligation in law.<sup>9</sup> What feminism generally points out is that the liberal goals of efficiency and rationality are frequently at odds with the majority of people and their concerns. Legislators and judges do not make favourable laws for all the people all the time, though they pronounce that they do. The universal application of law is one of the tenets of liberal democracy. However, embedded in liberal democratic legal systems is the notion that there are winners and losers. That is the *raison d'être* for a system that mediates disputes between two parties. One of the pillars of a liberal democratic legal system is the notion of neutrality and that this is embodied in the status quo. Fineman points out that feminist theory shows that the status quo is not neutral.<sup>10</sup>

The law has provided a forum where equality can be demanded<sup>11</sup>, but for working class women it is rarely won. As the ruling and judging elites apply the law their objectivity is relative, and if objectivity is formed within a patriarchal (as well as capitalist) society, then all its structures, values, norms and goals are tainted by class and sexism. Feminist analysis evaluates outcomes and fundamental concepts, values and assumptions buried in legal thought<sup>12</sup> and counters with a discussion of substantive equality and equity. Feminist jurisprudence means that these concepts must be "re-thought, re-evaluated, and perhaps re-made."<sup>13</sup> Feminism shows that more often than not, the law is a form of oppression for women. And, as Cohen argues, it is especially insidious because once the predominant view of social ordering is exemplified in law it is perceived as neutral.<sup>14</sup>

The dominant culture in a society invariably identifies and determines the norms and values to be emulated by the influential and powerful. The dominant culture in our society is formed by, and hence epitomises, the values and experiences of educated, wealthy and powerful white males,

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<sup>8</sup> Martha L. Fineman (1990) Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship. In *Florida Law Review*. Vol.42: 25-43 at 30.

<sup>9</sup> Paetzold, Ramona L. (1993) Commentary: Feminism and Business Law: The Essential Interconnection. In *American Business Law Journal* Volume 31: 699-715 at 700.

<sup>10</sup> Fineman, *supra* note 8 at 31.

<sup>11</sup> Cohen, *supra* note 1 at 5.

<sup>12</sup> Fineman, *supra* note 8 at 32.

<sup>13</sup> Paetzold, *supra* note 9 at 705.

<sup>14</sup> Cohen, *supra* note 1 at 6.

who have a vested interest in maintaining capitalist patriarchy. By controlling all state institutions, the military, the judiciary, the government, and the bureaucracy this carefully constructed ideology of the dominant culture defines our social and moral values. Widely-held beliefs that male dominance is inherently natural and that male traits are necessary for success in public life provide the justification for women's inequality. In this way our society is gendered and, by extension, so is our society's legal system. Stereotyped gender traits are institutionalized in schools, church and state are used to rationalize why women cannot and should not participate in public life; this leads to exclusion and paternalism. The law contains and reflects social or cultural roles and characteristics that are interwoven with gender. The characteristics that are held in high esteem are those possessed by men who occupy the public sphere.<sup>15</sup> This is also true of the public-private sphere of business and business law. For these reasons, feminist theory is politically focused rather than legally focused. It is a political theory concerned with issues of power and it recognizes that law is power.<sup>16</sup> According to Fineman, the law is relatively powerless compared to some ideological institutions that influence society. She argues that the law reflects and facilitates social change but it seldom initiates it.<sup>17</sup> The focus here should be on the struggle that is required to initiate that change.

A feminist critique exposes the omnipotent, androcentric bias that regulates, controls, and delineates the state. From the perspective of political economy, a socialist feminist analysis probes further, and challenges the classical liberal notion that the state is politically and gender neutral.

### **Patriarchy**

"Since men control women, men are superior to women: this difference in status stratifies the human race..."<sup>18</sup> The underlying origin of women's inequality and oppression in our society is due to an ideological system of social relations recognised as patriarchy. Patriarchy is the underpinning for all political and economic systems in the industrial world. No matter what political economy, democratic or totalitarian, socialist or capitalist, women are considered subordinate to men, whether overtly or tacitly.

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<sup>15</sup> Paetzold, *supra* note 9 at 703.

<sup>16</sup> Fineman, *supra* note 8 at 32.

<sup>17</sup> *Id* at 33.

<sup>18</sup> Marilyn French (1985) *Beyond Power: on Women, Men and Morals*. New York at 112.

Intrinsic to different feminist perspectives is the concept that patriarchy is an ideologically designed hierarchy stratified along gender lines: men are at the top and women are on the bottom. Patriarchy perpetuates the imbalance of power and control and therefore is a political system.

Marilyn French advances the concept:

that patriarchal cultures control, exclude and attempt to control things women produce. By direct institutionalization, this sets up independent hierarchical structures devoted to control women. Patriarchy's fundamental nature is located in stratification, institutionalization and coercion with an emphasis on power and individualism.<sup>19</sup>

Socialist feminist, Jane Ursel defines patriarchy: "as a system or set of social relations which operates to control reproduction through the control of women both in their reproductive and productive labour".<sup>20</sup> Donald Tomaskovic-Devey discusses patriarchy in a workplace setting: "the system by which male advantage is preserved. In workplaces, patriarchal practices include excluding women from good jobs and defining whatever work is done by women as less valuable or of lower status".<sup>21</sup>

As a consequence patriarchal norms define reality and regulate relations and actions of society. Furthermore, they have a profound influence on the formation, interpretation and implementation of public policy and law. According to Burt:

Public policy helps to shape the discourse of social interaction. The laws enacted by legislators in part reflect the values, or ideology, of the lawmakers. In turn these laws affect the fabric of society, imposing new limits on and the possibilities for thought and action.<sup>22</sup>

Patriarchy is ubiquitous and influences everything in women's lives. This social arrangement is not "natural" or inevitable however, even if many accept it. Anthropological evidence now shows that there was a time in human history when egalitarian social systems existed. Gerda Lerner professes that patriarchy in the Western world was constructed in the Bronze Age.

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<sup>19</sup> French, *supra* note 18 at 72.

<sup>20</sup> Jane Ursel (1986) *The State and the Maintenance of Patriarchy*. In *Family, Economy and State*. James Dickinson and Rob Russell eds. Toronto: 1986 at 150.

<sup>21</sup> Donald Tomaskovic-Devey. (1993)*Gender and Racial Inequality at Work*. New York at 61.

<sup>22</sup> Sandra Burt. (1993)*The Changing Patterns of Public Policy*. In *Changing Patterns: Women in Canada*. 2nd ed. Sandra Burt et al. eds. at 212.

Western civilization arose out of a combination of militarism and the agricultural revolution.<sup>23</sup> As Western culture evolved and became more centralised, autonomous villages joined into kingdoms, and militaristic culture became entrenched. The rise of nation states meant the transmogrification of patriarchal ideology into a social and political system that defined reality.

Patriarchy was institutionalized by governments and was reinforced by policy implementation instruments. Patriarchy was also reinforced through all formal and informal aspects of society: in philosophy, literature, law, religion, politics, culture, the military, government and customs. The law is a part of society's patriarchal organization and hence functions as part of society's subjugation of women.<sup>24</sup> After centuries of this tradition, patriarchy seems "natural" and expectations about gender roles define the moral order.

As political economies changed in the Western world, patriarchy quickly adapted to the liberal democratic state and capitalism. As the state became more complex and expanded, it reflected and regulated society's paternalistic, patriarchal moral values. The state as an institution codified and safeguarded patriarchal norms; overall policy has been framed within the context of patriarchal patterns of authority<sup>25</sup>, to the detriment of women.

Certainly economic policies by themselves are not responsible for women's inequality and the poverty of many. Women are and always have been disproportionately poor because we are seen as deviants from the norm: the norm is male. The effect of economic policy builds on what already exists and exacerbates the inequalities between men and women and people in different classes and racial groups.<sup>26</sup>

Not only have state institutions replicated patriarchal norms and values, but other institutions and organizations such as corporations have as well. This is especially true of formal corporate legal and structural elements, as well as informal corporate policies that serve to discriminate against women inside and outside the organization. Corporate law and corporations are dominated by white, ruling class men; women are often found in the bottom tier of firms. Women lawyers and workers in corporate law firms and corporations are met with the "glass ceiling", whereby, they are able to rise within organizations to a certain level but then find any advancement possibilities

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<sup>23</sup> Gerda Lerner. (1995) A Transformational Feminism. In *Women of Power*. Orleans. Issue 24, at 42.

<sup>24</sup> Paetzold, *supra* note 9 at 705.

<sup>25</sup> Burt, *supra* note 22 at 212



mysteriously stymied. (Organizational and bureaucratic issues will be discussed in more detail below.) Corporations simultaneously replicate societal patriarchal norms and exacerbate them: "The corporation promotes patriarchy because it creates a hierarchy based on and dominated by the reality of men, and dominance because it establishes power relations between directors and shareholders, directors and managers and management and employees."<sup>27</sup>

### **Feminisms**

"However autonomous of class the liberal state may appear, it is not autonomous of sex. Male power is systemic. Coercive, legitimated, and epistemic, it is the regime."<sup>28</sup> Sex equality is an elusive and profound concept. Firstly, equality is looked at in two ways: sameness and difference. Secondly, sameness and difference are judged in comparison to men: "...male is the implicit reference for human, maleness the measurement of entitlement to equality."<sup>29</sup> This sets up multiple tensions and contradictions for the notion of equality. For if equality's yardstick is male, then women can never be equal because we are "different". Equality presupposes sameness, yet sex assumes differences.<sup>30</sup> This sameness/difference conundrum has led to a relatively new concept: equity. Women and men are different, but to be treated the same sometimes they have to be treated differently or equitably to achieve equality.

The vision of equality varies widely among many feminists according to the brand of feminism to which they subscribe. Feminist theory abounds and comes in many political stripes. Liberal feminism usually operates within institutions, accepts the social and economic order and argues for equal opportunity for individuals. Liberal feminists want equal treatment for men and women.<sup>31</sup> For instance, they would argue for equal pay for equal work. As far as corporations are concerned, liberal feminism would argue that there are too few women on corporate boards, too few women executives and women get paid too little. It focuses on the constraints and lack of

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<sup>26</sup> Marjorie Cohen (1991) *Women and Economic Structures*. Ottawa at 7.

<sup>27</sup> Katherine H. Hall. (1995) Starting From Silence: The Future of Feminist Analysis of Corporate Law. *Corporate & Business Law Journal* 7(2): 149-180 at 152.

<sup>28</sup> Catherine MacKinnon. (1989) *Towards a Feminist Theory of the State*. Cambridge at 170.

<sup>29</sup> *Id* at 168.

<sup>30</sup> *Id* at 216.

<sup>31</sup> Barbara Ann White (1999) Feminist Foundations for the Law of Business: One Law and Economics Scholar's Survey and (Re)View. In *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda and Bibliography*, Betty Taylor, Sharon Rush and Robert J. Munro, eds. Littleton: Rothman & Co: 233-279 at 235.

opportunities that organizational structures have for women.<sup>32</sup> As White illustrates, they would argue against corporations using the fact that women tend to be the primary care giver as a basis for not hiring them in important positions.<sup>33</sup> To fix the problem would involve few structural changes, but would involve more women on boards and promoting women executives. Liberal feminism tries to change aspects of organizational structure.<sup>34</sup> Relational or cultural feminists usually want to celebrate men's and women's differences. White explains that in the business context women are just as capable as men but approach tasks differently in a way that enhances society.<sup>35</sup> This type of feminism appears to define masculinist values as inherently hierarchical and in opposition to feminist values such as nurturing and caring.<sup>36</sup>

Radical feminism identifies women's biological capacity to reproduce as the root of the power imbalance, without providing an holistic analysis of institutions in our society. They equate hierarchical structures, rationalism and efficiency with masculinist values as well, but they emphasize separation as a way to women's autonomy.<sup>37</sup> They would argue for equal pay for work of equal value. They would also assert that if women ran the show, corporations would be more socially responsible and less hierarchical. Radical feminism would be more concerned, too, with the abuses of women within the corporation, such as, violence against women, sexual harassment, and workplace etiquette.

Interestingly, in her discussion of feminist legal scholarship, White asks if feminist analysis can go beyond a gendered analysis.<sup>38</sup> Most feminists falling within the above categories would argue that by extension, a gendered analysis could be inclusive of other marginalized groups. However, these feminist theories are inherently flawed in the first place. For they mistake liberalism as masculinist values and leave out capitalism all together. Moreover, these theories make the covert assumption that, if they were implemented, they would impact on corporate law and corporations, and that *all* women would benefit. But if, as appears to be the case, they do not deal with other

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<sup>32</sup> Kathleen A. Lahey and Sarah W. Salter (1985) Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism. In *Osgoode Hall Law Journal* 23(4): 544-572 at .544.

<sup>33</sup> White, *supra* note 31 at 235.

<sup>34</sup> Lahey and Salter, *supra* note 31 at 544.

<sup>35</sup> White, *supra* note 31 at 235.

<sup>36</sup> *Id* at 236.

<sup>37</sup> *Id* at 236.

<sup>38</sup> *Id* at 237.

levels of oppression such as class and race, then simply substituting women for men at the level of analysis will only benefit elites. If the goal of these theories is to be more inclusive and to eradicate women's oppression, then all women's oppression must be discussed. These feminist theories assume capitalism as a given and to do so is to ignore the historical basis for corporations. Corporations did not simply come out of thin air, nor are their oppressive effects on women universal. A woman who makes socks in a transnational maquiladora plant in Mexico will experience corporations in a radically different way than one who is a general manager in an automotive plant in Canada. Feminism too often equals a white middle-class focus.

### **Socialist Feminist Analysis: The Intersection of Class and Gender**

Socialist feminism on the other hand, asserts that women's oppression is the result of social, economic and political determinants and recognizes that women are oppressed as a group. It regards both gender and class relations as interwoven and does not prioritize either as the primary cause of women's oppression.<sup>39</sup> Socialist feminists are concerned with the effects of corporations on all of society.<sup>40</sup> They would argue for equal pay for equal work and equal pay for work of equal value as well as pay equity and employment equity. Moreover socialist feminism, unlike liberal feminism, recognizes that simply tinkering with capitalist structures such as liberal democracy or the corporate law will change little in the day-to-day lives of most women. Nor will substituting women for men change corporate structures and values. Socialist feminism realizes that doing away with patriarchy and patriarchal values is only one step towards equality. Just as important a barrier to equality is the capitalist means of production and all it entails.

Polan notes that critical legal theory has to be grounded in the belief that the legal system of capitalist society supports the capitalist social order and that a feminist critical legal theory supposes the legal system of patriarchy enforces a male supremacist social order as well.<sup>41</sup> She sees women's inferior status in society as the product of these interacting systems of domination.<sup>42</sup> Moreover,

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<sup>39</sup> Susan Boyd and Elizabeth Sheehy (1990) *Feminist Perspectives on Law: Canadian Theory and Practice*. In *Women, Law and Social Change*, T. Brettel Dawson ed. Ottawa: Captus Press: 40-45 at 44.

<sup>40</sup> Lahey and Salter, *supra* note 31 at 543; Cohen, *supra* note 1 at 4.

<sup>41</sup> Diane Polan (1993) *Toward a Theory of Law and Patriarchy*. In *Feminist Legal Theory: Foundations*, Weisberg, D. Kelly ed. Philadelphia: Temple University Press: 419-426 at 419.

<sup>42</sup> *Id* at 420.

Polan shows that the law may play a different and less significant role in the maintenance of patriarchy than it does in the perpetuation of capitalism.<sup>43</sup> She argues that maintaining patriarchy has been done primarily by maintaining the relationship of the family through non-legal forces and social institutions. Yet at the level of ideology, the law can be considered as playing a role in maintaining dominant relationships.<sup>44</sup> Law is just as significant in perpetuating both systems of domination and not just at the level of ideology. For most socialist feminists the locus of oppression is not just within the family, but at the state level as well. The state has a vested interest in the social control of women, at the same level as it has an interest in controlling the working class and the marginalized in our society. Through marriage, family, property laws and social welfare laws, the state has ensured that women are not fully participating citizens. Moreover, the common law as interpreted by judges, has participated in ensuring women's inferior legal and economic status as well.

A neo-Marxist, class based analysis of our society can be used to explain the disparate system of power relations that exist between who controls the means of production and who must sell their labour power. But, in itself, this does not explain women's subordination. Women are the victims of multiple, compounding oppression. Class and sex are equally important social categories. In order to analyze women's lower status in society both categories must be examined, without one subordinating the other.

Neo-Marxism is somewhat elastic and adaptable to historical evolutionary changes in our society and the function and role of the state. It is also useful when examining law, and how it functions to maintain class inequality. The state facilitates the accumulation of capital through policies, laws, etc. But by the same token it must appear legitimate and maintain social harmony. To analyze how policies affect women as a group specifically, feminism must be incorporated into this model. Similar to the state's relative autonomy to capital is the notion of the relative autonomy of law. Polan raises the concern that this concept is difficult to apply to the reality of women's lives.<sup>45</sup> She observes that laws and judicial interpretations have directly enforced both sexism and racism in

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<sup>43</sup> *Id* at 421.

<sup>44</sup> *Id* at 421.

<sup>45</sup> *Id* at 423.

the US context.<sup>46</sup> The law may appear to be neutral on its face but it has not been applied equally. For women and people of colour, the law is seen as an instrument of their oppression and an integral aspect of their subordinate status in society.<sup>47</sup>

Socialist feminism focuses on the way domination is organized and reproduced. Linda Briskin asserts that, "socialist feminist politics is based on a radical critique of the entire society, in particular of existing institutions, ideological practices and the complex relations of power expressed through class, gender, race and sexual orientation."<sup>48</sup> Marxism is the seed of socialist feminism, but socialist feminism also acknowledges women's different experiences not considered by Marx. Socialist feminism also makes a connection between the dominant mode of social relations and modes of production and reproduction. Central to its thesis is that capitalism serves as a means to perpetuate patriarchy, hence the term capitalist patriarchy. According to Adamson et al:

socialist feminism identifies the state along with the workplace and the family as a site of patriarchal capital relations of power and therefore a participant in the reproduction of women's oppression. Institutions, structures and social relationships and their organization functions to perpetuate women's oppression.<sup>49</sup>

Socialist feminism affirms that the state in a liberal democratic society is not neutral, but acts in way to legitimize capitalist patriarchy. Socialist feminism contends that the state has a direct interest in maintaining the patriarchal family unit and exercises this through systemic or institutionalized discrimination. Systemic discrimination is rooted in the class structure and political structure of the society and practised by those who hold economic and political power over the lives of others. It consists of policies, practices and customs, which result in exclusion of, or disadvantage to, specific groups.

In the interests of capitalist patriarchy, the government and the bureaucracy control the means of reproduction and advocate that women stay in the private sphere so they will reproduce the future labour supply. This perpetuates patriarchy and assists capitalism. According to Ursel, the state cannot legislate procreation. Instead, it sets up a system via family, property and marriage laws

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<sup>46</sup> *Id* at 423.

<sup>47</sup> *Id* at 423.

<sup>48</sup> Linda Briskin (1992) *Socialist Feminism: From the Standpoint of Practice*. In *Feminism in Action: Studies in Political Economy*. Patricia Connelly and Pat Armstrong eds., Toronto: Canadian Scholars' Press: 267-287 at 279.

<sup>49</sup> Nancy Adamson et al. (1988) *Feminists Organizing For Change*. Oxford University Press at 99.

which serves to translate social and economic requirements into compelling household imperatives.<sup>50</sup> The state is also inherently male biased because it operates internally and externally within a patriarchal system of relations.

Rifkin, shows how law is a paradigm of maleness, how law and legal ideology is preserved under capitalism and updated to serve the interests of the bourgeoisie.<sup>51</sup> As she points out, law is a form of hegemonic ideology and it is reinforced as a ideological force of social cohesion and stability.<sup>52</sup> "Law in relation to women, is seen as a measured and rational set of beliefs which at the same time asserts a mythological vision which is believed by many to present an accurate statement of the world".<sup>53</sup> This legal ideology does not bend to accommodate the economic reality of working women.<sup>54</sup> As many women's issues are resolved in courtrooms and a new body of law is deployed, the basic sexual hierarchy is not changed.<sup>55</sup> To that end, neither, is the economic hierarchy changed for people of colour and the working class as labour laws and human rights laws are enacted. As she points out, the ideology of law masks the real social and political questions underlying the law.<sup>56</sup> . At the same time this symbol of male authority goes unchallenged and is reinforced as a legitimate mechanism for resolving disputes.<sup>57</sup> Powerfully, she demonstrates that the law that accommodated capitalism retained the male hierarchy and made even more explicit the subordination of women to men.<sup>58</sup> Examples of how women's subordinate status is reflected in corporate law and within corporations are discussed below.

### **Critique of Feminist Legal Scholarship of Corporate Law**

Corporate structure, organization and legal capabilities are not solely constrained or enabled by legal provisions. Political economy and other systems of relations, such as patriarchy, influence them. Without these considerations explicitly being factored into any explanation of

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<sup>50</sup> Ursel, *supra* note 20 at 155.

<sup>51</sup> Janet Rifkin. (1990) Toward a Theory of Law and Patriarchy. *Harvard Women's Law Journal* 3 (1) Spring: 83-95 at 84.

<sup>52</sup> *Id* at 84.

<sup>53</sup> *Id* at 84-85.

<sup>54</sup> *Id* at 85.

<sup>55</sup> *Id* at 86.

<sup>56</sup> *Id* at 87.

<sup>57</sup> *Id* at 87.

what corporations are and what they do, only half the story is told. Although it is true that the "corporation is almost entirely a modern male invention,"<sup>59</sup> it is more than that. They are also evolving social constructions of the hegemonic corporate and state elites that reflect and perpetuate society's values and norms by dominating and controlling public discourse. Although it is important to be aware of the tendency to be reductionist and deterministic when discussing capitalist liberal democracies, it is also important to keep in mind that exposing corporate law and corporations for what they really are does not necessarily mean we are stuck with them, nor that nothing can be done to change them. As Ortiz asserts, current business practices and values are contingent, and their status are not truths but "artifacts of culture," and these constructs are not neutral but rather promote the values of some over others.<sup>60</sup> This society must be described and placed in the correct context. Many corporate metaphors are male constructions: descriptions of an organization as at war with others and/or the team concept that describes corporate interactions with sports metaphors.<sup>61</sup> By calling them simply male, or even the "old boy" network, undermines the overarching political economy of corporate legal structure and their oppressive effects.

Solomon's discussion of corporations and competition is simplistic at best. He argues that the corporation can be viewed as a community where a group of people work together for shared goals and it can be viewed as a variety of personal and professional relationships.<sup>62</sup> This is similar to contractarian notions of the corporation. However, both forget about power and inequality issues; each relationship is considered just as important as the next one, but this is not grounded in reality. Moreover, by using the language of cooperation to describe what is essentially a competitive enterprise, Solomon forgets the historical goal of corporations under capitalism -- the maximization of profit. Corporations will cooperate with state regulations and other corporations when it suits them. One only has to look at the flexible specialization

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<sup>58</sup> *Id* at 92.

<sup>59</sup> Richard C. Solomon. (1997) Competition, Care, and Compassion: Toward a Nonchauvinist View of the Corporation. In *Women's Studies and Business Ethics*, Larson, Andrea and R. Edward Freeman, eds. New York: Oxford University Press: 144-174 at 146.

<sup>60</sup> Daniel R. Ortiz. (1997) Phallocorporatism. In *Women's Studies and Business Ethics*, Larson, Andrea and R. Edward Freeman, eds. New York: Oxford University Press: 127-138 at 128.

<sup>61</sup> *Id* at 146

corporate movements of some transnational corporations to see that they are extremely adaptable and accommodative when they need, or want, to be. The highly successful Benetton is one such example. Corporations also cooperate in lobbying different levels of government to ensure favourable business environments. However, this cooperation is limited. Solomon naively endorses the values of the ethics of compassion and care in corporations.<sup>63</sup> This flies in the face of reality; corporate compassion only exists so far as it is profitable. It is dangerous even to posit these notions, for it obfuscates the real location of the debate.

As Hall asserts, "corporate law reflects the masculinist values of capitalism, patriarchy and dominance."<sup>64</sup> It promotes capitalism by encouraging business development and the accumulation of wealth, which results in the unequal distribution of wealth. Corporate law also "operates through gender neutral 'objective' concepts and rules which mask the effect of the law on women."<sup>65</sup> This is a tautological problem. Women have less access to the "benefits" of corporate law, such as more wealth accumulation and better paying jobs, not only because they are women but because women as a social category are poorer and therefore, have less influence on corporate law. On the whole gender neutral concepts on their face may appear to be neutral, but they usually have a disproportionately negative effect on women.

### **Lahey and Salter: A Radical Feminist Perspective**

Lahey and Salter's seminal article of 1985 was the first look of feminist legal scholarship at corporate law. They brought attention to the issue, as well as showing the possibility of applying feminist legal scholarship to corporate law. However, the commentary did not look at specific aspects of corporate law. Instead it looked at the problem as being able to theorize and apply feminism to this sector of legal scholarship. Much of the literature on feminist legal critiques of corporate law use this article as their starting point. The authors endorsed a radical feminist critique of corporate law, asserting its suitability over socialist and liberal feminist critiques. They asserted

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<sup>62</sup> Solomon, *supra* note 59 at 151.

<sup>63</sup> *Id* at 154.

<sup>64</sup> Hall, *supra* note 27 at 152.

<sup>65</sup> *Id* at 153.



that radical feminism better explains the corporate form development and the role it plays in adapting to liberal and capitalist patriarchy.<sup>66</sup> Lahey and Salter dismiss liberal feminism because it is involved with integrating women into corporations and reduces its focus to a structural critique.<sup>67</sup> By the same token, they dismiss socialist feminism because it treats the dominance of corporations as a given and therefore, cannot lead to a "definitive discussion of the legal structure of corporations".<sup>68</sup> They base this critique on an article by Dorothy Smith and her analysis of corporate capitalism.

Smith's article discusses some Marxist concepts, is interested in women as workers, and explores how corporate capitalism mediates social behaviour.<sup>69</sup> Although Lahey and Salter point out that Smith adds some useful insights, they question just how feminist she is. There are some problems with dismissing socialist feminism so summarily. Firstly, Lahey and Salter base their view on Smith's article alone. However, Smith's article is an inadequate sample of socialist feminist analysis because it is restrictive and looks at only a couple of aspects of corporations. Smith's thesis does not represent all socialist feminist critiques. Socialist feminism, even in 1985, was more expansive than they said it was. Moreover, even if Smith's article was the only one to look at corporations through a socialist feminist lens, this does not discredit socialist feminism as a framework for examining social problems. It is easily adaptable. Secondly, they seem to question Smith's feminism because she brings in Marxist concepts and goes beyond a gendered analysis by including class. However, Smith's analysis speaks to more people and is closer to altruistic feminist values than Lahey and Salter are willing to admit. Nevertheless, Lahey and Salter's critique is useful in some aspects.

In their look at other mainstream corporate law scholarship, Lahey and Salter clearly establish the weaknesses of classicism, and realism. They point out that corporate law scholarship tends to be decontextualized and "overwhelmingly doctrinal or within the classical legal tradition."<sup>70</sup> However, they fail to discuss satisfactorily that this notion is related to the politics and ideology of

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<sup>66</sup> Lahey and Salter, *supra* note 32 at 553.

<sup>67</sup> *Id* at 548-549.

<sup>68</sup> *Id* at 549

<sup>69</sup> Dorothy E. Smith (1977) *Women, the Family and Corporate Capitalism*. In *Women in Canada*, Marylee Stephenson ed. Toronto: General Publishing Co. Limited: 17-48.

liberalism and patriarchy. The law, as an instrument of reifying liberal masculinist values, is presumed to be the acceptable and dominant societal norm, and capitalism the dominant and preferable economic system. Therefore, in Lahey and Salter's context it is not necessary to discuss these factors because they are treated as given. Law and policy makers assume that the desirable overarching political economy is a liberal democratic capitalist system. Generally, both realism and classicism accept this overarching premise and refuse to challenge its foundations or question its effects on people. Realism may point out that politics influence law making, however, its politics are still liberalist. This decontextualization perpetuates the dominance and influence of liberal political and legal thought. For socialist feminists, this discourse is myopic and tells an incomplete story.

Lahey and Salter also discuss the theme of fragmentation in their radical feminist critique.<sup>71</sup> The corporation fragments through its structure and form, by alienating some people from others, and women from their work. Following this proposition is an analysis of bureaucratic capitalism and how it fragments: "the business corporation is the paradigm of modernist bureaucracy. Its very legal form is a fragmentation of the whole range of entrepreneurial activities and of human judgement. Its method is 'neutral' rules and roles and its goal is efficiency and domination"<sup>72</sup>. Whilst it may be true that corporate law, by ascribing duties and obligations to shareholders and directors, fragments business decision making, it does not fragment business objectives or the ruling class. Corporate law and the corporate form do not fragment all business activities, but assume there is cooperation between director and shareholders. Corporate law is premised on, and facilitates, profit-making and, therefore, it is assumed that both shareholders and directors have increasing profits as their common goal. Legally, there is separation between managers and shareholders, but this is a late development and was implemented to protect shareholders from fraudulent managers as well as to give shareholders limited liability. However, shareholders with only equity capital at stake assume limited liability and delegate decision making power to the directors because they believe directors, as members of the same economic class, have similar goals. This is particularly relevant when one considers 95 percent of Ontario corporations and 99 percent of Canadian corporations are

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<sup>70</sup> Hall, *supra* note 27 at 153.

<sup>71</sup> Lahey and Salter, *supra* note at 553

closely held and not publicly traded.<sup>73</sup> Therefore, corporate law does not fragment these two groups but allows for an institutionalized and regulated form of decision-making. Corporate law reflects and recognizes masculinist liberal economic goals. In so doing, it does not fragment; it unifies people around mutually held values and objectives. However, corporate law fragments this dominant and privileged elite from workers. This fragmentation theme is pervasive in most feminist legal scholarship that analyses corporate law. Without a socialist feminist analysis, the axis of fragmentation will be mislocated and focus on the corporate decision making process instead of how that decision-making effects people. This is picked up below in a discussion of capitalist bureaucracies as authoritarian forms of organizations, and how the corporate structure can fragment and marginalize women and minority groups.

### **Bureaucratic Capitalism**

As firms grew and began to deal with more complex administrative problems some type of hierarchy and control over workers was necessary. As bureaucratic forms of firms grew and exerted more social control over workers, so did worker fragmentation. Workers were alienated from the products of their labour and from other workers as work was allotted in complex systems of division of labour. Bureaucracy is all about control through written rules and specific policies that describe employee duties. For Lahey and Salter, "the business corporation is a perfect masculinist version of self -- existence as property, separation of accountability and enjoyment, abstract rules as justice, domination as ownership"<sup>74</sup> Ferguson argues that capitalism is interconnected with bureaucratic authority relations and this creates problems of dominance and subordination.<sup>75</sup>

Early formal theories of organizations mirrored the structure of the patriarchal family unit. Organizational theories in the nineteenth century tacitly reinforced patriarchy and facilitated the endorsement of capitalism. Max Weber, the founder of bureaucratic theory, believed that the bureaucracy was the archetype of organization to resolve complex administrative problems. Weber

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<sup>72</sup> *Id* at 552

<sup>73</sup> Glasbeek, October 20, 1999.

<sup>74</sup> Lahey and Salter, *supra* note 32 at 555.

<sup>75</sup> Kathy E. Ferguson (1984) *The Feminist Case Against Bureaucracy*. Philadelphia: Temple University Press at 9.

believed the bureaucracy was the best way to ensure rationality and impartiality: "Its structure derives on the one hand from basic principles of modern authority and technical rationality: on the other from the hierarchical requirements of coordinating the division of labour within the economy and the state."<sup>76</sup> According to Weber hierarchy, continuity, impersonality and expertise characterize bureaucracies.<sup>77</sup> Weber also claimed that:

The central feature of bureaucracy is the systematic division of labour, whereby complex administrative problems are broken down into manageable and repetitive tasks, each the province of a particular 'office' and then coordinated under a centralized hierarchy of command.<sup>78</sup>

These characteristics were necessary to achieve an organization's goals of efficiency and quality, which were deemed neutral and objective concepts.

Weber believed that objectivity in the social sciences could be achieved through procedures designed to eliminate personal prejudice in the research process.<sup>79</sup> However, he also acknowledged that social scientists were also human beings, affected by their values. Nevertheless, Weber believed that a systematic social science could be developed "using generalizations by constructing 'ideal types': mental constructs, which specify the theoretically significant aspects of phenomenon." Ideal types are constructs, which make empirical generalization and comparison possible.<sup>80</sup> Some of Weber's concepts of ideal types, such as capitalism or liberal democracy, are intrinsically value-laden concepts. Depending on one's viewpoint, one's 'mental construct' will be different from another. One's social status and gender will bias one's values and beliefs, or what one chooses to observe and deem significant.

Weber concluded that bureaucratization was part of the 'rationalization of the world', the triumph of instrumental over value rationality.<sup>81</sup> Rationality, then as now, is also closely tied into the concepts of maximization of "man's" resources and the efficiency of bureaucratic capitalism. Although Weber was not a proponent of one economic system over the other, he did see capitalism

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<sup>76</sup> David Beetham (1987) *Bureaucracy*. Minneapolis. at 92

<sup>77</sup> *Id* at 11-12.

<sup>78</sup> *Id* at 15.

<sup>79</sup> Patrick Dunleavy and Brendan O'Leary.(1987) *Theories of the State*. London. at 147.

<sup>80</sup> Robert Denhardt. (1993) *Theories of Public Organization*. 2nd ed. at 31.

<sup>81</sup> Dunleavy, *supra* note 79 at 170.

"as maintaining the capacity to calculate in formal terms the most rational (i.e. efficient) organization of the productive mechanism."<sup>82</sup>

Weber was also influenced by scientific management theories and Frederick Taylor's "one best way" vision of mechanistic work designs for the organization of work, which added to Weber's theory about specialization and expertise. Weber believed that bureaucratic authority derived from precisely defined rules was preferable to authority derived from tradition.<sup>83</sup> Weber also argued that every system of authority must establish legitimacy.

Weber identified three pure types of legitimate authority: 1) legal authority, based on a belief in the legality of certain patterns or rules and in the right of those positions of legal authority to issue commands; (2) traditional authority, based on the belief in the importance of enduring traditions and those who rule within such traditions; and (3) charismatic authority, based on an emotional attachment or devotion to a specific individual.<sup>84</sup>

Weber's bureaucratic model and concepts established the yardstick that many subsequent theorists were measured against.

In the late 1800's, industrialization and technological advances were hailed as progress; classical economic theory which honoured entrepreneurs was in vogue; the corporate form was given legal status; Victorian and Protestant morality defined women's subordinate role and encouraged the work ethic; scientific discoveries and theories were developed and considered objective; and society celebrated individualism. Just how rational and objective was Max Weber? Weber was influenced by Calvinism, which emphasized the individual and the theory of predestination.

Calvinism in particular ...made possible the attitudes that led to capitalist exploitation of nature and people, the amassing of wealth, and the rise of science which gave industry its foundation. Calvin...insisted that in this world women were to be obedient to their husbands, keep silent in public, and busy themselves with their households.<sup>85</sup>

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<sup>82</sup> Denhardt, *supra* note 80 at 31.

<sup>83</sup> Beetham, *supra* note 79 at 59.

<sup>84</sup> Denhardt, *supra* note 80 at 75.

<sup>85</sup> French, *supra* note 18 at 173.

Weber was influenced by the military for its chain of command and hierarchy and Calvinism for its discipline and Protestant work ethic. Both these institutions were progenies of male dominance and misogyny, and prejudiced Weber.

At the time, certain assumptions were made about gender. According to Morgan:

Values, of stereotypical maleness, such as the patriarchal family, fortitude, courage and heroism and the belief that only men possessed the necessary qualities such as rationality, analytic and methodical skills required for administration, once again reinforced the necessity for the stratification of males and females. Formal organizations typically built upon characteristics associated with the male sex in Western society and historically have been dominated by males, except in those jobs where the function is to support, serve, flatter, please and entertain...<sup>86</sup>

These beliefs, already formally and informally institutionalized, were now supported by objective scientific findings.

Goals such as efficiency are actually values. Efficiency is a value and one that may conflict with other values.<sup>87</sup> There is an underlying assumption of the value of rationality. Benston attacks scientific rationality as limited and fraught with irrationalities and inconsistencies.<sup>88</sup> Dorothy E. Smith argues from a socialist feminist perspective that early social sciences never bothered to consider women at all. Rather than be the subjects of its discourse, women were its object:

The whole method of thinking, how social science addressed the world, created a very peculiar relationship between men and women. Rather than beginning in their own actual situations and with their own good knowledge of the practicalities and organization of their everyday and every night worlds, social scientific methods objectified women.<sup>89</sup>

Clearly, Weber was influenced by the trends of the day. Weber's bureaucratic criteria and goals supported by objective rationality are value laden and are expressions of androcentric norms and values woven into the fabric of society. Furthermore, although the bureaucracy preceded capitalism, Weber believed that it would help the expansion of capitalism.

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<sup>86</sup> Gareth Morgan. (1986) *Images of Organization*. Newbury: Sage Publications at 211.

<sup>87</sup> Denhardt, *supra* note 80 at 75.

<sup>88</sup> Margaret Benston. (1982) Feminism and the Critique of Scientific Method. In *Feminism in Canada: From Pressure to Politics*. Angela R. Miles and Geraldine Finn eds., Montreal: Black Rose Books, 47-66 at 48.

<sup>89</sup> Dorothy E. Smith. Feminist Reflections in Political Economy. In *Feminism in Action: Studies in Political Economy*. Patricia Connelly and Pat Armstrong eds., (Toronto: 1992) at 2.

Objectivity is relative. If objectivity is formed within a patriarchal society, then all its structures, values, norms and goals are tainted by sexism, thereby leaving women out of the calculation entirely. Weber's types of legitimate authority must be put in a context of patriarchal relations. As asserted earlier, the endurance of patriarchy depended on its institutionalization: laws, traditions and male stereotypical norms being valued. Therefore, Weber's legitimate authority was conceived with these standards providing the rubric. This begs the questions, just who was this authority legitimate for, and whom would leaders possessing such legitimate authority act on behalf of? If an androcentric bias is intrinsic, how does Weber's theory treat women? For if only men are rational and women are emotional, then rational administration is only men's domain, thereby reinforcing patriarchy. If gender neutral rationality were practised would it make a difference for women, or is the bureaucratic structure problematic as well?

Socialist feminist Linda Briskin posits:

the forms of organization inside patriarchal capitalist institutions...are hierarchic and bureaucratic. They tend to be inflexible, reinforce patterns of uniformity, regulate and neutralize dissent and difference, and limit any substantive challenge to their goals and practices.<sup>90</sup>

How does this affect women? According to Donald Tomaskovic-Devey, bureaucratic structure can be manipulated to ensure the elites rise to the top. Weber discussed a phenomenon called social closure.<sup>91</sup> Social Closure refers to the process by which social collectives seek to maximize rewards by restricting access to resources and opportunities to an elite based on property and education.<sup>92</sup> Tomaskovic-Devey also notes that social closure processes are active ongoing attempts by the already privileged to preserve that privilege.<sup>93</sup> Once jobs are identified as female they are devalued. He also argues that large bureaucracies with formalized procedures should do away with job segregation; however when there is a steep hierarchy with a profusion of job titles that attach social distinction to them, women end up at the lower end. Tomaskovic-Devey also proposes that the fragmentation of tasks inherent in bureaucratization leads to job segregation.

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<sup>90</sup> Briskin, *supra* note 40 at 275.

<sup>91</sup> Donald Tomaskovic-Devey. (1993). *Gender and Racial Inequality at Work*. New York at 61.

<sup>92</sup> Dunleavy, *supra* note 79 at 188.

<sup>93</sup> Tomaskovic-Devey, *supra* note 91 at 9.

Bureaucratization enhances an organization's ability to conform to societal pressures. Job titles with fewer people associated with them are easier to segregate. Job segregation is a result of workplace processes and is structural in nature. Jobs take on gender characteristics which influence how jobs are organized such as, the level of complexity, autonomy, authority, manner of control and earnings. As the proportion of women increase in a job, wages fall and conditions deteriorate.<sup>94</sup> "Bureaucracy imposes the simultaneous isolation of individuals from one another and the depersonalization of the channels still linking individuals together."<sup>95</sup> Perhaps what Weber did not envision was that this fragmentation would be used to reinforce racism and sexism, by keeping women and minorities in low paying, job-segregated ghettos. The hierarchical pyramid structure of an organization makes it difficult for women to make lateral or upward moves in the organization.

Classical economic theory posits that profit pressures will force employers to hire the cheapest labour possible. According to this theory social closure should not happen because it does not make economic sense. The reason it does exist is that ideological, not economic, forces drive it. Once Weber's bureaucracy was married to scientific management and the concomitant rise in office technology, women faced increasing social closure. For example, clerical jobs were fragmented into full time specialities. In this type of corporate structure working class women are not the beneficiaries of profit making. Corporate law may not speak directly to this phenomenon but it does enable it. After all, the corporate law regime is supported by occupational health and safety, worker's compensation, labour and corporate criminal liability laws that recognize and enhance the more powerful position of corporate owners vis-a-vis workers. Common law principles and legal tests, such as the vicarious liability of employers for the acts of their employees and the 'controlling mind test' to discern when corporate members can be held responsible for workers' actions on behalf of corporations, underscore the distinction between employees and corporate directors and/or managers. This illustrates the division between social and economic classes and their different obligations under the law.

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<sup>94</sup> Tomaskovic-Devey, *supra* note at 10-13.

<sup>95</sup> Ferguson, *supra* note 75 at 12.



### Relational Feminism: Cohen

Cohen, like Lahey and Salter suggests that corporate law is masculinist. She advances the notion that the law seeks to preserve liberal philosophy and regulates individual self-interest.<sup>96</sup> Embodied in the law of corporations are values such as competition, hierarchy, aggression and classifications of roles.<sup>97</sup> Excluded values are those associated with women, such as nurturing, maintaining relationships and recognizing the symbiotic nature of our existence;<sup>98</sup> an ethic of care.<sup>99</sup> Cohen argues for corporate social responsibility, an ethic of care and quashing the separation between the private and public spheres. Despite Cohen's initial recognition that western law is tied to liberal philosophy, she prefers relational or radical models of feminism for analyzing corporate law.<sup>100</sup> In so doing she limits her self in the development of alternative strategies, and a truly feminist critique.

According to Cohen, developing a feminist critique of corporate law should be done through group consciousness raising, which is to be based on women's daily lives.<sup>101</sup> Experience with this feminist problem solving method in the 1960 and early 1970's found that it was limited in its usefulness. Some critics argued that middle class educated white women dominated the feminist discourse and, therefore, neglected the real experience of most women's lives. Haug illustrates the problems with this technique by arguing that, although it can lead women out of their isolation and into a sense of collective experience, the "mere exchange of personal experiences does not necessarily lead to greater understanding."<sup>102</sup> Group discussions can initially boost self-confidence, but can also sap people of courage in the long term.<sup>103</sup> Moreover, groups' lives are relatively

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<sup>96</sup> Cohen, *supra* note 1 at 10.

<sup>97</sup> *Id* at 11.

<sup>98</sup> *Id* at 11.

<sup>99</sup> The ethics of care originates with Carol Gilligan. She proposed that there were two realms: the public and the private. The public realm is dominated by men and is similar to Hobbes' all against all world. It is individualized and atomistic. The private realm is dominated by women and is based on human relationships and bonding. According to Gilligan the public realm dominates the private, but the public realm cannot survive without the private realm.

<sup>100</sup> Cohen, *supra* note 1 at 21.

<sup>101</sup> *Id* at 22.

<sup>102</sup> Frigga Haug. (1997) The Hoechst Company and Boredom with the Economy. In *Materialist Feminism: A Reader in Class, Difference, and Women's Lives*. Hennessy, Rosemary and Chrys Ingram, eds. New York: Routledge. 129-140 at 131.

<sup>103</sup> *Id* at 131

short.<sup>104</sup> It is difficult for most women to make connections between the daily oppression they face and the necessity for theoretical and metanarrative explanations unless this type of consciousness raising is guided. According to Haug: "[d]aily life cannot simply be inferred from the laws of capital, anymore than the laws of profit can be said to have a direct impact on domestic life in the family. And what can be said of everyone's daily life, namely that it cannot be explained by the laws that govern large-scale production, is even more valid when applied to women's issues."<sup>105</sup> Legal theory is abstract and far removed from poor and working class women, it is doubtful that this would be a class inclusive exercise. More realistically it would be dominated again by middle class white women. Moreover, it must be recognized that women from this social and economic class have a vested interest for maintaining the market economy and the status quo. Cohen's analysis fails to recognize these shortcomings of consciousness-raising because her level of analysis is radical/relational.

Given this analytical context, it is not surprising that in her discussion of liberal theory she fails to enunciate that it is not only normative, but also predictive, in so far as it encapsulated male values and capitalism. Cohen appropriately exposes liberal values as represented by notions of individual autonomy, the desire to protect private property and to increasing personal wealth.<sup>106</sup> In contrast, Cohen maintains that feminist theory sees the social nature of human beings and their social context and is not as atomistic as liberalism. This is problematic, and assumes that all strains of feminism are aware of and believe that these liberalist attributes are not desirable. The discussion above of various strains of feminism exposes the fallacy of this totalizing assumption. Liberal feminism rarely, if ever, challenges liberal values per se. This feminism merely argues that women should share equally in the benefits of liberalism.

Cohen reasons that corporations, as aggregations of individuals, take on the collective manifestations of liberal characteristics while profit seeking and accumulating wealth and property.<sup>107</sup> Yet paradoxically, she incorporates liberalism's notion of individuality by ascribing human capacities to corporations by arguing that the law should recognize corporation's collective

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<sup>104</sup> *Id* at 131.

<sup>105</sup> *Id* at 130.

<sup>106</sup> Cohen, *supra* note 1 at 23.

<sup>107</sup> Cohen, *supra* note 1 at 23.

power as arising from a 'corporate entity', and not merely as the result of an aggregation of individuals.<sup>108</sup> This ascribes characteristics to the corporation and moves it beyond the realm of a fiction. In ascribing separate powers to the corporation itself this recognizes another individual, which is consistent with liberal notions of individual autonomy and individual responsibility. However, Cohen's analysis must fail because she does not point out that liberalist notions of individual responsibility are made perverse by collectivities unless, as she does here, corporations are given an individual beingness.

Cohen's recommended changes must also fail. Since Cohen uses a radical feminist analysis, her conclusion that a feminist theory would be one of social responsibility and would require the recognition of the qualities of nurturing and caring, is a corollary.<sup>109</sup> However, this ignores the *raison d'être* of corporate existence and assumes that all women are inculcated with noble qualities and that, given the chance, women as directors and major corporate decision makers would forget about profits and shareholders and make decisions for the benefit of society. However, socialist feminism shows that not all women care about others. There is a dividing line between women, that of class. Women of the ruling class will make decisions pursuant to their economic, as well as gender, interests. As Glasbeek points out in his critique of the social responsibility movement, the corporation is a device to further capital accumulation and selfish profit maximization<sup>110</sup> Moreover, he points out the inherent assumption that this type of corporate governance would work is tenuous and hard to realize. Nor can the common interests of society be identified and defined in a way that the corporation does not only serve the interests of a few.<sup>111</sup> Changing the form of corporate governance only tinkers with corporations and does not attack the institutions and mechanisms which permit the ruling classes to perpetuate power.<sup>112</sup> If corporate leaders suggest social responsibility it is probably partly because of the fear of government regulation,<sup>113</sup> not because of any altruistic motives. Moreover, since corporations have legal responsibilities to stockholders and

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<sup>108</sup> *Id* at 23.

<sup>109</sup> *Id* at 24.

<sup>110</sup> Harry Glasbeek. (1988) The Corporate Social Responsibility Movement--The Latest in Maginot Lines to Save Capitalism. In *Dalhousie law Journal*. Vol.11, Number 2, March 1988. 363-402 at 380.

<sup>111</sup> *Id* at 380.

<sup>112</sup> *Id* at 399.

creditors, the idea that they also have obligations to the community, which may have very different interests, is complicated.<sup>114</sup> Cohen does not recognize this verifiable reality. She inaccurately assumes that all women's interests are the same and that women would automatically dump the profit motive if favour of operating corporations for the good of all society. This assumes that ruling class women would not act in their own interests. Although this may happen an occasion, it is rarely ruling class women who are victims of corporate practices and their products.

By adopting a "modified socialist feminist theory", Simpson and Elis show that the brunt of gendered corporate victimization is borne by working class women. This occurs in the labour market where women are disproportionately at the bottom and in less powerful positions.<sup>115</sup> It also occurs when minority and working class women try to seek legal redress from corporations from either work related injuries or injuries related to harmful products. The authors show that women usually use birth control products, cosmetics and hazardous home cleaning products. Working class women have less access to costly legal systems because laws, standards and classifications are gendered.<sup>116</sup> Women victims in tort cases are the "object of discrimination from the beginning of the legal process through to its conclusion."<sup>117</sup> Women's sexual history has been questioned on the witness stand, women get less in damages because it is geared to earning capacity and women are discriminated against in the labour market and earn less than men. Moreover, women are usually the users of birth control and corporate America "has consistently demonstrated the prioritization of profit over women's reproductive health by knowingly developing and/or marketing products that expose women to unacknowledged and unacceptable risks."<sup>118</sup>

The corporate victimization of women is even more acute when one looks at the case of Third World poor women. In the 1970's and 1980's these women were given IUD's that western governments had declared illegal because of the negative health effects on women in the west, but

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<sup>113</sup> Edward S Herman., (1981) *Corporate Control, Corporate Power*. Cambridge: Cambridge University Press. at 251

<sup>114</sup> *Id* at 253.

<sup>115</sup> Sally S. Simpson and Lori Elis. (1996) Theoretical Perspectives on the Corporate Victimization of Women. In *Corporate Victimization of Women*, Elizabeth Szockyj and James G. Fox eds. Boston: Northeastern University Press: 33-58 at 50.

<sup>116</sup> *Id* at 37.

<sup>117</sup> *Id* at 37.

<sup>118</sup> *Id* at 50-51.

corporations went in search of new markets with less regulation and they found them. This was also the case with the selling of infant formula in the Third World to breast feeding mothers. Corporations gave women free samples to start them up; women who tried the samples were forced to keep on giving their babies formula because once they stopped breast feeding they no longer lactated. Despite the fact that breast milk is free and better for babies, multinational companies like Nestle insisted on their corporate freedom to sell unnecessary products. It was not until there was a public outcry and boycott that both Nestle and the World Health Organization reacted, and corporations were forced to stop the practice. However, recently corporations like Gerber have been giving Third World women free items like tote bags to encourage the use of infant formula. Moreover, governments that have protested the practice find themselves as defenders of complaints to the World Trade Organization. For the most part, these governments cave in since they do not have the resources to fight the complaints and/or cannot deal with the fallout of trade sanctions. This reality of women's lives as corporate victims seems to fly in the face of the social responsibly movements and certain strains of feminism because it is the quest for profits that drives corporations.

### **Feminist Critique of Shareholder Limited Liability: Gabaldon**

"The ideal capitalist economy is one in which the greatest possible number of shareholders makes the greatest possible profits."<sup>119</sup> Shareholder limited liability facilitates this. One of the fundamental doctrines of corporate law is the legal concept of limited liability for shareholders. It means that shareholders with equity investment in a corporation will not be held legally responsible for corporate losses or transgressions. This flows from the legal proposition that the corporation is a separate legal personality. Shareholders when investing in a corporation put themselves at some risk, but the only risk they assume is the loss of their investment and nothing else. "They enjoy the benefits of involvement in a corporation without the full responsibility and risk which flows from their investment."<sup>120</sup> As Ireland explains, when shares were legally declared as property in their own right in the mid-1800's, "shareholders were no longer 'tied' to their shares, nor to the companies of

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<sup>119</sup> Tom Hadden. (1977) *Company Law and Capitalism*, Second Edition. London: Weidenfeld and Nicolson at 3.

<sup>120</sup> Hall, *supra* note 27 at 163.

which they were members or its assets."<sup>121</sup> In this way shareholders can easily slide their interests, in and out of corporations by buying and selling shares. This provides stability to companies because contributors can withdraw their money by selling shares without interrupting or injuring the affairs of the corporation.<sup>122</sup> Add this tenuous investor attachment to limited shareholder liability and the total effect is that of shareholders with little direct input into corporate decision making. Shareholders have some legal rights and responsibilities, including the right to attend general meetings of the corporation, to vote at shareholder meetings to elect directors and approve or reject what directors have done, to assign voting rights by proxy and to see the financial statements. However, shareholders do not want to have the right to be involved in the day to day activities of the corporation.

Using a class analysis one notes that in a capitalist regime it is unnecessary for shareholders to meddle in the day to day running of the corporation because it is assumed that directors, the key decision-makers, will act in their collective interest -- they will make decisions to act in their own self-interest, which is a class interest, to maximize profits. Presumably, efficiency reasons underscore the economic basis for limited shareholder liability.<sup>123</sup> It encourages risk taking and entrepreneurialism because investors are more likely to invest in risky ventures if they will not be held responsible for losses beyond their investment. This is particularly true of the wealthy investor, who is more likely to be sued for liabilities because they have deep pockets. Furthermore, according to Hall, "limited liability promotes patriarchal values because it underlies the division of power in the corporation."<sup>124</sup>

Using a relational feminist analysis Theresa Gabaldon discusses the doctrine of limited liability and corporate decision making. Gabaldon argues that in the search for profits corporations often impose risks on third parties.<sup>125</sup> She argues that limited shareholder liability is not in keeping

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<sup>121</sup> Paddy Ireland. (1996) Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality. In *The Journal of Legal History*. Vol.17, No.1, April 1996. 41-73 at 68.

<sup>122</sup> Hadden, *supra* note 119 at 13.

<sup>123</sup> Harry Glasbeek. (1995b) More Director Responsibility: Much Ado About...What? In *The Canadian Business Law Journal*. Volume 25.416-459 at 418.

<sup>124</sup> Hall, *supra* note 27 at 166.

<sup>125</sup> Theresa A. Gabaldon., (1992) The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders. *Vanderbilt Law Review* 45 (6): 1387-1456 at 1400.

with feminist values. Nevertheless, she believes that to suggest doing away with it is not feasible. Firstly, there is the possibility of capital flight if other states or nations do not also do away with it. Secondly, there are problems of implementation: for example issues around determining how to make people liable would be difficult.<sup>126</sup> Ultimately she recommends keeping limited liability, but also advocates taking steps to adopt reforms to empower investors and impose requirements that all businesses carry enough insurance.<sup>127</sup> Gabaldon proposes that "the concept of limited risk is a more suitable surrogate for limited liability," and is compatible with the precepts of feminism.<sup>128</sup>

Hall critiques Gabaldon's assumption that limited liability is 'natural' for shareholders because of legal and economic principles and that this is evidence of the naturalness thesis. Gabaldon argues that courts recognized limited liability before it was enunciated in statutes and, secondly, that the doctrine is consistent with other legal concepts of responsibility, such as those found in tort.<sup>129</sup> The law of agency requires an ability to control in order to create a principal-agent relationship and the law of tort calls for demonstrations of culpability and causal relationships.<sup>130</sup> Therefore, according to Gabaldon, limited liability for those with limited control responds to equity notions reflected in tort law.<sup>131</sup> However, she notes that in closed corporations where shareholders do have the ability to control it may not necessarily be natural to have limited liability.<sup>132</sup> She brushes off this anomaly by asserting firstly, that limited liability is not of much consequence for closed corporations because of the likelihood that voluntary creditors will ask for personal guarantees and that shareholders acting as corporate agents will be held liable in tort and secondly, that the piercing of the corporate veil by courts is more likely in the closed corporation context.<sup>133</sup> Gabaldon also appears to concede many points to the law and economics school in its assertion of the naturalness of limited liability. She reiterates the school's arguments that suggest that limited liability is necessary for efficiency reasons and categorizes some arguments as more viable than others. Although she effectively marginalizes some of the arguments, she seems to tacitly accept

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<sup>126</sup> *Id* at 1447.

<sup>127</sup> *Id* at 1448.

<sup>128</sup> *Id* at 1455.

<sup>129</sup> *Id* at 1399.

<sup>130</sup> *Id* at 1398-1399.

<sup>131</sup> *Id* at 1399.

<sup>132</sup> *Id* at 1401-1402.

others as more "convincing". The law and economics school, according to Gabaldon, argues that without limited liability investors would be limited in the number of entities they could, or would, invest in.<sup>134</sup> Secondly, although it discourages monitoring of investments by shareholders, it allows for a development of an active securities market that provides supervision.<sup>135</sup> Thirdly, it allows management to assume higher-risk endeavours.<sup>136</sup>

Gabaldon claims that limited liability, while tacitly invoking some aspects of contractarian theory without disputing its underlying premise of liberalism, is also justified because it has a lower transaction cost. The risk of an investment is reflected in the price of a contract that shareholders enter into if allowed to bargain with third parties.<sup>137</sup> Therefore, limited liability allows for more investment in risky ventures.<sup>138</sup> If there is any fallout from embarking on risky ventures it will fall on voluntary creditors who extract price concessions for assuming the risk. This is desirable according to economists because it maximizes social wealth through either the saved cost of less monitoring or because creditors will monitor more efficiently. Gabaldon, then goes on to dispute some aspects of these same arguments. She disputes the concept of voluntary creditors, and shows that the law and economics school assumes that even employees and customers are voluntary creditors,<sup>139</sup> and therefore, would demand more in concessions from the corporation before entering into a contract with them. This notion of voluntary creditors is consistent with liberalist notions of individual responsibility and autonomy; no one would enter into a contract except freely and upon being fully informed. This analysis fails to account for the unequal bargaining power workers have in this society; workers have nothing to bargain with except their labour power and do not have societal, political or legal supports to put them on a level playing field with employers. According to Glasbeek, the employment contract is distinct and is not a voluntary arrangement.<sup>140</sup> This is even more so in the case for working class women and/or Third World women because they are frequently used as a 'reserve army of labour' to discipline the western male labour force. It is not by

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<sup>133</sup> *Id* at 1402.

<sup>134</sup> *Id* at 1405.

<sup>135</sup> *Id* at 1406.

<sup>136</sup> *Id* at 1406.

<sup>137</sup> *Id* at 1407-1408.

<sup>138</sup> *Id* at 1408.

<sup>139</sup> *Id* at 1411.



accident that women in Canada earn two-thirds of men's wages and are occupationally segregated in jobs that pay less. There is a two-tiered labour market and for the most part the male and female markets operate independently of each other. Women have even less power to demand concessions from employers, not only because they have a lower unionization rate, but also because they have less mobility. Since women earn less, they often rely on a spouse's second income and it is not feasible for them to move to where the jobs are independently of their husbands. Capital is more mobile than it has ever been given regional and international trade agreements that has liberalized trade without giving labour the same mobility rights.

Without explicitly exposing that the nexus of contracts thesis is particularly harmful to working class women, no solution to the problem of limited liability will be systemic. Likewise, Gabaldon's relational feminist analysis results in the failure to fully unpack the contractarian and law and economics school analysis of limited liability. As a result the solution offered simply tinkers with limited liability and would result in even more diffused liability. It is not simply that the law and economics school valorizes efficiency arguments to the detriment of workers, but they also fail to actually expose the verifiable reality of women workers in the social, legal and political context. Underlying Gabaldon's recommendations is the tacit yet palpable notion that shareholder limited liability is "natural". Hall argues that to present limited liability as natural represents it as a neutral rule rather than a reflection of patriarchal and capitalist values it promotes.<sup>141</sup> "It discourages those who encounter it from challenging its perspective and bias, and contributes to the internalization of the values it enforces."<sup>142</sup> As Hall notes, legal principles are never 'natural', but are social constructs.<sup>143</sup> This notion on its face appears attractive to unpacking the limited shareholder liability, especially when applying it to the real world of corporate law. Gabaldon offhandedly dismisses an indepth discussion of closed corporations, yet as stated above over 95 percent of corporations in Ontario are such entities.

Since this is the case, it would make more sense to tailor legal concepts to reflect reality rather than the liberalist fallacy of maximizing social wealth by accommodating aggregate

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<sup>140</sup> Glasbeek, *supra* note 1 at 127.

<sup>141</sup> Hall, *supra* note 27 at 166.

<sup>142</sup> *Id* at 166.

<sup>143</sup> *Id* at 166.

investment in corporations. This is consistent with the notion that corporations are incompatible with liberal capitalist notions of maximizing social wealth, as opposed to individual wealth, because corporations do not actually increase societal wealth but ruling class wealth to the detriment of the working class. This also calls into question the meaning of social wealth. In a market economy it appears to mean accumulating wealth for the sake of accumulating wealth through the production of goods and services sold in the market. It is argued that this fosters innovation and efficiency since the market is a neutral arbiter of distribution. However, what it really means is that in a capitalist system we value goods over the well being of people. For example, our political economy favours nuclear weapon production over good, regulated day care, because one is profitable and one is a societal burden. Currently, the distribution of wealth is so skewed with a disproportionate amount held by the top 1 percent of western society, that reality is simply not represented in corporate legal tenets and statutory instruments that maintain this inequality of wealth and favour individual wealth accumulation over that of society's in general. As Hall argues:

The law, in allowing limited liability, not only has the real effect of relocating risks by reducing shareholder liability (in the same way the separate legal entity doctrine reallocates directors' responsibilities) but it encourages individuals and society as a whole to think that this sort of shifting of risk is desirable. It stimulates a mentality that legitimises individuals artificially distancing themselves from the real life effects of their involvement in activities, and, in the process, it decreases society's perception of personal responsibility.<sup>144</sup>

Therefore Gabladon's recommendations, if accepted, could further perpetuate the myth of aggregate social wealth accumulation through limited shareholder liability because it gives the appearance of increasing corporate democracy and minimizing the consequences of corporate risk-taking on its victims, whilst masking and preserving the fundamental notion that shareholders would still bear no legal or political responsibility for corporate actions. Gabaldon's recommendations of empowering investors and imposing insurance requirements on businesses,<sup>145</sup> are in keeping with a capitalist paradigm of the morality of financial incentives to increase wealth. This seems inconsistent with a feminist ethic of care that is promoted on compassionate grounds, a much

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<sup>144</sup> *Id* at 168.

different morality than the financial gain model which is clearly at play in the corporate decision making process. White argues that feminism indicates that different decisions would be made if the impact of those decisions were to trigger a moral dimension in the decision-maker, which in turn would help to separate decision-makers from the abstract process.<sup>146</sup> Since decisions are made in the abstract they are based on considerations weighted in favour of the profit motive.<sup>147</sup> "The moral pangs seem to arise when there is a separation of those who decide the activity and its level of risk from those who end up bearing the risk."<sup>148</sup> How can the capitalist notion of morality, which includes a belief in the inherent fairness of the market, be taken to task by empowering investors and imposing insurance requirements? How is it possible to make corporate decision-making less abstract without attaching responsibility for those decisions?

Gabaldon asserts that part of the problem stems from investor passivity which occurs as a result of their limited input in the decision making process. If investors had more input they would, the theory goes, be less removed from the abstract decision making process and therefore, be more apt to replace a pure cost benefits analysis with one that takes into consideration the real impacts of decisions. To underscore this point, Gabaldon asks what would have happened had Ford shareholders been involved in resolving the issue of exploding gas tanks; would they have voted to let them explode? "Is that how you would have voted?" Gabaldon asks the reader.<sup>149</sup> By Gabaldon's analysis, more shareholder input would have resulted in a vote to not let the gas tanks explode. However, this is a utopic over-simplification. It fails to consider that, despite the legal constraints regarding shareholder rights and responsibilities that currently exist, there was nothing to stop shareholders, if they were not motivated by profits, from stopping the exploding gas tanks by publicizing the issue and politically and socially embarrassing both directors and other shareholders. After all, these people have agency and are empowered within our society. Limiting possible remedies and shareholder action to legal vehicles fragments social responsibility and, once again, valorizes the law. If shareholders were motivated by an ethic of care, they would have gone public

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<sup>145</sup> Gabaldon, *supra* note 125 at 1448.

<sup>146</sup> White, *supra* note 31 at 273.

<sup>147</sup> *Id* at 273.

<sup>148</sup> *Id* at 274.

<sup>149</sup> Gabaldon, *supra* note 125 at 1431.

no matter what happened behind the closed doors of a directors meeting. Why then did they keep silent? A socialist feminist response to that question recognizes that class interests are a cohesive social and political force and are paramount when disproportionate wealth accumulation is the motive. It is not simply a problem of abstract corporate decision making, it is a conscious strategy to favour one group of people's interests over another's. In a capitalist system corporate decision making is decontextualized from its consequences because the only context considered is one of profit seeking. This decontextualization is intentional, goes beyond legal form and principles and is substantive. It means that reasonable people knew that gas tanks would blow up, but looked the other way anyway. Just like reasonable people looked the other way as Jews were killed in concentration camps. Everybody knew it was happening, or they ought to have known, but very few did anything to stop it until they were overwhelmingly compelled to.

Mandatory insurance will not make shareholders more responsible either. The only positive effect this might have is that victims of corporate risk-taking might have more access to compensation. This brings up the whole issue of access to justice by working class and poor people as well as the issue of quantifying injuries in monetary terms. This is impossible, for injuries to people and the environment are never truly quantifiable. How does one measure the loss of a woman's biological reproduction capacities because she was exposed to hazardous chemicals? Furthermore, by placing monetary values on harm maintains the economic status quo: for example, a woman homemaker injured in the home using a cleaning product would get less in damages than a male CEO because her loss of earnings would be less.

Insurance seems to be inconsistent with Gabaldon's concern over capital flight problems. Given that corporations prefer to locate in environments where they can operate unfettered by regulations and financial responsibilities to anyone but shareholders, why then would they acquiesce to the additional cost of mandatory insurance? Are some externally imposed costs acceptable for corporations and others not? This argument is problematic and encourages state to state competition in the race to lower labour standards, decrease environmental regulation and cut corporate taxes. Corporations take many things into consideration before relocating. Why do corporations locate in environments with higher corporate tax rates in the first place? Possible answers include: access to markets, a skilled labour force, an adequate state infrastructure, the rule of law, etc. The home

location of corporations still matters. Most corporate boards are comprised of members from the home country. This partially explains why corporations are psychologically and sociologically tied to their home base. Why then, on the one hand, would doing away with limited liability incur capital flight but mandatory insurance would not? Surely, corporations averse to incurring more externally imposed costs would argue that it would make them less competitive? This is the case unless a corporation can make someone else pay the cost.

As far as deterrence is concerned, insurance severs the connection between those responsible for the harm and the consequences by allowing them to pay compensation indirectly through insurance. Although Gabaldon purports to support less abstract decision making, insurance coverage distances risk-taking from responsibility for the harm it causes because shareholders do not pay for it. The costs of insurance as a rule are not borne by corporations, they are passed on to consumers and employees through higher prices and wage concessions, profits are rarely affected. Since there is no financial loss to shareholders to carrying insurance why would this mediate or influence decision making in favour of more social responsibility? This initiative also seems contradictory to advocating for more investor empowerment, because insurance removes the financial incentive to act more responsibly. Gabaldon argues that passing on costs of harm to an insurance provider is an improvement over the current state because insurers have the ability to impose restraints on the insured.<sup>150</sup> However, the insurance industry is not one of innovation and creativity. If the automobile insurance industry is anything to go by, their lackadaisical supervision has not led to increased vehicle safety, instead it has resulted in higher premiums for drivers. Employer paid worker's compensation insurance schemes do not result in fewer workplace accidents, but they do encourage the under-reporting of accidents where there are experience rating systems that offer rebates to employers with a lower accident rate.

The validity of Gabaldon's community input on its face is not antithetical to the goals of minimizing corporate harm and increasing shareholder responsibility, but it is problematic when insurance companies are considered "community representatives". "From a feminist standpoint, the mandatory enterprise insurance plan has the distinct advantage of using community viewpoints to

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<sup>150</sup> *Id* at 1452-1453.

establish the adequacy of the insurance an enterprise will carry."<sup>151</sup> What Gabaldon is advocating is the equivalent of foxes supervising other foxes in the hen house. Since when are insurance companies any more a part of the community than the corporations they insure? Insurance companies are businesses driven by the profit motive and also have shareholders to satisfy. Aside from business "community standards", which community standards could they possibly impose? Not to mention the problem of who would oversee insurance companies.

Gabaldon's feminist analysis of shareholder limited liability starts off as promising but in the end does not offer a systemic critique of it. Without placing the concept in its proper place, as an instrument which facilitates corporate accumulation of wealth within a capitalist economy, it is given short shrift. It remains an abstract and decontextualized legal and economic tenet. Furthermore, her recommendations do nothing to challenge the existing status quo, but instead would tend to enhance it.

### **Alternatives to the Corporation?**

The above feminist analyses are useful in that they expose many of the problems with corporate law and the corporate form. However, aside from Gabaldon's confined recommendations to limited shareholder liability, the authors offer no concrete alternatives. A couple of the recurrent themes in the above feminist analyses' of corporations and corporate law is the theme of fragmented corporate decision making and the necessity for a feminist ethic of care. What legal form then might actually attempt to incorporate feminist principles, whilst making corporate decision making less fragmented?

From a socialist feminist point of view, the priority for any alternative would be to imagine an entity that is less profit oriented and more solidaristic, which would not oppress working class women as capitalist patriarchy does now. Moreover, it would make the connection between the public and private spheres, and the role of women in production and reproduction, with a view to re-appropriating the inequitable distribution of wealth. Since socialist feminism recognizes that the differences between men and women are not pre-social givens, but are socially constructed, then they are also socially alterable. The alienation framework links women's oppression to the home

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<sup>151</sup> *Id* at 1455.

with both men's and women's experience in wage labour. Therefore, any changes to our society demands more than just change in capitalist relations of production. For women to achieve equality patriarchal institutions must also be challenged. Socialist feminism seeks the democratization of institutions that constrain their choices. It also recognizes women's labour in the home must be taken into account when any reforms are discussed that would be meaningful to women.

Given that capitalism is overarching and seems well entrenched in western society, short of a revolution, what type of legal form would help fight the day-to-day oppression women face and be a mediating factor? A viable alternative is worker or consumer co-operatives, which are legally provided for at the federal level as well as in Ontario and some other provinces. A co-operative is a voluntary and democratically controlled association of people that are usually "formed for the purpose of increasing, through the benefits of co-operative association, the economic welfare of their members."<sup>152</sup> Co-operatives can be incorporated as long the articles of incorporation conform to the statute. As long as that happens the Minister will grant a certificate. For a workers co-op, there is a minimum of three members.<sup>153</sup>

A worker co-operative incorporated under the Ontario *Co-operative Corporations Act*, has many of the same legal rights and responsibilities as typical corporations. For example, members have limited liability as long as the protection provided is not used to avoid paying debts, and as long as the total number of members does not fall below three in the case of a worker co-op.<sup>154</sup> Similarly, directors are the co-op's legal representatives and their decisions, and the actions they authorize, are the co-op's.<sup>155</sup> Directors are elected by members to provide management and policy.<sup>156</sup> Directors must also act honestly, in good faith and in the co-op's best interest: in conducting business, directors must exercise the same care and skill they would apply in conducting their own affairs.<sup>157</sup> The law for co-operatives parts company with regular corporations by giving its members more rights than corporate shareholders. Each member has the same right as other members: no member, except for elected directors, has any more say than others do. This situation

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<sup>152</sup> Daniel Ish. (1981) *The Law of Canadian Co-operatives*. Toronto: Carswell. at 1-3.

<sup>153</sup> *Co-operative Corporations Act*, R.S.O. Section 5(1.1) ("Act").

<sup>154</sup> Ministry of Finance Ontario (1995) *Co-operatives in Ontario: Legal Requirements*. at 4-5.

<sup>155</sup> *Id* at 20.

<sup>156</sup> *Id* at 20.

<sup>157</sup> *Id* at 21.

is very unlike that of shareholders that may or may not have voting rights. Furthermore, in worker co-ops at least 75 percent of employees must be members, and only employees can be members.<sup>158</sup> In this way employees are not left out of the decision making loop, with the exception of those decisions and responsibilities that have been delegated to directors. Those who are elected as directors also have to be members of the co-op.<sup>159</sup> This makes for a flattening of the decision making hierarchy, and since directors are members/employees any choices they make are informed by their position as an employee. Moreover, there are onerous democratic requirements built into the Act. For example, directors can only change or make by-laws with the approval of two-thirds of the members' approval.<sup>160</sup>

Nevertheless, despite this democratization of the decision making process, this does not ensure that a feminist ethic of care would be inculcated into the organization. This is especially true since, operating within the confines of capitalism, a co-op is still an economic unit and can generate profits. However, this model assumes it will not necessarily be a co-op's *raison d'être*. Moreover, according to the Act, the articles of incorporation for a workers co-op must provide that the co-operative's primary object is to provide employment to its members.<sup>161</sup> In this way a co-op's surplus or profits can be used to create reserve funds or pay dividends on shares. In a worker's co-operative, returns may be paid, credited or allocated to members based on the number of hours worked or the total compensation received each year.<sup>162</sup> However, because of patriarchal norms, women can still find themselves shut out of the decision making process because sometimes it takes more than democratic forms to effect real and substantive democracy. This may be achieved by paying attention to processes that effectively keep women's voices from being heard. Outcomes should be evaluated with a view to ensuring that women, and particularly women of colour, have a real say in the direction of the co-op's affairs. In other words, this would demand ensuring that the tyranny of the vocal majority does not sacrifice the voice of the minority by constantly paying attention to results and/or formalizing women's representation. This could be accomplished by ensuring that

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<sup>158</sup> *Co-operative Corporations Act, Section 1 and Ministry of Finance, 3*

<sup>159</sup> Ministry of Finance, *supra* note 154 at 20.

<sup>160</sup> *Co-operative Corporations Act, Section 23*

<sup>161</sup> *Co-operative Corporations Act, Section 1*

<sup>162</sup> Ministry of Finance, *supra* note 154 at 31.



there are an equal number of women directors or by forming a women's caucus among members in the co-op's by-laws.

Nevertheless, the co-operative legal form does nothing to prevent the corporate victimization of women as consumers, per se. The worker co-op model facilitates a more consensual and egalitarian model of work relations and business decision-making. Although the legal form does not mandate it, to varying degrees the co-op social model assumes a certain level of working class solidarity. Workers as business owners have a less abstract connection to collective decisions and business practices because they are directly involved in both. Individual profit capabilities and maximization are lessened because all members share equally in any surplus. Within the co-op model one party or group involved in the enterprise does not benefit to the detriment of others because there is only one group--the worker manager shareholder group. The limited liability contemplated in this model allows for the creation of this type of business. Similar to the corporate legal model, it ensures that people only risk their investment and not their personal property when investing and creating the business. Although this is by no means a complete answer to the problems discussed above regarding the severing of the connection between taking risks and imposing risks on consumers it does ensure a more direct assumption of responsibility for business decisions because those making decisions are also responsible for the implementation of them. Unlike shareholders, co-op members do not delegate responsibility for decision-making, they assume it. Consumer co-ops provide more protection for buyers. This model is also contemplated in the legislation and it is possible to graft it onto a worker's co-op.

The Sleepless Goat Café<sup>163</sup> is one such example of a workers co-operative. This establishment is located in the downtown area of Kingston, Ontario and was formed after a couple of people bought out the original owners. The café is part restaurant and part catering business and has thirteen members. They are incorporated under the Act and their by-laws mandate that all the members are directors and the whole membership elects a President and Secretary Treasurer. A majority of the Sleepless Goat co-op members are women. They have included an anti-oppression statement in their by-laws that commits the co-op to the fight against oppression in all its forms.

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<sup>163</sup> Information about the Sleepless Goat Café is taken from their by-laws, articles of incorporation and speaking with members.

They have also committed one percent of the surplus money left, after paying off internal capital accounts, to community projects to be decided on by the workers. (Not all employees are members, but at least 75 percent are members.) Workers and members get employment bonuses as well. Workers have the right to apply for membership. To be eligible for membership people must purchase five shares for \$100 each and the membership is subject to being an employee who has worked a minimum of 800 hours and a minimum of eight months. They must also support the objectives of the co-operative.

The members of the Sleepless Goat are very active in political, environmental and social justice causes. They provide free soup to street kids and have been involved in fundraising for the Low Income Needs Coalition, a Kingston anti-poverty organization. As members of the Kingston Downtown Business Association they are usually a lonely voice in advocating against police harassment of street youth and panhandlers. At the same time, since they are members of the association they can thwart business campaigns that target these marginalized groups by finding out their internal plans, publicizing them and putting an alternative spin on it. Many co-op members recently formed the People's Community Union which is organizing a bicycle user's co-op, is involved in direct action campaigns that help tenants about to be evicted and welfare recipients that are facing problems with social assistance, and has helped fundraise for the local youth shelter. What makes the co-op work as an agent fighting oppression is not just the legal form it has assumed, but also the goals of its members: their by-laws did not have to include an anti-oppression statement or mandate funding community projects. However, the regular corporate form would have been poorly suited to pursue these goals. Under the Act, workers in a co-op are paramount, which can help to build working class consciousness as well as sympathetic with other marginalized groups in our society. This type of organization more approximates the feminist ethic of care.

The main foreseeable problem a workers co-op can encounter is the lack of ability to raise capital to form a business. This is usually the main problem when plants close and the workers try to take over ownership and organize a worker buy-out. It is not enough that there are alternate legal forms to corporations. This must be supported by a different kind of loan-making and entrepreneurial vision than currently exists. However, what co-operatives do show is that it is

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possible to build a microcosm of a different kind of society and morality than that of the market's and distribute social wealth more equitably than is currently done. Nor are there any arguments of any probative value that show it would not be possible to implement this on a more systemic basis. Social movements and unions in developing countries have implemented lending circles, consumer and worker co-ops to higher degree than exists in the North. In other words, working class people can come up with and have developed business enterprises that suit their needs more effectively than corporations even if all they do is mediate the effects of capital. Moreover, in participating in the market they more closely approximate the goals of the market because they do not accumulate capital for the sake of accumulating capital. These co-operative forms of business are more involved with the distribution and the allocation of resources and can help with societal wealth maximization and enhance worker and member dignity.

## **Conclusion**

Corporate law and corporations are legal constructs. They operate to maximize profits and facilitate the accumulation of wealth for owners, directors and shareholders. From a socialist feminist viewpoint, they are instruments of oppression and help perpetuate the patriarchal system of human relations. Corporations exploit workers and victimize consumers. Since women have less political, social and economic power in western society they disproportionately bear the brunt of this victimization. Other strains of feminism, when used to analyse corporate law and corporations, fail to take this into account. The articles of Lahey and Salter, Cohen and Gabaldon provide some unique feminist insights into corporate law, but their accounts are limited because they universalize the category of "woman". They attribute the term "masculinist" to values and norms that are not only the result of patriarchy, but also of liberalism and capitalism. By neglecting to give credence and attributing significance to the influence of these forces, feminist theory is incomplete. Alternatives and solutions which seek to change aspects of corporate law and corporations that fail to consider these realities and influences are incomplete. From a socialist feminist point of view, the priority for any alternative would be to imagine a business organization that has as its primary aim

not profit, but a place where workers and women would be free of oppression. Such an organization would provide a vehicle for real social change and would challenge the status quo.

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