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Feminism, Corporations, and Capitalism: Policy and Protest

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Feminism, Corporations and Capitalism: A Research Agenda
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Introduction

To consider the relationship of feminism, capitalism and corporation law is a daunting task for the reason that it requires a reconsideration of first principles. What does a feminist perspective have to offer an analysis of the American business corporation and its place in our capitalist economy? How might such a perspective generate original research in the area of corporation law? Would a more "feminist" corporation necessarily be a less profitable one? If feminist law reforms came at a net economic cost to firms or shareholders (which is not the foreseeable result, necessarily) might the proposed law reforms be justifiable, on the basis of net social gains, nevertheless?

Part I of this prolegomenon first proposes certain axioms for a feminist approach to corporation law scholarship. These "feminist propositions" are intended merely to commence discussion, rather than to constrain it. Part II presents a research agenda that is, it is hoped, consistent with feminist values and concerns.

Part I: A Feminist Perspective

What essential set of principles or common outlook might form the basis of a feminist perspective on corporation law? The question is immediately controversial, of course. Nevertheless, consistent with the idea that "the perfect" should not be the enemy of "the good," it is worth risking controversy in proposing a set of common principles that might support a feminist analysis of capitalism and corporation law. In working through these principles, it becomes immediately evident that at the level of theory, a feminist approach has much in common with a generally progressive or left-leaning orientation. It is anticipated, however, that a feminist orientation would lead, in its application, to the analysis of substantive areas of corporate conduct that are particularly of concern to women and proponents of womens' equality and womens' rights.

In regard to the latter point, the research project described in Part II does not expressly address womens' rights in relation to corporate conduct. Its analysis and insights are intended, however, to facilitate law reform that would enhance norms of democratic participation within corporate firms, including greater responsiveness to the needs and interests of workers. To the extent that a more democratic, egalitarian and, thus, worker-friendly firm resulted, and/or if the law reforms discussed below were to give rise to a greater sharing of the corporate surplus with workers, women would foreseeably experience a net benefit, both in economic and extra-economic terms. [n.b.: statistical information on women as shareholder claimants versus women as workers..]

Axiom #1. A feminist perspective on capitalism and corporate law might proceed upon the premise that economic transacting is merely one form, one subset of the larger category of human social relations. As Karl Polanyi stated in The Great Transformation, "The outstanding discovery of recent historical and anthropological research is that man's economy, as a rule, is submerged in his social relationships." [p. 46] In this regard, the broader predicament of the human condition (including bounded rationality, inter alia) and human social needs must be considered, must be taken seriously, in thinking about the interests and concerns of corporate constituents (i.e., shareholders, labor and management -- and potentially others). Neither psychology nor sociology, nor the other human sciences, can be regarded as exogenous to the study of business and capitalism.

Such an expanded focus would validate, for example, the possibility that certain investors might value the opportunity (or "right") to make informed choices (i.e. a right to receive full, accurate information) vis a vis the uses and results of their invested capital, independent of attendant pecuniary gains or losses. It would also validate the notion that investors may be motivated by concerns for fairness and democratic process, in addition to more narrowly instrumental, pecuniary motivations. Certainly, Tom Tyler's (psychological) research on "procedural justice" suggests that this is the case. A feminist orientation towards corporation law need not be critical of arrangements facilitating wealth creation – and Tyler's work validates the notion that feminist corporate reforms facilitating greater fairness, egalitarianism and democratic processes would not foreseeably result in net economic losses (and might indeed portend the opposite). As a core principle, then, a feminist approach to the analysis of capitalism and corporation law would oppose the notion that distributional considerations can be separated from, or can be regarded as secondary to goals of wealth creation or "allocative" efficiencies.

Axiom #2. A feminist perspective is antithetical to claims based on fixed categories and historic right. It is suspicious of zero-sum reasoning and the common scholarly tendency to cast choices in terms of deadening, binary oppositions (efficient/inefficient, capitalist/socialist, private(property) /public(property). In this regard, for example, the property law scholarship of Carol Rose and most recently Michael Heller (See, e.g., The Liberal Commons, Yale Law Journal, with H. Dagan), in which "the commons" is proposed as an alternative, intermediate concept to "public" versus "private" land constructs, may be helpful in countering the conclusions and momentum generated by viewing the corporation as the private property of its shareholders.

Axiom #3. A feminist perspective takes seriously both the study of social norms and social institutions (including those having to do with economic activity, such as corporations), without reifying them. That is, norms and institutions are to be viewed as being at the same time both powerful (in their capacity to structure and thus influence human behavior) and malleable (in being subject to legal and practical evolution as a result of theoretical innovation. In this regard, the feminist reconstruction of the institution of "the corporation" may not be so foreign to this scholarship's analytical and ideological reconstruction of "the family."

Consistent with this focus, for example, one would question why the "nexus of contracts" understanding of the corporation, while it has endorsed the contractual basis of the firm (and thus elided the issue of the purpose or effects of the corporation *qua* institution), has all but ignored the "nexus" part. Although the "nexus of contracts" school of thought has acknowledged the superficial interrelatedness of corporate "contracts" (for example, that debtholders' covenants protect them from a board of directors' potential decision to subject the firm to enhanced risk), it has failed to take seriously the interdependence of corporate co-venturers as a potential source of positive gains. This failure to take seriously the synergies that enhanced trust and mutual recognition might produce is more surprising in light of Ronald Coase's explanation of the motives for organizing economic activity within firms (as opposed to through isolated, market transactions). Thus, a feminist approach would take the "nexus" part of the nexus of contracts paradigm at least as seriously as the contractarian part in defining corporate law's role in optimizing concerted action among management, labor and the contributors of capital.

Axiom #4 Underlying this sensitivity to the role and influence of social norms and social institutions is a commitment to the view that theory matters. A feminist approach declines to conflate what exists with what is optimal (or necessarily freely chosen); and it assumes that there is no pre-theoretic, pre-political position. This is crucially important in opening new vistas in corporation law because mainstream corporation law scholarship, with its law and economics orientation, has represented itself as being "atheoretic" – as if "the market" is natural, pre-theoretic and thus apolitical. A feminist approach to the study of corporation law and capitalism would reject the "naturalness" or inevitability or "pre-political" nature of current market-based arrangements (including the accepted notion that there is something fundamental about the idea that capital hires labor). In analyzing individual human beings' choices as they interact with firms and in the broader capitalist economy (as well as the political institutions that facilitate current economic organization), a feminist approach remains alive to the understanding that theory inhabits us -- whether or not we are aware of it consciously. [See, e.g., Michael Sandel, Democracy's Discontent, "But if political philosophy is unrealizable in one sense, it is unavoidable in another. This is the sense in which philosophy inhabits the world from the start; our practices and institutions are embodiments of theory." Preface, ix.]

Axiom #5 A feminist perspective rejects the mainstream, law and economics norm that individuals are atomized, self-seeking, rational "utility" maximizers. In this regard, it takes issue with the conservative branch of utilitarianism (i.e. one which rejects value pluralism) and with neo-classical economics. In the alternative, a feminist perspective may be compatible with certain forms of egalitarian liberalism, at the same time that it stands in opposition to libertarian liberalism. Ultimately, in it's analysis of corporations and capitalism, feminism's most natural philosophical ally may be (some version of) communitarian thought. [n.b. Carlin Meyer's objections, inter alia]

In charting a feminist research agenda for corporation law, these axioms should be addressed in analyzing (i) the distinct interests of "the firm," as opposed to individual sets of claimants (ii) shareholders' relations inter se and with management (iii) the relative claims and prerogatives of the entire range of corporate claimants – *viz* management (the board and executive officers), capital (whether debt or equity) and labor and (iv) the expectations and entitlements of investors in securities markets.

Part Two:
Feminism, Capitalism and Political Theory in the American Law of Corporations

Introduction

What does political theory have to offer an analysis of the American business corporation and a feminist orientation thereto? This piece envisions a comprehensive revisiting of the construction and significance of American corporation law in relation to feminist principles and political theory; it surveys both the states' corporation codes and the fiduciary case law. The central premise of the piece is that political philosophy is inseparable not only from law in general, but from both the existing construction (and potential reformulation) of corporation law in particular. Some version of political philosophy inhabits the corporate form and the legal and political structures and institutions that support it. That said, American corporation law's theoretic commitments remain murky. They have, for too long, been obscured by the law and economics paradigm in which market arrangements are represented as natural, pre-political and atheoretic.

What happens if the corporate form, and in particular, the particular creature of the American public corporation, is analyzed in relation to the dominant paradigms of contemporary political theory – that is, utilitarianism, liberalism and communitarianism? Does one theory fit the corporation laws that we have more than another? What corporate attributes or what laws or rules or standards would have to change to make the business corporation more "true" to any of these philosophies? What types of gains and losses would likely arise if law reforms reconfigured the American law of corporations according to any of these philosophies?

Part I Utilitarianism. Utilitarianism is the dominant political paradigm underlying the law and economics critique of the corporation, which is to say mainstream corporation law scholarship. Within this tradition, the corporation (or more generically "firm") is posited as being the private property of the shareholders. Under scrutiny, the notion of the firm being a private body is constructed, within this discourse, in tautological terms. That is, the firm is regarded as private because, it is contended, individuals are able to maximize their utility through individualized contracting in private arrangements. Because individualized bargaining, it is argued, is the basis for the maximization of utility (by definition), the firm must be private.

This view of the corporation also connects up with fundamental neo-classical economic norms in which financial capital is understood to "hire" labor. The accepted wisdom that capital hires labor was of great concern to the founders of the American republic, who saw the vulnerability of wage labor to (at least) economic enslavement and political coercion. Jefferson, certainly, regarded private land ownership as crucial to the maintenance of political liberty. Nevertheless, the private property basis of the corporation (or of political liberty, for that matter) is not to be taken for granted.

Ultimately, the concept of the corporation as the private property of its shareholders is tenable only if one assumes that 'state ownership' is the alternative to "private" property. Because a shift to viewing the firm as "collective property" owned by all is surely to radical, the "private" nature of the firm is reinforced. Within this binary construction, corporations are surely more assimilable into the category of private property than public – if one assumes that the latter term implies that the firm is an agency, an extension of the state.

However, recent innovations in both corporate finance and in the legal academic literature on theories of property undermine the absoluteness of the claim that the firm "is" the private property of the shareholders. In the field of corporate finance, as Frank Partnoy has demonstrated unequivocally in his writing on financial derivatives, debtholders can quite plausibly be regarded as owners of the firm who have sold an option to the shareholders, exercisable contingent on certain indicia of (positive) financial profitability being met. Conversely, the shareholders can be regarded as the owners, who, analogously, have a put to sell the firm to the debtholders in less happy financial circumstances. Taking Partnoy's configurations seriously, the lesson learned from understanding derivative financial instruments, is that ":ownership," in relation to the corporation, is a highly malleable concept. Assignment of "ownership" status shareholders, as opposed to debtholders is arbitrary and conventional. Scholars may prefer the idea of shareholders as being the owners in part because it is so longstanding, and in part because it may be more difficult to conceive of the firm without shareholders than without debtholders (although venture capital arrangements are making this less difficult to imagine, in fact).

Recent innovation within the theoretic literature on property law also makes the concept of the firm as the private property of its shareholders less tenable. In particular, the evolving notion of the "liberal commons" provides an appealing and highly plausible alternative heuristic for conceptualizing the corporate person. The "liberal commons" is not to be confused with "open access" property. Rather the common is "open access" in relation to the accepted participants, and private property vis a vis third parties. The advantage of conceiving of the corporate person as "liberal commons" is that it captures the intuitive understanding that the multiple corporate constituents can prosper, optimally, only in conditions of trust and collaboration, that is through joint, concerted action (or at least in the absence of opportunism). If either shareholders, debtholders, labor or management engages in opportunism, indeed if there is only a pervasive fear or expectation of opportunism, then returns to all corporate constituencies will be reduced. In addition, the innovation of the "liberal" commons attempts to reconcile the accommodation of individual interests, Perhaps the most challenging aspect of the commons notion, for the American business corporation is determining who is on the inside of the commons, and who is on the outside.

The historically mainstream understanding of shareholder primacy, in which the corporate entity is conceived of as the private property of the shareholders is supported by the relative absence of the discussion of non-shareholder constituencies within the states' corporation codes, and the fact that fiduciary obligations are currently, absent extraordinary circumstances such as insolvency, enforceable through derivative suits only by shareholder plaintiffs. The import of the presence of concerns relevant to shareholders (and not debtholders or workers) within the states' corporation statutes and the fiduciary case law is less persuasive than one might assume, however. State corporation law may "cater" to shareholders' interests on the theory that they are more prone to problems of collective action than are contributors of debt capital or workers. At least historically, workers had considerable opportunity to be represented to management through unions. Banks and holders of corporate notes were represented through their lawyers. Only subscribers to public debt securities were, potentially, as dispersed as shareholders – but such debtholders are not infrequently institutions, and thus more capable of organizing themselves to protect their interests through contract. Furthermore, Congress intervened, through the mechanism of the Trust Indenture Act, to make sure that public debtholders would not be subject to unfair expropriation or other pathologies of constrained collective actions.

In fact, the rights afforded corporate shareholders, through the state corporation statutes and the fiduciary case law are far more limited than they appear at first blush. The state codes say nothing about the primacy of shareholders' interests in relation to firm governance. The promise of shareholder elections for directors is limited by corporations' ability to stagger the board (into four classes in New York, so that directors would ordinarily be subject to election only every fourth year, and removable, consistent therewith, only for cause), shareholders' limited occasions for action, beyond the annual meeting (that is their constrained ability to act by written consent in many cases and their failure to obtain a right to call a special meeting by operation of law). Shareholder voting on fundamental corporate acts and transactions (such as mergers, sales of assets and certificate amendments) is also highly restricted and dependent on managerial assent.

Again, utilitarianism has provided the most significant, justificatory philosophy for current corporate arrangements. Yet utilitarianism's usefulness to proponents of the private property/contractarian/shareholder primacy way of thinking is not as self evident as scholars have assumed. Utilitarianism says nothing about precisely what value is to be maximized. Should economic values (i.e. short term financial profit) be the exclusive metric, or are values such as security, autonomy, longer-term welfare gains (including profits) and concern for the generation of externalities of significance in considering corporate arrangements -- even those relevant to shareholders? Law and economics writing has not allowed for plural values, but the analysis of corporate arrangements along feminist lines forces the question into the open.

Utilitarianism, furthermore, does not resolve the "us versus them" problem of corporation law, as stated above. If we take utilitarianism seriously, it offers no justification for making the maximization of shareholder utility (even assuming that were monolithic, which is already problematic, as stated above) the sole or even preeminent criteria for structuring corporate arrangements. If maximizing utility is the concern, then shouldn't the project be to maximize the most utility for the most actors, and not merely or even primarily shareholders? What prior claim do shareholder have to having their utility maximized at the expense of other contributors of long term capital or firm specific resources? Taking utilitarianism seriously would seem to undermine the working assumption of shareholder primacy, and the "privateness" of the corporation. If "maximizing" is the goal: then maybe the state should get busy in structuring arrangements that are proven to be most "maximizing."

In addition, it is not at all clear that the working notion of the firm as the private property of its shareholders is "maximizing" overall. Again, the working hypothesis has been that endorsing the "private" nature of the firm facilitates individual contracting that maximizes wealth. Even if this is accepted on the level of theory, since utilitarianism is fundamentally teleological, we shouldn't be most concerned with the theory, but with the result.

It is simply unclear that current norms of shareholder primacy, and the conception of the firm as the private property of the shareholders, does in fact "maximize." If we care most about making firms most profitable, then we should be ready to endorse any means available to do so. The American model is not clearly the answer. Studies in comparative corporate governance or political economy do not support the idea that it is the definitive answer to maximizing anything, certainly. [See Bernie Black's research suggesting that governance changes have little impact on firm performance, as well as his recent international pieces assessing firm returns under foreign governance regimes.]

In addition, research in the area of behavioral law and economics suggests that individuals err systematically in making decisions that would maximize their utility. If we want to maximize utility then, then the state should enact laws that seek to correct for these biases. Of course, the alternative decisional frames that are regarded as errors to the utilitarian economist may in fact be alternative value preferences (such as for fairness or justice norms – which in the corporate context might play out as reductions in income inequality or greater opportunity for the expression of minority viewpoints). If we care most about maximizing "utility" (and one would assume that this means maximizing it across the broadest range of persons), there reason to believe that legal reform of existing corporate arrangements is warranted.

Part II Liberalism. It is more plausible that the notion of the "private" firm rests on political biases rather than positive, objective economic principles. That is, it is argued herein that the belief in the private nature of the business corporation is a particular variant of political liberalism, and libertarian liberalism in particular – more than it is the result of objective or inevitable market forces or economic principles. We have settled on the belief that American corporations are private actors out of the same sensibility in which we laud the private rights, the private life of real, human individuals. We endorse the private nature of the corporate legal person because the idea of the "private" corporation speaks to our political consciousness, our concern for the maximization of liberty, of freedom of action, as much as to economic principles related to the maximization of utility.

Within the American political imagination, the private firm is a bulwark against state-based coercion and tyranny. This can be seen as a variant of the Jeffersonian belief in the liberating power of personal property. We like the idea of corporations as a "free" agent. The concept of "freedom" in the notion of free markets means just this: it is the foil to governmental tyranny or coercion, not just a statement about the wisdom (in a utilitarian sense) of minimal regulation. The "free market" idea is rhetorically powerful: we hope to be freed by freeing the corporation. We hope for the independence that we imagine may come with wealth. Within the American political construct we rely on a constitution to protect our most cherished rights; we don't perceive the need to be protected from the "private" corporation.

Put simply, the contractarian, privatist norm at the heart of the utilitarian corporation is not well supported in empirical terms -- a major shortcoming for a teleological theory. From the perspective of libertarian liberalism, however, the firm is "private" because constructing it thus. legally, jibes with our broader philosophical and political aspirations to freedom. Or, at least, this is true at first blush.

What is the inheritance of libertarian liberalism, if one sees current corporate arrangements in this light? First, libertarian liberalism has bequeathed to us a corporation in which corporate management is afforded a truly staggering degree of discretion to determine both the immediate substance of corporate policy and action, as well as the vision or larger objectives of such action. Although contractarians and law and economics scholars take the primacy of shareholders for granted, the law in fact does not necessarily, or at most only very loosely supports this viewpoint. The corporation as liberal actor maximizes the freedom of its managers to make whatever choices appear "best" for the firm, without specifying, in most instances, precisely why any decision was consistent with shareholder (short or long term) value. Corporate fiduciary law had already, in effect, given managers the discretion that the so-called "other-constituency statutes" purport to afford managers by legislative fiat. Absent some foolhardy decision on the part of management to deny even the potential for long term, indirect economic benefits to the firm and the shareholders, managers' decisions are unassailable, based on the "business judgment rule." [See Ford v Dodge Motor Company, where Henry Ford practically begged to have the court find against him in determining he had stepped beyond the allowable range of managerial discretion -- in that case in relation to dividend policy.]

Corporate fiduciary law imposes certain minimalistic process-based limitations on managerial conduct. As a function of the duty of loyalty, management cannot help themselves to corporate assets (i.e. compensate themselves) "under the table," or in private -- the duty of loyalty imposes a constraint on secret-profit taking. Managers cannot act on an uninformed basis in their decision-making, consistent with the duty of care. They also have the obligation to establish and maintain internal information gathering and reporting systems that will produce the data necessary for good governance. Of course, neither the duty of care, nor the duty of loyalty or any other fiduciary duty says anything about what the "good" of good governance is. There is little if any vision of "the good life" of the American business corporation within corporation law – this would be "anti-liberal," of course.

Within the theoretic construct of libertarian liberalism, corporations are autonomous, individual actors, to be governed by management accordingly. The state has given corporations speech rights, so managers can elect to make them speak; there is, moreover, no narrow limitation (within fiduciary law or elsewhere) that the speech must be directly related to corporate business affairs. Similarly, the law has facilitated (or failed to delimit) the entrenchment of political power in the hands of corporate management. It is only in this moment that Congress is considering limiting the soft money corporate donations that have allowed management to manipulate federal election laws. On the matter of corporate charitable contributions, once again, corporations -- which is to say their managers -- are free to act, or not to act. The law allows corporations to make charitable contributions, or not, with very little in the way of constraint. The law corporate management extraordinary discretion in determining what benefits to afford employees. The law affords corporations to elect to make widespread disclosures to shareholders and the market of information about the treatment of employees, environmental safety compliance, product safety compliance, workforce safety compliance, political and charitable contributions, inter alia: but neither corporation law nor even federal law mandate such disclosure. The expectation of transparency that accompanies state action, does not apply to firms -- on the notion that they are "private." The byproduct of libertarian liberalism's "freeing' the corporation has been to "free" management to pursue (or fail to pursue) its own, relatively individualistic vision of the place of the corporation within society and its responsibilities (or lack of responsibilities) thereto.

What might it mean if corporation law were to take the liberalism more seriously? Alternative, less "libertarian" and more "egalitarian" models of liberalism might have different import for corporation law. For example, mechanisms of shareholder voice could be significantly improved. Current corporation law pays lip service to notions of shareholder free choice and autonomy. This is evident in the state statutes' provisions for shareholder voting, for example. It is reflected, furthermore, in corporate fiduciary law's proscription of managers' "entrenching themselves in office" in the face of a valid offer to acquire corporate control; in the "fiduciary duty of disclosure" line of cases that appears to validate norms of shareholder (informed) free choice. These same concerns are also evident in the line of cases that requires managers to demonstrate "compelling justification" for interfering with the shareholder franchise.

However, upon closer look, it becomes evident that American corporation law has failed to deliver on principles of (egalitarian) liberalism, both in relation to the establishment and facilitation of democratic mechanisms of governance and otherwise. There are substantial impediments on shareholders' individual rights to pursue derivative actions. The occasions for shareholder voting within state law are frequently highly attenuated: in most states shareholders have no right to call a special meeting by operation of law, and may act by written consent without a meeting only on the basis of a presence of an extraordinary proportion (e.g. a supermajority or even unanimity) of shares voted. The stated doctrine that managers can interfere with a shareholder vote only upon ":compelling justification" has been diluted down in its subsequent application by the courts. And American corporation law has never fostered robust worker representation, either through board representation for labor or the extension of fiduciary duties (on the part of management0 to labor. (See comparison with German co-determination.) ...

Part III Communitarianism and the Power of the Legal Counselor.

[Discuss how open ended nature of corporation law provides lawyers who would counsel boards of directors and executives the opportunity to address matters of ethical, philosophical and political import, in addition to legal and economic matters.]