Women (Re)incorporated:
A thesis examining the application of feminist theory to corporate structures and the legal framework of corporate law.

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Abstract

The thesis is about the re-incorporation of women, on feminist terms, in corporate law and structure. Working from the idea of feminism as a theory about exclusion, the thesis endeavours to include women's voices in how the dominant discourse shapes corporations and the securities markets. Moreover, it attempts to capture the feminist continuum and use it as a critique of the existence of the separate entity of the corporation and limited liability. The thesis also joins the corporate governance debate on feminist terms, reshaping its scope to include feminist aspirations. The market for securities and insider trading are also subject to a feminist analysis and the problems in policing and preventing insider trading are rethought through a feminist lens.

La présente thèse traite de la ré-incorporation des femmes, selon les théories féministes, dans le droit corporatif et la structure des sociétés. Développée sur l'idée que le féminisme est une théorie sur l'exclusion, cette thèse vise à incorporer la voix des femmes dans les débats actuels sur le droit corporatif et le droit boursier. Par ailleurs, cette thèse définit le continuum féministe et l'applique à la critique de la notion corporative d'entité distincte et de responsabilité limitée. La thèse rejoint également le débat sur l'administration des sociétés en y introduisant les notions féministes. Le droit des marchés de valeurs et la question du débit d'initié sont aussi soumis à une analyse féministe, et les problèmes de prévention et de réglementation des opérations réalisées par des initiés sont reconsidérés à la lumière des idées féministes.
Chapter One: Introduction

The Perspective

The choice and purpose of a thesis is a personal and political one. It must fulfil certain academic requirements yet should also relate to the interests of the writer if she is to engage with her subject matter. Thus the choice of a thesis to examine the application of feminist theory to corporate structures and corporate law is a decision to attempt to combine the meta-narrative (and politics) of legal concepts and personal approaches to life.

A personal approach is not enough in this scheme of things but thankfully my own feminist sensibilities have been debated, dominated and deconstructed by many, and feminism as a theory (whether local or universal) has developed exponentially. As a result and with reference to diverse feminist scholarship, the purpose of this thesis is to use a feminist perspective to shed light on an area of law that also holds my interest.

I have studied and practiced corporate law for some years and the complete absence of feminist dialogue on the subject in Ireland was presented as a given: feminism concerned women and not companies even though women are represented at all levels of the company. My thesis wishes to join with the growing number of feminists who acknowledge that 'neutral' legal structures are
in fact gendered, in a way that the concept of woman and her experiences are both marginalized and excluded. Hélène Cixous writes,

> Woman must write for her self: must write about women and bring women to writing, from which they have been driven away as violently as from their bodies ... Woman must put herself into the text – as into the world and into history – by her own movement ... Her writing can only keep going, without ever inscribing or discerning limits ... She lets the other language speak – the language of 1,000 tongues which knows neither enclosure nor death.¹

By writing and adding to the discourse, in albeit a modest way, my thesis intends to place women in the discourse of the corporation (recognising us as within, outside and beyond).

How can I identify what feminism is - why it is not socialism, humanitarianism, liberalism?² This is becoming a more controversial question with the presence of Postmodern and minority feminists finding voices in feminist theory. Denise Réaume warns that “articulating feminist distinctiveness in terms of women’s commonality has given rise to an unfortunate dynamic, as competing accounts all at least implicitly claiming to define the meaning of feminism, proliferate”.³ Réaume suggests shifting the focus of the definition of feminist critique from a substantive emphasis on women to the employment of a more conceptual analysis of feminist scholarship which regards “any argument that some or all women have been excluded from the design or application of law”⁴ as feminism.

² This question is posed in Denise G. Réaume, “What’s Distinctive about a Feminist Analysis of Law?” (1996) 2 Legal Theory 265 [hereinafter What’s Distinctive].
³ Ibid. at 266.
⁴ Ibid. at 298.
Thus, I would argue that my query as to why women have been excluded from how we theorise and create corporate law would appear to be a correctly feminist pursuit.

Methodology

As this is a feminist thesis, I will draw from the feminist pool in regards to methodology. Methodology is of particular concern to feminists as they seek to reconstruct theories of and approaches to knowledge that are not colonised by patriarchal notions. Katharine Bartlett was one of the first to identify feminist methodologies. Bartlett argues that the methods she identifies are feminist as they “reflect the status of women as ‘outsiders’”. Her distinctive categories are repeated throughout feminist theory and can be described as:

(1) identifying and challenging ... those elements ... that leave out or disadvantage women and members of other excluded groups (asking the ‘woman question’); (2) reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas ... (feminist practical reasoning); and (3) seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative (consciousness raising).

These methodologies have been supplemented and condensed by various feminists. Esther Vicente describes storytelling or feminist narrative scholarship

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5 Katharine Bartlett borrows Catharine MacKinnon’s definition of method as organising “the apprehension of truth; it determines what counts as evidence and defines what is taken as verification”, see note 6 at 830.
7 Ibid. at 831.
8 See for example the articles referred to in note 23 below.
9 Feminist Legal Methods at 831.
as "innovative ... provid[ing] ... insights which escape all other legal methods". Indeed the story as "thinking concretely" brings women's particular and local experiences to light, putting women, to paraphrase Hélène Cixous, into the knowledge.

However, feminists should also be wary of methodology in that although the examination of method may necessitate more serious consideration of feminism by the law, it is universally acknowledged that we rarely choose a method to contradict our political goal. Feminism must appreciate the bias (whether it be feminist or patriarchal) inherent in methodology. Jeanne Schroeder, in her study of feminist methodology, demonstrates how developments in scientific theories of methodology could help the feminist debate. Rather than resorting to a feminist stereotype of science Schroeder explains how science has incorporated 'positionality' in its investigations. She also illustrates the scientific scepticism towards methodology.

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11 Kathryn Abrams, "Hearing the Call of Stories" (1991) 79 Calif. L. Rev. 971 at 1051.
12 Feminist Legal Methods at 831.
13 To paraphrase Jane Austen, in Pride and Prejudice.
14 Denise Réaume describes this tendency of adopting a "too 'thickly' substantive" (essential woman) perspective in What's Distinctive at 292.
16 Schroeder in particular refers to the Heisenberg Uncertainty Principle which states that at subatomic level the act of observation changes or brings into being what is being observed, see ibid. at 130.
17 Schroeder points to Paul Feyerbrand as an example of this scepticism stating that he suggests that different methods may be more or less adequate for different tasks and that it is very difficult, if not impossible, to define ahead of time what method is best suited to the task at hand. She argues that he believes that method and conclusion are inevitably developed and refined simultaneously. See ibid. at 151.
With this sceptical approach to methodology, I will make good use of Bartlett's categories for simultaneously attacking and explaining women's exclusion from the corporation. Like Réaume I will focus on the concept of exclusion but will use the feminist methods where they throw light on women's segregation.

Unfortunately, much like the liberal individual, this thesis must have boundaries. In more feminist terms: it is only a small picture of the larger narrative. Feminism, and especially Marxist or socialist feminism, has very valuable and insightful critiques of capitalism which I shall deal briefly with in chapter 2. However, I do not extend the thesis to concern these critiques despite the corporation's central role in dividing labour from production and reifying and commodifying experience. Unlike Theresa Gabaldon, I will not examine extensively what a feminist corporate model would look like. I leave this to the organisational experts in chapter 4. I do not question the system of raising capital on the open market and its investment for an equity interest or a fixed return when I critique insider trading. I leave untouched the right of the investor to sell her interest in a corporation if such an entitlement was part of her agreement. This is not because any of these pillars of capitalism or the corporation cannot be assessed critically through a feminist analysis. It is rather because I wish to focus on certain aspects (as opposed to others) of the corporation and corporate law.

Feminism does require that we change our locality and world radically. But this

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18 See discussion below note 260 and accompanying text.
20 See infra note 251.
will only ever be achieved in pieces, gradually, through consensus, co-operation and understanding. Thus, my thesis tends more towards realistic and practical feminism than the revolutionary variety, all the while acknowledging that one of our central revolutions lies in our challenge to the patriarchal status quo.

The Thesis

The thesis follows a traditional linear and rational structure (which, in terms of style, may on the surface appear contrary to the more postmodern ways of writing as woman). I present feminism, explain certain corporate issues from the prevailing mainstream perspective and finally use the former to critique the latter.

Chapter 2 deals in depth with different feminisms: Liberal, Cultural, Dominance and Postmodern feminism. I sort through the primary theories (or lack of such) grounding these feminisms and describe the internal critiques that arise to probe the different assumptions and beliefs behind each. Feminism is not a reductive theory and yet it is difficult not to reduce the feminists I discuss into categories of positions taken. I attempt to constantly remind the reader of the work against essentialism that feminism does. Thus I hope to provide an overview of feminism while emphasising its richness in its sheer diversity and disagreement.

Chapter 3 is a simpler or more difficult task (depending on the reader's standpoint) in that I try to present corporate law and structure as a neutral
paradigm governed by similarly located individuals to maximise the benefits to society. I do this in order to establish the exact position feminism is antithetical to, setting the stage for chapter 4. I consider three corporate concepts: the separate legal entity of the company and limited liability, the issue of corporate governance and the debate over the regulation of that issue and the securities market and insider trading. In each of these matters I strive to relate the mainstream debates about these concepts and how such has been resolved by both the legislator and the companies themselves.

Chapter 4 culminates in the feminist critique of the corporate concepts outlined in chapter 3. Taking from Cultural, Dominance and Postmodern feminism, I apply their theories of exclusion and reconciliation to critique and then attempt to resolve the corporation more in line with feminism. As law and economics scholarship has such a pervasive grasp on corporate and security markets theory, I also critically examine some of the premises of that scholarship, in regard to individuality and the inconsistency of the ideal market.

Finally, my conclusion in chapter 5 is about tearing up the thesis and scattering it against the wind of exclusion and patriarchy.²¹

²¹ The reader is free to inscribe herself in the text (see Nelly Furman, “The Politics of Language: Beyond the Gender Principle” in Feminist Literary Criticism) and thus produce many different texts, metaphorically tearing the ‘original’.
Chapter Two: Feminism Modified

Introduction

The purpose of the present chapter is to give an overview of the main branches of feminism and their areas of influence. It is difficult to adequately capture the breadth and depth of feminist thinking. There are as many feminisms as there are women.

There are many lenses of theory (some created by feminists, others not) and feminism has glanced through most of them, but the glass of feminism is tinted woman. Whether a woman may consider herself more connected to her ethnicity, religion, sexual preference, nation or specific ideology - if she addresses an issue by sympathetic reference to how women are effected or excluded or with an awareness of the imperceptible inequalities often perpetrated against women - then her scholarship/analysis is feminist.

I group the feminist theories I examine below into four categories: liberal feminism, Cultural/Difference feminism, radical feminism and Postmodern feminism. Undoubtedly within and outside these categories there are other classifications which perhaps deserve more recognition than they are given here.

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22 See What's Distinctive.
such as lesbian feminism, Marxist feminism, Black feminism, French feminism, but I hope to some extent that I touch on these through the categories I have chosen.

Liberal Feminism

Liberal feminism could be regarded as the mother of all feminist thought. Nursed in the cradle of the social contract theories of Rousseau and Locke,24 and nineteenth century European liberalism propagated by philosophers such as John Stuart Mill,25 it primarily addresses the autonomy of the person and the rights of the individual. Most early liberal theory focused on men, to the neglect of women, who were still perceived as their husband’s or father’s chattels and therefore did not merit the equality and autonomy sought for men.26 However some of the early liberal philosophers began to spread their nets to include women in aspects of their discourse on equality.

Locke, in the seventeenth century, addressed patriarchy27 and the role of women (mostly as wives) as he struggled with the “equal Right every Man hath, to his Natural Freedom”.28 Certain contemporary feminists regard Locke’s ideas about divorce and the limitation of the rights of a husband over his wife as progressive

26 Ibid.
27 The Sourcebook at 292.
28 Ibid. at 317.
for his era. Although Locke appears to have never gone far enough as to include women in the political arena, he did distinguish a woman’s property rights from those of her husband, and argued that women were as capable of rational thought as men.

Mary Wollstonecraft, one of the earliest English advocates for women’s rights, played a major role in applying liberal theory to women’s issues. She rebutted many of her contemporary male thinkers who had defined women as lesser rational beings (given that rationality was a central concept in liberal theory) but had great difficulty in reconciling women’s traditional roles in the private realm with their participation in public life.

Wollstonecraft’s cause was taken up later in the nineteenth century, amidst the crisis of the industrial revolution, by John Stuart Mill, who addressed the place of women in society in his book The Subjection of Women. Mill applied liberal theory to the position of women in society and concluded that the “legal subordination of one sex to the other - is wrong in itself ... and one of the chief hindrances to human improvement.” This inequality, he argued, arose from the advantage taken by men in their superior strength to women, which over time

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28 Ibid. at 321.
29 Ibid. at 322.
30 Ibid. at 319, see also Married Woman’s Property Act 1882 which eventually gave women the right to own and manage personal property.
33 Ibid. at 38.
34 The Sourcebook at 135.
became an accepted system within which women became bonded to men without actually determining whether such a system was "conducive to laudable ends." He argued that the subjugation should be replaced by perfect equality.

As liberalism evolved in the twentieth century, it brought with it essential tenets concerning the primacy of individual liberty, and the rationality and autonomy of the individual. Consequently one may identify feminist thinking today as liberal when it is primarily concerned with these issues.

Thus, while the first women's movement in North America and Western Europe began to gain momentum much of its reasoning was based in liberal theory. This early, or first wave, of the women's movement in the late nineteenth and early twentieth century sought equal access to property, parliament and the professions. The evolving political systems in Europe and North America adopted liberal theory as their cornerstone and women framed their arguments for advancement on the premise of liberal assumptions about the intrinsic dignity of the person/woman and on the human/woman's capacity for reason.

The importance of liberalism to the early feminist movement cannot be overstated, as women began to speak on terms that their political male

35 Ibid. at 136.
36 Ibid. at 135.
37 Feminist Jurisprudence at 96.
38 Limits of Equality at 30.
40 Limits of Equality at 31.
counterparts recognised, even if they did not accept all the suffragette's propositions. Liberal theory formulated by men and appropriated by women for their ends laid respectable importance on values accepted by the other causes swelling in society concerning labour and welfare. Indeed, many members of the women's movement combined their feminism with labour activism, work for the welfare of the poor and the abolition of slavery.

Liberal feminism was also the source of the second wave of the women's movement in the 1950s and 60s. Expectations about economic and reproductive independence arose out of the movement's desire to see individual women participate in the new prosperity. The call was again to equality, as women pled before national and supranational courts seeking equal opportunity and equal treatment. Liberal feminism sought, and continues to seek, women's integration into 'mainstream' society. Although liberal theory concerns equality, rationality and justice, it does not always respond properly to the real experiences of women. Liberalism, with its emphasis on rationality and the idea that somehow the mind is transcendent and the body a cage within which it is enclosed, undermines the meaningful centrality of women's bodies to their lives.

43 This was certainly the case in Ireland where feminist nationalists at the beginning of this century such as Countess Markievicz combined their struggle for women's rights with labour and welfare activism.
Liberalism cannot fit the pregnant woman into the 'equality map'. To do so liberal feminism has had to alter the scope of liberal philosophy to recognise the unequal level from which women must progress in order to join her privileged male colleagues.

If liberal feminists sought to distance themselves from the woman/nature versus man/reason paradigm, then they unwittingly found themselves buying into a structure constructed over centuries to favour the independent prosperous male. The promises of other-worldliness, salvation of the soul and the perils of the temporal nature of the body⁴⁶ locates liberalism deep within the worldview of a religious middle- and upper-class man and thus fails to give adequate voice to the more immanent and day-to-day experiences of women (and other groups) who labour to maintain quotidian life outside this elite bastion. Liberalism’s ideas may claim to be ‘transgendered’ yet its conceptions of individuality do not recognise (whether by choice or otherwise) the collective nature of women’s lives.

Liberalism has provided women with affirmative action, ambition and access to training, but it cannot make up for the structural barriers and inherent preferences for a specific kind of equality which it establishes. The equality preached by liberalism paradoxically enlists women into structures that were designed without them in mind. It could be argued that liberalism’s attempts to

⁴⁷ Feminist Politics at 186.
make up the difference merely requires women to work harder than ever at two jobs instead of one (or to earn enough money to pay someone else to do so) in order to hide or play down the difference and to buy their way out of inequality. Liberal democratic society has worked for well-educated white women but many women continue to remain ghettoised in lower paying jobs and to bear the full responsibility for their children.49

Feminist liberalism thus succeeds within the horizon of late western capitalist society but it does not think beyond the prevailing ideology, to interrogate to what degree patriarchy should remain the cornerstone of our civilisation.50 Feminist liberalism has used the powers in play to push a feminist agenda but this agenda does not involve rewriting the basis of the social contract itself.51 With birth control and wider access to education for women, liberal feminism gives some women the opportunity to participate in the public arena, but presumes that once all the barriers for participation in public life are removed feminism will have inherently completed its objectives.

The feminisms I discuss below provide many critiques of liberalism’s failure to adequately defend the differences and multitudes of women. Summarily, if all that liberalism requires is for women to be equal to men, it neglects what women have learnt from our experience of being women. The unique sensibilities that

48 Ibid.
50 Feminist Jurisprudence at 124.
51 Feminist Jurisprudence at 110.
arise from this experience\textsuperscript{52} could be integrated into society's treatment and consideration of its constituents, both on the margins and in the centre.

**Difference/Cultural Feminism**

The Difference school of feminism is based on the research of Carol Gilligan and other psychologists and psychoanalysts\textsuperscript{53} in the field of developmental psychology. Gilligan, in researching the moral development of girls and boys and men and women, discovered that girls developed different moral strategies from boys in dealing with moral dilemmas.\textsuperscript{54} She identified these strategies in girls and then women as more relational and connected than the more abstract and independent approaches of men and boys. Unfortunately when she compared the different logic of both genders to the accepted standard tables for moral development she realised that the moral reasoning of girls and women rated as being morally less developed than their male counterparts. This discovery laid the basis of her thesis that women's way of approaching moral questions and resolving problems has been excluded from the representation of human development. Therefore when this difference is recorded and discussed, it is invariably seen as inferior to the standard, or more accurately male, model.

Gilligan explains in *A Different Voice* the kind of moral reasoning that women possess, by reference to examples of the dilemmas posed. In one study, she

\textsuperscript{52} bell hooks, "Postmodern Blackness" (1990) 1 Postmodern Culture 1 [hereinafter Postmodern Blackness].
\textsuperscript{53} Feminist Jurisprudence at 143.
discusses how Clare’s view on abortion “casts the dilemma not as a contest of rights but as a problem of relationships, centering on a question of responsibility which in the end must be faced.”55 Gilligan concludes, in her final chapter ‘Visions of Maturity’, that:

[i]n view of the evidence that women perceive and construe social reality differently from men and that these differences center around experiences of attachment and separation, life transitions that invariably engage these experiences can be expected to involve women in a distinctive way.56

Moreover, Gilligan describes how women’s sense of integrity appears to be entwined with an ethic of care, so that to see themselves as women is to see themselves in a relationship of connection.57 Nancy Chodorow and others have theorised that this emphasis on relationships arises from the fact that men, who have had to individuate themselves from their differently gendered mothers in order to grow, tend to see moral dilemmas as problems of separateness and individual rights. For men problems are choices to be made and priorities to be ordered. Women, who need not completely separate from their same gendered mother in order to grow, see the world in terms of connections and relationships.58

Gilligan’s comparison of women with theory59 struck a resounding chord with feminist and other legal theorists concerned with woman’s place within the

54 Carol J. Gilligan, In a Different Voice (Harvard: Cambridge, 1993) [hereinafter Different Voice].
55 Different Voice at 59.
56 Different Voice at 171.
57 Ibid.
58 Redistribution Justice at 1282.
theory and formulation of law. Perhaps in response to the over-determined philosophy of liberalism, women were looking for a different way of explaining and solving legal questions. Thus Gilligan's different voice theory has been used to argue change in corporate law, bankruptcy law, hearsay, and lawyering.

Leslie Bender applies Gilligan's theories to tort law, arguing that the standard of care (or level of caution) used in courts excludes women's methods of approaching problems, and asks "[w]hat would happen if we understood the 'reasonableness' of the standard of care to mean 'responsibility' and 'the standard of care' to mean the 'standard of caring' or 'consideration of another's safety and interests?'"

In response to her question Bender reasons that instead of using economic efficiency as the standard (which has come to be used by the tort court) judges should hold people to a higher standard of real care which actually recognises

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60 Redistributive Justice at 1276.
61 Kathleen A. Lahey & Sarah W. Salter, "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23 No. 4 Osgoode Hall L. J. 1543 [hereinafter From Classicism to Feminism].
65 Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J. of Leg. Ed. 3 [hereinafter Lawyers Primer].
66 Ibid. at 31.
67 Ibid. at 30.
the interconnection of people (the drowning of one person is a tragedy for many people connected to the victim). She points to the torts rule of 'no duty to rescue' in her analysis, but also suggests that other aspects of negligence could also be subject to a feminist critique on the basis of women’s propensity to appreciate a higher standard of care. Bender suggests that “[c]aring about and for others’ safety and interests is part of reasoning, but it is a part that has been subordinated because of its gendered identification with women.” 68

Gilligan and her proponents’ theories are very seductive, in part perhaps because they appear ethically superior, or better in holding people to a higher standard of behaviour towards each other.69 However, Gilligan was careful to avoid stating that women’s approach was intrinsically ‘better’ than men’s, while highlighting that listening to women’s voices was ‘better’ than ignoring and not representing these voices,70 the reason she sought their inclusion in the prevailing psychological theory.

If we follow Bender and agree that women’s approach to responsibility is somehow more comprehensive than white middle class men, how can we expect men to follow the female standard if their ‘rigid and more linear’71 moral reasoning does not require them to rescue or prevent the archetypal blind man from walking into traffic?72 Things become even more problematic if the

68 Feminist Tort at 578.
69 At least Bender seems to imply so in Feminist Tort.
70 Feminist Discourse at 61.
71 Feminist Tort at 587.
72 Feminist Methodologies at 120.
defendant is a man or male entity (such as a corporation) and the plaintiff a woman. The question would arise as to which standard of caring the defendant should be held. It is dangerous to speak in terms of a male or female standard, firstly because courts already do, to the detriment of women. Secondly, it begs the question: how can one convince the (male-orientated) legal system to apply a female standard to males, as this is the gender inequality that feminism has been arguing against?

Cultural feminism, in my opinion, is a reaction against the pervasiveness of liberal ideology (which, it has been shown is a white western masculinist structure) in formulating our ideas about how people relate to each other and act. Cultural feminism provides a positive way of looking otherwise at situations. Its dangers lie in making this different way too ‘female’ or woman related, when it may be wiser to argue that such standards arise as a result of a common human experience of patriarchy and subordination. Women who break the law are treated more harshly than their male equivalents because society already expects them to behave in a more caring (i.e. stereotypically ‘maternal’) and social fashion. If we are to push for a more connected and caring torts law or legal system we should do so on the basis that society should treat its citizens with more concern as to their relationships and responsibilities to others.

Cultural feminism is also criticised for essentialising women, by not recognising the other kinds of femaleness, by not exploring the negative consequences of

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over-connection and the theory’s tendency to see problems in (liberal) terms of binaries and opposites as opposed to multiples. These criticisms arise primarily from the Dominance and Postmodern schools of feminism, which I will discuss in greater depth below.

In regards to problems of essentialism in Difference feminism, Black feminists in particular have pointed out that non-white women have different experiences of morality and different expectations of communities than Gilligan’s well-educated, white, middle-class subjects. Carol Stack has demonstrated in her research that the caste and economic system within rural Southern communities, for instance, creates a setting in which Black women and men have a very similar experience of class.75 She suggests that, “under conditions of economic deprivation there is a convergence between women and men in their construction of themselves in relationship to others, and that these conditions produce a convergence also in women’s and men’s vocabulary of rights, morality, and social good.”76

Moreover, Stack identifies a specifically African-American model of moral development, which appears to be very different from those of Gilligan. Angela Harris also argues against gender essentialism in feminist legal theory by describing it as dangerous because when it attempts to “extract an essential female voice from the diversity of women’s experience, the experiences of

74 Ibid.
women perceived as 'different' are ignored or treated as variations on the (white) norm".77

Catharine MacKinnon, on the other hand, challenges the roots of Difference feminism by observing that:

a failure to situate thought in social reality is central to Carol Gilligan’s work on gender differences in moral reasoning. By establishing that women reason differently from men on moral questions, she revalues that what has accurately distinguished women from men by making it seem as though women’s moral reasoning is somehow women’s, rather than what male supremacy has attributed to women for its own use ... Women may have an approach to moral reasoning, but it is an approach made both of what is and of what is not allowed to be.78

Where Difference feminism finds women’s connection and potential for relational understanding as a positive thing, radicals hear the threat of women’s forced interconnection and feel the violation of intimacy, which although culturally we are required to value, unofficially women dread as an intrusion.79 Jeanne Schroeder80 brings an alternative perspective to the debate on Gilligan’s theories by questioning the appropriateness of leaping from the hypothesis about women’s thought processes to jurisprudential conclusions. She points out three problems with Difference feminism. Firstly, she considers that Different Voice feminism “confounds feminine difference with the dominant masculinist

76 Ibid. at 322-323.
78 Theory of State at 51.
79 Robin West, “Jurisprudence and Gender” in The Sourcebook at 234.
80 Feminist Methodologies at 123.
gender stereotype”. Secondly, she considers that the adoption of masculinist gender stereotypes “threatens to make feminist and masculinist jurisprudence into dualistic opposites, reducing gender jurisprudence to gender loyalty”.

The third problem Schroeder identifies is the theory’s essentialist bias, which she concludes “squelches feminine diversity and the hope of communication with masculinity”.

Despite Difference feminism’s failings, Gilligan and the work of other theorists in this field have brought the silence of women who do not fit the patterns of the autonomous sovereign self and the connected presumptions about moral philosophy into the light so that feminists may examine the possibilities of including many women’s voices within the dominant discourse.

Radical Feminism

Radical or Dominance feminism can be identified as an overarching theory about the sex/gender system in society. Thus I include feminist Marxism and MacKinnon’s Dominance theory in this category.

Feminist writers have used Marxism as both a sounding board and punching bag for their theories. Simply put, Marx, in examining history, developed a

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81 Ibid. This criticism is similar to that posed by MacKinnon above.
82 Ibid.
83 Ibid. at 124.
theory about social change based on its material or economic evolution. Marx subsumed women into his analysis, rarely considering their position as unique or worthy of special consideration, failing to appreciate that his gender neutral categories did not fully comprehend the position of women in society. Rather he absorbed them into the categories given to their husbands or fathers. Engels did not fare much better, stating that women's emancipation could only come about once their work within the home ceased and they joined the forces of production, in which case they would become part of the class struggle to liberate all workers.

Simone de Beauvoir accused Engels of oversimplifying women's position within society and considering them merely as workers, thus neglecting women's reproductive capacities which she believed could not be equated to anything in Engels' or Marx's paradigm. De Beauvoir recognised that the situation of women was unique and used her book The Second Sex to describe what was specific to women's oppression and expose Marxism's failings. MacKinnon accuses Marxist feminism of tending to equate and collapse (in which sex is a class and feminism collapses into Marxism) or derive and subordinate (where an analysis of class is used for sex and feminism becomes subordinate to Marxism)

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85 The Sourcebook at 329.
86 Ibid. at 336.
88 Ibid. at 117.
as their method in addressing the issue of gender,\(^8\) giving rise to the ‘unhappy marriage of Marxism and feminism’ coined by Heidi Hartmann.

Yet feminists have employed the Marxist method which is at once materialist, dialectical and historical\(^9\) to understand the oppression of women in a capitalist society. Having denounced Marxism’s inadequate appreciation of patriarchy and women’s place in the cycle of class struggle, feminists theorise that the division of labour between the sexes into the private and public domain predates capitalist society and yet constitutes an essential element of capitalism.\(^9\)

Shulamith Firestone used the Marxist materialist view of history to examine sex as the basic social category in order to theorise about how sexism could be eliminated.\(^9\) Heidi Hartmann argues that “the accumulation of capital both accommodates itself to patriarchal social structure and helps to perpetuate it ... in short ... a partnership of patriarchy and capitalism has evolved”\(^9\) and therefore neither can be tackled without reference to the other.\(^9\)

Meg Luxton has asserted that feminism’s acknowledgement that oppression is rooted in the family could be used by Marxist feminists as a basis to examine

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\(^9\) *The Unhappy Marriage* supra note [] at 100.

\(^9\) Ibid. at 113.
women's labour in the home and the extent to which it "contributes to the maintenance and reproduction of capitalist society". Responding to this challenge some feminists have defined women's work in the home as separate from productive labour (producing surplus value) all the while being central to capitalist processes.

Marxism was adopted by many feminist thinkers in the second wave of feminism and has profoundly influenced contemporary feminist theory. As a theory concerned with class oppression, Marxism provides a useful basis to explore women's place in our capitalist and patriarchal society. Feminism has taken Marxist work in relation to the meaning of history, the evolution of production, the division of labour and the separation of family, state and economy as a historical, and not a natural phenomenon and has used it to formulate a feminist theory regarding the oppression of women in a capitalist society.

Where Marxism has been denounced for its failure to comprehend gender and its unknowing appropriation of capitalist and patriarchal presumptions, such as the importance of the production of food and objects over the satisfaction of human needs, feminism brought unique insights to Marxism by defining

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95 Meg Luxton, "Introduction" in Feminist Marxism.
97 Meg Luxton, "Introduction" in Feminist Marxism.
98 Linda Nicholson, "Feminism and Marx: Integrating Kinship with the Economic" in Feminism as Critique at 17.
99 Ibid. at 29.
100 Ibid. at 20.
women's exploitation as differently situated from men's and thus meriting separate analysis.\textsuperscript{101}

Feminists have moved away from defending Marxism\textsuperscript{102} to using it as a tool for scrutinising the oppression of women under patriarchy and capitalism. They have exposed Marxism as significantly lacking in its appreciation of gender relations which constitute a central component of society. Feminists have moved forward to develop larger theories of women in society which suggest that only radical change can lift the burden of subjugation. As a result those feminists much indebted to Marxist theory are referred to as radical feminists.

Radical feminism grew out of the recognition that society had been structured to the disadvantage of women, for their subjugation and the related empowerment of men, all the while working for the eradication of domination and elitism in all human relationships.\textsuperscript{103} In contrast to the Cultural feminists' positive view of women's difference and their claim that the law should take such difference into account, radical feminists see women's difference as a male social construct.\textsuperscript{104}

Shulamith Firestone, a radical feminist, claims that feminists have to question not all of "Western culture but the organization of culture itself"\textsuperscript{105} and uses Marxist historical and dialectical analysis to demonstrate the oppression of women over

\textsuperscript{101} Theory of Patriarchy at 24.
\textsuperscript{102} Theory of State at 8-9.
\textsuperscript{103} Limits of Equality at 806.
\textsuperscript{104} View of Vicente at 224.
\textsuperscript{105} Shulamith Firestone, "The Dialectic of Sex" in The Second Wave at 20.
the ages. Her early radicalism challenges the predeterminism of biology which
binds women to birth and child care over history and across cultures (she
describes this as the original division of labour) and succeeds, she contends, in
distorting human psychology to the detriment of women. This cycle of the
'biological family' which subjugates women and renders them dependent on
men Firestone sees as being overcome by a combination of developments in
technology and the appropriation by women of the control of reproduction.106
Only then, she posits, can we think of the elimination of both male privilege and
sex distinction, the ultimate goal of the feminist movement.107

Radical feminism differs in its theories of the constitution and origins of
women's subjugation, which in turn is reflected in the solutions proffered for the
end to patriarchy. Radical feminists, such as Kate Millett and Gayle Rubin, use
anthropology and psychoanalytic theory to identify the locus of women's
oppression in kinship.108 Millett asserts that "myth and kinship ties are the most
lasting vestiges of that vast historical shift whereby patriarchy replaced
whatever order preceded it and instituted that long government of male over
female".109 The exchange of women, a central theme in kinship, had managed to
survive several transformations of the structure of society by organising and
reproducing itself in every aspect of the social order.110 Women proposed

106 Ibid. at 24-25; Firestone appears to be influenced by de Beauvoir who I discuss briefly above,
see supra note 87.
107 Ibid. at 26.
108 Kate Millett, Sexual Politics (New York: Doubleday, 1970) [hereinafter Sexual Politics]; Gayle
109 Sexual Politics at 110.
110 Traffic at 58.
methods to dismantle kinship by dividing child-care more equally between the sexes, rejecting compulsory heterosexuality and stopping the system of exchange. The Radicalesbians of the 1970s placed their locus of oppression in compulsory heterosexuality and declared that "[u]ntil women see in each other the possibility of a primal commitment which includes sexual love, they will be denying themselves the love and value they readily accord to men, thus affirming their second class status".

As radical feminists uncovered the origins of women's oppression and its pervasiveness they moved to law to identify its complicity in patriarchy. Law was judged one of the symbols of masculine authority and patriarchal society.

Catharine MacKinnon is probably the most influential and best known radical feminist seeking to use the law to proscribe the domination of women. She argues that women, as a class, have been socially constructed as different from men and that our very existence is defined in relation to men. She stands in direct contradiction to the Difference feminists and argues that "construing gender as a difference, termed simply the gender difference, obsures and legitimatises the way gender is imposed by force" stating,

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112 Traffic at 58.
115 View of Vicente at 222.
117 Ibid. at 3.
[w]hy do women become these people, more than men ... the answer is the subordination of women. That does not mean that I would throw out those values. Those are nice values; everyone should have them ... [w]hat bothers me is identifying women with it ... I am troubled by the possibility of women identifying with what is a positively valued feminine stereotype.118

Like other radical feminists, MacKinnon uses Marxism to untie the complexities of sexual inequality through history up to our present time, and attempts to create a feminist theory from her conclusions. Equating gender in feminism with labour in Marxism she includes women in a class of their own and locates male power and dominance as central to women's inability to define themselves, citing the poverty of women, discrimination, violence against women, prostitution and pornography as the evidence of the existence of this power. She states,

[t]he liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender - through it legitimizing norms, forms, relation to society, and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying, or de jure prohibiting its excesses when necessary to its normalization.119

Her arguments are chilling, as she locates male dominance in every aspect of life, giving renewed significance to the radical phrase coined in the 1960s 'the personal is the political'. Andrea Dworkin who has worked with MacKinnon on developing the theory of pornography as inequality,120 and on drafting antipornography legislation,121 situates the Dominance theory succinctly,

118 Feminist Discourse at 74.
119 Theory of State at 162.
120 Ibid. at 198.
we have been asked by many people to accept that women are making progress, because one sees our presence in places where we weren't before. And those of us who are berated for being radicals have been saying: 'That is not the way we measure progress. We count the number of rapes. We count women who are battered...We count the dead. And when those numbers start to change in a way that is meaningful we will talk about whether or not we can measure progress.'

Despite the powerful and disheartening rhetoric, MacKinnon puts her theories to practice and works to change law in various areas including sexual harassment and pornography. Although she concedes that law (alone) cannot solve the problems of the world she does believe that women ignore its "consciousness-and legitimacy-conferring power" at their peril. Her strategy requires that women claim their concrete reality of exploitation and argue that this reality is illegal or unconstitutional by using group-based equality doctrine rather than individual rights. By doing so, MacKinnon argues that through consciousness raising women may discover the harm suffered and expose this as a group condition that deserves group protection by analogy to the situation of the Black movement against racial segregation. Once protection is extended to women as a collective as 'sex equality' (a change in itself that will be fundamental) this protection, covering sexual abuse in all the forms enunciated by radical feminists, will enable women to begin thinking of dismantling male

123 Ruth Colker discusses MacKinnon's rhetoric in Feminist Consciousness at 1153 arguing that her absolute statements which many feminists are unable to accept as too extreme are rhetorical devices and that when she responds to real questions her answers are qualified. Colker however rejects MacKinnon's use of rhetoric and seeks more 'authentic' dialogue, on the other hand see Jeanne L. Schroeder's intelligent analysis of rhetoric in Feminist Methodologies at 138.
124 Feminist Consciousness at 1148.
125 Theory of State at xiii.
126 Ibid. at 244-248.
domination.

MacKinnon leaves us with the infinite possibilities of the unimaginable without attempting to conceive what that could be like. Unfortunately on the way to the edge of the universe she ruffles many feminist feathers\textsuperscript{128} with her strident tones and uncompromising attitude.\textsuperscript{129}

Ruth Colker, for example, in reviewing MacKinnon’s \emph{Theory of State} fears that women’s perspective would merely turn into the dominant perspective which would not sufficiently protect vulnerable men, thus she prefers to talk about protecting women’s well-being rather than seeing the world from a women’s perspective.\textsuperscript{130} Colker also touches on the theoretical problem of how women may come to know their oppression if it is so all-encompassing.\textsuperscript{131} Here I can defend MacKinnon in suggesting that although she might like to paint the picture of complete domination, she is nevertheless aware of the sites of resistance created by women and men through the ages and across cultures.

Black feminists (with a more subtle appreciation of power and identity) such as Angela Harris, criticise MacKinnon’s Dominance theory for being flawed by its essentialism by only including Black women as white women with an additional

\begin{footnotes}
\footnote{\textsuperscript{127} Ibid. at 240.}
\footnote{\textsuperscript{128} \textit{Feminist Consciousness} at 1153.}
\footnote{\textsuperscript{129} See note 123 on MacKinnon’s rhetoric.}
\footnote{\textsuperscript{130} \textit{Feminist Consciousness} at 1157.}
\footnote{\textsuperscript{131} \textit{Feminist Consciousness} at 1170.}
\end{footnotes}
burden and not appreciating the experience of multiplicity of Black women. bell hooks warns against monolithic theories (such as MacKinnon’s) created in academic ivory towers (such as Harvard) and pushes for multiple philosophies and anti-theoretical perspectives which do not alienate and mystify the oppressed and exploited.

Drucilla Cornell recognises the extent of the sexual abuse perpetrated against women yet she questions whether MacKinnon can develop a theory of state based on the victimisation of women. She asserts that MacKinnon’s theory puts too much emphasis on women’s sexuality (and victimisation) which endorses the dominant view of women as the receptacle of men’s fantasy and inhibits the exploration of how women can and do create ourselves and how a celebration of this can form a basis for freedom and equality. On this note, Patricia Cain despairs of MacKinnon’s steamrolling of lesbian experience as either not mattering, or simply a case of women having sex with women. She also criticises MacKinnon’s silencing of possible locations of non-subordination.

Those of MacKinnon’s critics discussed above appear to be usually in the right, however this does not take away from her and other radical feminists’ brave categorisation of the real abuse the gender structure inflicts on women and men.

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132 *Race and Essentialism* at 591-592.
135 Ibid. at 2255.
and their attempt to formulate responses to this violence.

**Postmodern Feminism**

Finally, in this section I will try to outline what could be understood as Postmodern feminism. Given the limits of space I include many diverse schools within this catch-all term, such as certain Black feminists, lesbian feminists, critical legal feminists and French feminists. Each in different ways challenges the idea of the existence of a unitary truth in all theories and the essential identity of woman.

Postmodernism is a movement that denies the meta-narratives of history and law and refuses to accept the notion of the existence of truth beyond the competing discourses. Thus, postmodernism poses a serious challenge for feminism as we know it in that feminism’s ability to argue about women often rests on the assumption of the existence of a commonality between women, and commonality is a meta-narrative that postmodernism denies. Although some postmodern critiques focus on the “impossibilities of truth … characterised by all that is grim, cruel, alienating, hopeless, tired and ambiguous”, Postmodern feminism concentrates more on hearing all the voices of women by recognising the diversity of experience that constitute the multiple identities that make up woman.
Postmodern theory disputes "genderessentialism - the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience".\textsuperscript{138} Angela Harris argues that under MacKinnon's theory Black women are white women only more so, the standard is always white and the 'peculiarities' of being Black are relegated to footnotes and exceptions. The footnoting diminishes Black women.\textsuperscript{139} MacKinnon's essentialism cannot grasp how some Black women know rape differently from 'standard woman', how an ethnicity (sexual identity,\textsuperscript{140} religion, age, class, language, disability) which is not the One, shapes identity and leaves it contingent, shifting and uncertain. Postmodernism calls for the multidimensionality of knowledge to be revealed and valued.\textsuperscript{141}

Moreover the liberal, Difference and Dominance feminisms are defied by postmodernism's questioning of their common assumptions about the rationality of law, the possibility of objective truth on which the law can be based, and the coherence and stability of the individual subject on whom the law acts.\textsuperscript{142} Carol Smart echoes this ambivalence speculating that, "if law does not stand in one place, have one direction or have one consequence, it follows that we cannot

\textsuperscript{137} Pauline Marie Rosenau quoted in \textit{Feminist Jurisprudence} at 187.
\textsuperscript{138} \textit{Race and Essentialism} as quoted in \textit{Redistributive Justice} at1298.
\textsuperscript{139} \textit{Race and Essentialism} at 595.
\textsuperscript{140} See Diana Majury's discussion of this term in Diana Majury, "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context" [1994] 7 C.J.W.L. 286 [hereinafter \textit{Lesbian Identities}] at 298.
\textsuperscript{142} \textit{Gender Law} at 13.
develop one strategy or one policy in relation to it.”

Postmodern thinkers such as Jacques Derrida and Julia Kristeva have studied the power of language and its impact on the way people understand and assign meaning to their lives. In particular postmodernism posits theories on how gender identities are received by girls and boys by virtue of the social-linguistic conventions of their social context and exposes the Western tendency to define things in terms of opposites and/or the meta-narrative to the detriment of the Other. In the deconstruction of language, postmodernism opens up the possibilities of how one may constitute “identity [not in terms of the other, but] via recognition and the letting be of true difference”.

Many feminists have viewed postmodernism with suspicion and criticised it for depoliticising the women’s movement and stripping it of its identity. However Linda Nicholson and Nancy Fraser have suggested that Postmodern feminism need not abandon “the large theoretical tools needed to address large political problems” as long as these theories are “explicitly historical, attuned to cultural specificity of different societies and periods and to that of different groups

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143 Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 163.
145 Drucilla Cornell & Adam Thrushwell, “Feminism, Negativity, Subjectivity” in *Feminism as Critique* at 145.
146 Drucilla Cornell & Seyla Benhabib, “Introduction” in *Feminism as Critique* at 15.
147 View of Vicente at 226.
within societies and periods".\textsuperscript{148}

Marginalised groups are loath also to give up their 'unitary identity' in which they have found much strength against the prevailing discourse.\textsuperscript{149} Further, as bell hooks points out postmodern scholarship is often characterised by linguistic convolution\textsuperscript{150} and warns how this may alienate non-academics. Diana Majury argues "in the face of the current very real oppression of lesbians, I think it politically unwise for lesbians and their supporters to abandon the category [lesbian]. To me this is tantamount to abandoning each other".\textsuperscript{151} Linda Alcoff recognises the importance of political action despite postmodernism's suspicion of it, and states:

the authors ... are clear about the problematic nature of one's identity, one's subject-ness and yet argue that the concept of identity is a posit that is politically paramount. Their suggestion is to recognize one's identity as always a construction yet also a necessary point of departure.\textsuperscript{152}

Postmodernism has been said to herald "the retreat from utopia within feminist theory by debunking essentialism".\textsuperscript{153} But the yearning that wells in the hearts and minds of those whom the meta-narratives have silenced is the longing for critical voice \textsuperscript{154} and represents real ambition to create a kind of complex and multifaceted being that may not be a utopia but certainly holds promise for the

\textsuperscript{149} Deborah L. Rhode, "Feminist Critical Theories" in The Sourcebook at 358.
\textsuperscript{150} Talking Back at 36.
\textsuperscript{151} Lesbian Identities at 317.
\textsuperscript{152} Linda Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory" (1988) 13 Signs 404 at 433.
future.

My critique in chapter 4 will attempt to combine aspects of all of the above feminisms with particular focus on the repercussions that Dominance and Postmodern feminist theory could have on corporate law. I will use these theories fluidly as, although I have separated them for the purposes of analysis, they are interconnected and related by taking part in the evolution of multiple feminist theories, which reflect the experiences of many women.

154 Postmodern Blackness at 15.
Chapter Three: Le Nom du Pére

Introduction

In the present chapter I will discuss the nature of corporations or companies (I shall use these terms interchangeably) as presented by the prevailing literature within corporate law. I particularly focus on two scholarly tomes on corporations that are standard textbooks in Canada and Ireland, Francis Buckley’s Corporations: Principles and Policies and Thomas Courtney’s The Law of Private Companies. As a result this chapter concentrates on the corporation as it exists today in Canada and Ireland with appropriate reference to English and American precedent or literature when necessary given the historical and present day influence of these other jurisdictions on both the Canadian and Irish context.

The term ‘company’ covers a multitude of organisations from small, often family-run enterprises to large transnational entities, which are created for the

155 This is Jacques Lacan’s name for the symbolic order which a child is introduced into through language. “The Name of the Father is the fact of the attribution of paternity by law, by language”, see Nelly Furman, “The Politics of Language: Beyond the Gender Principle” in Feminist Literary Criticism at 71.
156 My choice of Canadian and Irish law is based on my knowledge of both systems of corporate law arising from my undergraduate and graduate education, as well as my professional training and experience. Being the two jurisdictions with which I am most familiar they must be the subject of my critique.
purposes of doing business\textsuperscript{159} under a particular form.\textsuperscript{160} In a broad sense, created by law, the corporation offers a structure within or around which people or other legal entities arrange relations with themselves and others. Rather than put forward my own concept of the corporation I shall use this chapter to examine how sources which may be considered mainstream view the corporation. This chapter intends to present the corporation as the neutral legal entity it is often presented as, in the literature I deal with. Given the many ways of defining or looking at a corporation I shall narrow the analysis to three areas of the corporation:

(i) separate corporate personality and limited liability;
(ii) corporate structure; and
(iii) insider trading and the securities market.

This is an eclectic examination of diverse aspects of corporate law. I choose to deal with separate corporate personality and limited liability because these are the basic aspects of what it is to be a corporation. On the other hand, corporate structure is presently a popular topic, the subject of much debate in a fast changing business environment.\textsuperscript{161} Finally, I deal with insider trading as a peculiar and interesting axis of virtue and vice in the ownership of publicly held corporations traded on stock markets (which remain an enduring image of the power and wealth associated with large companies).

\textsuperscript{159} Although corporations may be charitable or non-profit organisations I will concentrate on those that are formed for the purposes of doing business.
\textsuperscript{160} L.B. Curzon, \textit{Dictionary of Law} 3\textsuperscript{rd} ed. (London: Pitman, 1979) at 82.
The choice of these topics also includes a choice about the kind of corporation I will consider. Apart from separate corporate personality and limited liability which are common to all companies, I study corporate structure in relation to sizeable companies\(^{162}\) which must balance many competing interests as they exist on a larger scale.

As much of the literature in this field deals only with these bigger enterprises, to form a criticism of corporate governance discourse and structure, I wish to meet that discourse head on. Moreover, given that,

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\text{size alone tends to give these giant corporations a social significance not attached to the smaller units of private enterprise ... [n]ew responsibilities towards the owners, the workers, the consumers, and the State thus rest upon the shoulders of those in control,}^{163}
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big corporations would appear to be ripe for the feminist critique below. This preference naturally creates an imbalance, as by only dealing with larger companies I am excluding many small- and medium-size enterprises or closely held companies which do not encounter the kinds of issues I discuss, although they represent how many people engage in commerce with each other.\(^{164}\) Companies listed on the world's stock exchanges are one of the most powerful (and representative) forces of capitalism. The way in which we engage with them cannot represent the way investments are made in smaller enterprises. Unfortunately, a considered appraisal of small- and medium-size corporation's

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\(^{162}\) I.e. Companies in which ownership and management are not one and the same.
role is not within the scope of this thesis.

Separate Corporate Personality and Limited Liability

The limited liability of a corporation arose out of, but was not necessarily an integral part of, the legal definition of the separation of the corporate entity from the individual that held shares/ownership in it. This separation has apparently ancient roots dating back, some scholars claim, to 2,000 BC. The collective or kin group in primitive societies were recognised as distinct entities before the individual. The concept of the corporation as a right or concession granted by the sovereign powers was developed by the Romans who gave concessions to form corporations. This idea of imperial or royal consent for the creation of the corporation was handed down and vested in the monarch as the entity having the right to grant a corporate charter. In England the right was a rare royal privilege and consequently difficult to obtain. Corporate status could also be granted by a special Act of the English Parliament to members who would enjoy limited liability.

These early companies were often involved in colonial enterprises, like the East

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164 Private Companies at xxiii.
165 Private Companies at 3.
166 Ibid.
168 Ibid. at 4.
169 Ibid. at 6.
India Company,\textsuperscript{170} which sought to raise money for prospecting abroad. Like any evolving area of law the companies created by way of charter or statute were misrepresented and illegally transferred, and many frauds as to corporate status were perpetrated on the unknowing public until the English Parliament attempted to rein in the opportunist.\textsuperscript{171} The modern corporation began in England (and by extension in its colonies)\textsuperscript{172} with the Joint Stock Companies Act of 1844 but limited liability was not granted to these companies until eleven years later by the passing of the Limited Liability Act of 1855.\textsuperscript{173} Thus limited liability is a fairly recent occurrence in the history of the corporation; nonetheless it has become central to how we think about the corporate form.

Despite the differences in the legislative programs and forms taken by both Canada (indeed Canada has many legislative forms as a result of its federal system) and Ireland, separate corporate personality and limited liability as the cornerstone of a corporation appear to remain firmly rooted in English precedent in both Courtney’s \textit{Private Companies} and Buckley’s \textit{Corporations}, and most famously the case of Salomon.\textsuperscript{174}

In 1892, Aron Salomon, a boot manufacturer and leather trader, decided for various reasons to incorporate his business as a company. Given that the legislation at the time required a corporation to have a minimum of seven

\textsuperscript{170} Nobel’s \textit{Responsibility} at 1257.
\textsuperscript{171} \textit{Private Companies} at 7.
\textsuperscript{172} \textit{Corporations} at 153, the Parliament of the United Province of Canada General Incorporation Act of 1850.
\textsuperscript{173} Ibid. at 10.
members, he divided the 20,007 shares, receiving 20,001 shares himself, the six remaining shares going one apiece to his wife, his daughter and his four sons. The company was incorporated as Aron Salomon Co. Ltd. and Mr. Salomon received his shares in lieu of part payment for the transfer of his business which he valued at 38,782 English pounds, with 10,000 pounds of the purchase price recorded as secured debt to Mr. Salomon. Thus Mr. Salomon was both the company’s principle shareholder and creditor. As the company foundered outside creditors were not paid and liquidation was instituted. The liquidator and Mr. Salomon ended up in court to decide whether the secured debt to Mr. Salomon (and another debenture thereon) were invalid on the grounds of fraud. The court of first instance and appeal both found in the liquidator’s favour. The House of Lords unanimously reversed these rulings, Lord MacNaughten asserting that:

the company is at law a different person altogether from the subscribers to the Memorandum and, although it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not at law the agent of the subscribers or a trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think the declared intention of the enactment.175

The Salomon decision has been criticised by some for failure to sufficiently protect the company’s unsecured creditors.176 Nonetheless, its principles have survived and continue to ensure that the liability of the shareholders of a company to that company are limited to the amount unpaid on their shares in

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175 Ibid. at 51.
the company and that shareholders are not liable for the obligations of the
company vis-à-vis the company's creditors.

The advantages of separate legal personality (other than being immune from
claims from company creditors) include the right to hold property, sue and be
sued as well as be subject to certain tax obligations and benefits, being able to
give certain kinds of security and receive certain benefits or shoulder
obligations. Courtney suggests that the privilege of limited liability conferred
by The Limited Liability Act of 1855 would probably have been increasingly
contracted by parties if the law had not bestowed it.

Buckley on the other hand combines both separate legal personality and limited
liability in one and examines the efficiency of these benefits. He describes how
more risk averse shareholders move the risk of the failure of the business to the
creditors and argues that shareholders especially in small firms have more to
lose on the failure whereas creditors should be able to set off a bad debt from
one debtor among many. This analysis changes when those that manage the
firm are different from the shareholders, as is the case in larger corporations.
Buckley thus refers to Frank Easterbrook and Daniel Fischer, two well-

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176 Both Corporations and Private Companies cite Kahn-Freund as one critic, at 85 and 65
respectively.
178 Lee v. Lee’s Air Farming Ltd. (1960), [1961] A.C. 12, where the wife of the deceased director
and employee claimed workers compensation for her husband’s death as a result of his
employment by effectively his own company, see Private Companies at 81.
179 Private Companies at 10.
180 Corporations at 87.
established contractarian corporate law theorists,\textsuperscript{181} to discuss the efficiency of limited liability.

Easterbrook and Fischer conclude that for the large firm\textsuperscript{182} which needs considerable amounts of capital from many people who would otherwise not be prepared to expose themselves to liability, the efficiency of limited liability is affirmed.\textsuperscript{183} They argue that as the costs of monitoring managers and other shareholders is reduced the price of shares is less than it would be if the extensive monitoring required because of the risks of unlimited liability were factored therein, thus rendering the shares more freely transferable and managers more accountable.\textsuperscript{184} The authors also point out that limited liability allows diversification of shareholding (thus spreading the risk) which in turn encourages managers to invest more imaginatively (and they consider more productively) as the risk to many shareholders is less than it would be to a few.\textsuperscript{185} Finally Easterbrook and Fischer acknowledge that someone must inevitably bear the risks of the failure of business and suggest that as the shareholders are the last to be paid in liquidation proceedings and can only monitor to a limited extent, and thus run the biggest risk, they should be

\textsuperscript{181} Carl Landauer, “Beyond the Law and Economics Style” (1996) 84 Calif. L. Rev. 1693 [hereinafter Beyond Economics] at 1703; for an explanation of contractarianism see note 211 below and accompanying text.

\textsuperscript{182} Whose shareholders are usually different from its professional managers and therefore do not run the company themselves.

\textsuperscript{183} Corporations at 87-89.

\textsuperscript{184} Proponents of the law and economics theory argue that in an efficient capital market, managers’ success can be reflected in the price of shares. If the shares are priced low, but the company is otherwise valuable, other companies may take control of the target company and replace the managers who are causing the low price, this in turn will act as an incentive for managers to do their job well. The takeover as “an incentive to managerial efficiency” was first set forth by Henry Manne, see Corporations at 94.
allowed to limit this risk and share it with creditors who may be in a better position to monitor the financial situation\textsuperscript{186} of the company.\textsuperscript{187}

The disregarding of the separate legal personality of a company is often referred to as 'piercing the corporate veil'. Overlooking the separateness of the company does not necessarily lead to the unlimited liability of the members or the liability of the executive officers, it may merely assist a court in attributing residence or culpability to the corporate entity by looking at the actions of its members or executive officers.\textsuperscript{188}

However the most popular and controversial instance in which the separate personality of the corporation is ignored is when a court or statute seeks to impose liability on others for the company's actions. Lord Halisbury noted in his judgment in Salomon that the separate legal personality of a company would be upheld provided that there was "no fraud and no agency and if the company was a real one and not a fiction or a myth."\textsuperscript{189} These bases are continued to be held by the courts as a reason for imposing liability on others\textsuperscript{190} although some commentators complain that judgments are inconsistent and unclear with regard to these principles.\textsuperscript{191} Apart from the concept of fraud,

\begin{itemize}
\item \textsuperscript{185} \textit{Corporations} at 89.
\item \textsuperscript{186} One only has to think of the onerous provisions (caps on other borrowing, earnings ratio etc.) many banks require before lending money to companies thus ensuring that their debt investment is well protected.
\item \textsuperscript{187} \textit{Corporations} at 89.
\item \textsuperscript{188} \textit{Private Companies} at 113.
\item \textsuperscript{189} \textit{Salomon} v. \textit{Salomon & Co.} (1897), [1897] A.C. 22 (H.L.) at 23.
\item \textsuperscript{190} \textit{Private Companies} at 112; \textit{Corporations} at 94.
\item \textsuperscript{191} Robert B. Thompson, "Piercing the Veil within Corporate Groups: Corporate Shareholders as Mere Investors" (1999) 13 Conn. J. Int'l L. 379 [hereinafter \textit{Piercing the Veil}] at 395; Dana M. Muir
\end{itemize}
agency or fiction, both Courtney and Buckley identify the shirking of legal
obligation\(^{192}\) and the recognition of a single economic entity\(^{193}\) as other reasons
held by courts in both jurisdictions to disregard the separation.\(^{194}\) These
common law grounds have been supplemented by statute in that shareholders
that do not properly adhere to the niceties of incorporation\(^{195}\) or otherwise
breach certain important statutory rules\(^{196}\) may be held liable for a company's
debts. Maurice Wormser explained:

> [w]hen the conception of corporate entity is employed to defraud
creditors, to evade an existing obligation, to circumvent a statute, or
advertise or perpetuate a monopoly, or to protect knavery or crime,
the courts will draw aside the web of entity, will regard the
corporate company as an association of live, up-and-doing, men
and woman shareholders, and will do justice between real
persons.\(^{197}\)

These grounds for looking beyond the separate legal entity of the corporation I
will treat in more detail in chapter 4 under my critique thereof.

To conclude my investigation of the separate personality and limited liability of
the company I refer back to Robert Thompson who has tracked over almost a

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\(^{192}\) Where for example a person incorporates a company to avoid fulfilling her contractual duties
to another.

\(^{193}\) Where a group of companies is identified as acting as one as opposed to several legal entities.
This has sometimes been incorporated into statute to hold parent companies liable for the
transgressions of their subsidiaries, see H. Lowell Brown, "Parent-Subsidiary Liability under the

\(^{194}\) Corporations at 94; Private Companies at 112-113.

\(^{195}\) Corporations at 109.

\(^{196}\) Such as the reckless trading provisions in the Companies Act 1990 (Ireland), s. 279A.

\(^{197}\) Maurice Wormser, "Piercing the Veil of Corporate Entity" (1912) 12 Colum. L. Rev. 496 quoted
in David L. Cohen, "Theories Of The Corporation and the Limited Liability Company: How
decade the court's treatment of limited liability in the United States and describes the question as "the most litigated issue in corporate law". Thus, whether myth or reality, it informs the way we look at and consider corporations and how they interact with our lives, which shall be my point of departure for a feminist critique in chapter 4.

Corporate Governance

Corporate governance is presently one of the major issues in corporate law involving large widely-held corporations. One could argue that its importance may arise from the fact that many academics and capitalists at the beginning of this century could not imagine the nascent division between ownership and control lasting to give rise to the issues of governance that we have today.

Corporate governance concerns how a company is run. The legislature in Ireland and the Canadian provincial and federal governments have laid down rules in their various corporate laws that set out how a company is managed and controlled. These laws create structures through which a corporation is organised. Shareholders as capital contributors are said to own the company and in many privately run small- and medium-sized companies they would

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198 See Piercing the Veil and Robert B. Thompson, "Piercing the Corporate Veil; An Empirical Study" (1991) 76 Cornell L. Rev. 1036.

199 Michael Bradley & Cindy A. Schipani, "The Relevance of the Duty of Care Standard in Corporate Governance" (1989) 75 Iowa L. Rev. 1 [hereinafter Corporate Governance] at 2-3. The authors state that both Adam Smith and Adolf Berle and Gardiner Means questioned the viability of large corporations where ownership was separate from control.
also be heavily involved in managing the company. However, the law nevertheless requires that the governance of a company be divided (at least in theory) between the shareholders and the directors. The directors, appointed by the shareholders, are charged with managing the company in both jurisdictions, moreover they are entitled to appoint the company’s officers or executives who they may delegate their management powers to.

However, corporate law is not the only factor that determines how a corporation is run. Other factors such as securities, competition and other regulations impose parameters on corporate governance to ensure “corporations serve (or at least do not compromise) the greater public good, while pursing corporate imperatives.” Moreover, societal pressures in tandem with regulation determine how governance structures evolve in particular with regard to attitudes to big business, limiting banking power and labour involvement. The Canadian situation has been classified as a hybrid between the more European ‘big blocks of shareholder’ model and the American ‘democratic shareholder’ style.

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200 Companies Act 1963 (Ireland), Schedule 1, Table A, Part 1: “[t]he business of the company shall be amended by the directors”; Canadian Business Corporations Act, R.S.C. 1975 [hereinafter the CBCA], s. 102: “the directors shall manage the business and affairs of the corporation”. Some provincial acts provided that the directors may manage or supervise the corporation, see Corporations at 373.

201 This power may be read into Irish law by the director’s power to manage. For the Canadian right see CBCA s. 121, see Corporations at 380.


Thus it is only through a series of complex and composite issues that shareholders in large corporations have effectively divested their control in these corporations to the directors in North America. Given that a board of directors only meets approximately six times a year and that each member’s appointment is controlled to a large extent by the management, in the form of the CEO, it is interesting to look at how these incidental structures have arisen, and the law’s response to them.

The first or at least the most influential writers to identify the gestation of this trend were Adolf Berle and Gardiner Means, who found that:

[c]orporations need to raise large amounts of capital to attain the critical size necessary to compete in expanded domestic and international markets. This capital raising requires the involvement of large numbers of investors. Because a typical investor has only a small amount of assets invested in a particular enterprise, it is not cost efficient for the investor to closely monitor management. However, without shareholder monitoring, managers face the ‘moral hazard’ of operating a corporation in ways beneficial to them, not the shareholders.

This moral hazard has been a central focus for corporate law scholars and legislators in North America who have debated these interests in the context of rapidly evolving corporate structures and this is the debate I intend to focus on in this section.

204 Corporations at 539; The Corporate Board at 26.
The debate about governance emerging in the last half of the twentieth century
generated a new look at what a corporation was. Society, to decide on how
corporations should be managed, had to form a theory of the firm. Ronald
Coase approached the question in his appropriately titled article “The Nature of
the Firm” by asking why companies existed at all. He proffered the idea that
companies were formed to avoid the cost of determining prices for the activities
that would produce goods they could otherwise buy, or in other words it was
cheaper to produce goods under one entity until the cost of organising that
entity caught up with the saving otherwise made. This pricing mechanism
was taken up and turned into what it popularly known as the contractarian or
law and economics method, which seized Coase’s idea that corporations save
money by pooling resources (which is efficient) and concluded that the purpose
of corporations should be efficiency.

Michael Jensen and William Meckling used Coase’s theory to develop their idea
of the firm as a ‘nexus of contracts’. Jensen and Meckling regard the legal
framework as an irrelevancy which disguises the real existence of a network
of agreements that carry out the activities of the company. Given the ‘nexus’
and the goal of efficiency, both conclude that it is important to increase the

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Corporate Governance and United States Institutional Investors” (1995) 21 Brooklyn J. Int’l L. 1 at
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[hereinafter Views on U.S. Corporate Governance] at 3.
209 See Beyond Economics at 1698.
210 Ibid. at 1700.
211 Ibid.
212 Yoshiro Miwa, “Corporate Social Responsibility: Dangerous and harmful, though maybe not
irrelevant” (1999) 84 Cornell L. Rev. 1227 at 1232.
efficiency of each of the contracts (between managers and shareholders, managers and employees, managers and creditors etc.) in order to maximise the wealth of all the participants. With this in mind, they assert that the free market has ensured that the corporation has evolved efficiently by giving all participants the bargaining power to fairly determine the worth of their service in their particular contract which incorporates the market's demand for such and the effectiveness with which it is provided. Thus, in the struggle between management and shareholders for control:

[the] market forces act to discipline corporate managers and cause the managers to align their interests with those of the firm's security holders. These forces stem from competition in the capital, labor, and product markets, as well as competition in the market for corporate control.

From the theory of the firm academics went on to determine normative responses to how corporations should be governed. Much of this normative discourse (which has been considerable) has been based on the findings of the law and economics scholars, and now it is impossible to move within the area without knowing, if not appreciating, the law and economics paradigm.

In contrast to the law and economics approach, traditionally the law in both Ireland and Canada has used the concept of the fiduciary duties of directors or managers to shareholders (or more properly the corporation) to direct and

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213 Corporations at 23.
215 Corporate Governance at 5.
regulate corporate governance (along with the other factors described above). Ireland with a smaller and more closely-knit business community has used this concept in common law to set the parameters within which directors can operate. The Irish concept of corporate governance thus does not encounter the same quandary of who should be in control, rather the issue is more related to preventing shareholders from abusing their positions as directors of a company, i.e. the connection rather than the separation is controlled. In this model the traditional fiduciary approach has been used as the normative basis to control abuse. This has been further supplemented by the legislature that imposes a wide range of statutory duties on directors and officers.

Since Canada and Ireland have shared legislative histories in English law, the fiduciary model influenced the development of Canadian corporate law. However, the Canadian corporate market is considerably bigger and has a more widely diversified shareholding than its Irish counterpart. Although Canadian corporate statutes are enabling (facilitating companies to pick and choose the rules applicable to them) Canadian judges have a greater say in interpreting those statutes and imposing their ideas of fiduciary duty on the corporate body. The law and economics school attempts to push against the control of courts (and the legislature) and the concept of fiduciary duties. By deriving normative conclusions from their analysis of how corporations work, they argue that:

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217 Private Companies at 229.
218 These include duties to creditors see Private Companies at 310.
219 Corporations at 516.
the fiduciary model interferes with the free market; [as] the check against inefficient management of large corporations is said to be the market for corporate control rather than the fiduciary paradigm. 221

Thus by describing "individuals as private, autonomous, rational decisionmakers" 222 law and economics posits that in the free market of these individuals everyone should be free to negotiate the terms of their contracts (released from mandatory legislation and judicial interference) for corporate governance. Corporations should be able to set their own terms (which as a result of the control of the market will be efficient) with regard to governance without being hampered by outside interests that impede corporate efficiency. 223

Given the transitions faced by the Canadian economy, questions are being asked about how to prepare for and face global competition through improved corporate governance. 224 Law and economics scholars are pushing to give responses to these questions and it is these responses that I will examine in chapter 4.

222 Community Interests In Bankruptcy at 1036.
223 Corporations at 516.
224 Canadian Directorship Practices No. 2 at 1.
Insider Trading and the Securities Market

The securities markets as the system for raising capital on the open market and its investment for an equity interest or a fixed return pose new challenges to legislators and courts with emerging ideas on corporate ownership and responsibility. The ‘gentlemen’s agreements’, which maintained some civilised decorum over the cutthroat wrangling over large sums of cash, are falling apart as the owners become faceless entities blipping by on a computer screen. Regulators, limited by resources and outrun by technology, are hindered in their efforts to keep up.

Once investments are made, investors are presumed to be entitled to sell their interest if such an entitlement was part of their agreement. Securities legislation regulates the very first request for capital called the primary market and the subsequent market in the investment interest called the secondary market.²²⁵ Internationally the primary market regulation is concerned with providing initial investors with enough information through a prospectus to make the decision whether to invest or not. The secondary market regulation concerns itself with keeping that level of information constant to ensure a fair pricing of the security for both buyers and sellers. Securities markets are supposed to operate on the principle of the Efficient Capital Market Hypothesis that provides that “in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and
Insider trading, on the other hand, is the buying or purchasing of securities on confidential non-public information. Since the information is not public, the party on the opposite end of the trade cannot factor the information into the price of the security she is trading. If the information is significant the price will be adjusted accordingly, usually to the subsequent disadvantage of the latter trader once the information is made public. Basically, the knowledgeable party takes advantage of the other's ignorance to get a good price on a security. Once the information is public the former trader will have made a gain on the new updated price.

Concern about the regulation of securities investment developed as markets became larger and opportunities for profit and loss more risky. Up until recently continental European and Asian markets were a closed shop to outside investors as markets. They were controlled by a limited number of large banks and other institutions which thrived on a close knit and familiar atmosphere. There was no 'inside information' because there were no outsiders. Equally, until this century the common law was unwilling to address the unfair advantages directors of corporations had over outside purchasers of shares. Such a view was based on some notion of the absence of a responsibility to inform the other party

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225 Mark R. Gillen, Securities Regulation In Canada (Toronto, Carswell 1992) [hereinafter Securities in Canada].
as a result of the lack of legal duty to do so.\textsuperscript{228}

The movement for regulation started in the United States. With its open and free market, it had to address the problem facing investors who did not have the relevant information to appropriately price securities. The legislators realised that in order to attract a diverse and international investment community they would have to level the playing field in their domestic market. Notions of everyone participating in the new capitalism required that the extent of insider trading be limited. Everything was done to ensure the perception that the market was not rigged for the privileged few.\textsuperscript{229} Market integrity became the keyword for states' participation in the new global economy.

The Federal Securities Act of 1934 of the United States was the first statute to address dishonesty or fraud in securities transactions. Under section 10b of that Act, it states:

\begin{quote}
It shall be unlawful for any person, directly or indirectly, by the use of any means ... of any facility of any national securities exchange,
\end{quote}

\begin{enumerate}
\item To employ any device, scheme, or artifice to defraud,
\item To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
\item To engage in any act, practice, or course of business which operates or would operate as a fraud upon any person,
\end{enumerate}

\textsuperscript{227} Ursula Carrier Pfeil, "Finanzplatz Deutschland: Germany Enacts Insider Trading Legislation" (1992) 11 Am. U. Int'l L. & Pol'y 137.
\textsuperscript{228} Derry v. Peek (1889), 14 App.Cas. 337 (H.L.).
in connection with the purchase or sale of any security.\(^{230}\)

Irish and Canadian statutes are more specific in defining insider trading (or 'dealing' as it is referred to in Ireland). Liability attaches to an insider, defined under certain categories of person in close contact with a corporation, or the 'tippee', someone who receives information from that person.\(^{231}\) The way in which the information is imparted is less important, rather its source is the determining factor in finding guilt. Both jurisdictions have civil, criminal and administrative procedures for addressing the problem.\(^{232}\)

Some commentators argue that insider trading benefits the market in several ways.\(^{233}\) Firstly they point out that the insider is usually prepared to sell or buy at less or more of the market price because of their access to information.\(^{234}\) As a result, the price they sell or buy at affects the overall price of the securities, thereby indirectly informing the market of the real cost of the security.\(^{235}\) Since access to all information all the time is impossible, allowing insiders to trade on the non-public information influences the price of the stock and thus permits the true value of it to be known to the market.\(^{236}\) It is also argued that in permitting insiders to trade on information they have access to, they can reap the benefits of the productive work that they have done for the corporation.\(^{237}\) Either way the

\(^{230}\) See Corporations at 798.
\(^{231}\) Ontario Securities Act, R.S.O. 1990, c. S-5, s. 1(1) and s. 76(5)e.
\(^{232}\) Private Companies at 861.
\(^{234}\) Ibid.
\(^{235}\) Ibid.
\(^{236}\) Rounding the Peg at 1091.
\(^{237}\) Insider Trading at 123.
critics claim that the extent of insider trading is too minimal to actually affect the long-term health of the market.238

On the other side of the debate, it is maintained that insiders who have a right to trade will delay the release of important material in order to profit from the market's ignorance.239 As a profit can be made from negative results as well as positive there is in fact no incentive to improve the corporation's performance for the insider.240 In addition legitimate research and analysis to estimate price may be discouraged if there is no regulation of those who posses inside knowledge.241 Ultimately the idea of the unequal bargaining position seems unfair to the community. The integrity of the market, it is held, should be maintained in order to guarantee maximum access to capital and assure outsiders that they have a fair chance of a good investment opportunity. 242

Courts, especially those in the United States where insider trading litigation is very advanced, tend to shy away from an equality of information or 'fairness' approach243 illustrated in 10b-5 (above), instead preferring a convoluted test of duties that must be breached before liability will occur. One author writes that:

[w]hat is remarkable about Rule 10b-5 is that there is such ambiguity as to its basic nature and purpose ... the rule was thought to be grounded on notions of 'fairness' and 'equity'. These justifications were vague and ill-informed and did not provide a coherent basis for

238 *Rounding the Peg* at 1094.
239 *Securities in Canada* at 293.
240 Ibid.
241 Ibid.
242 *Corporations* at 855.
imposing legal sanctions. At the moment the market is a delicate balancing act between information that is suitable to act on and that which is not. Despite legislators' worthy attempts to force disclosure of material data, there is an undercurrent of tips and untraceable clues of what is happening in the corporate world. The courts have decided that there is little point in persecuting a discrepancy in knowledge unless it is preceded by some breach. Basically judges and securities regulators acknowledge that the market is skewed in regards to information. Moreover, the legislation does not capture the complex nature of information and the difficulty in pinning down fault when so much of the equation is about advantage.

This problem is aptly demonstrated by the Ontario Securities Commission pursuit of Mr. Bennet and his brother for insider trading. The facts of the case demonstrate how a simple unrecorded phone call can make a 'cool million'. Yet even in the wake of a drastic stock plummet, Securities Commissioners were powerless to pin the Bennets down for this one isolated incident. The wrong is so nebulous that it is difficult to detect the perpetrators and the market makes insider trading profitable. Thus, from this point of departure feminism might have some contribution to re-imagining alternatives to solving this predicament.

246 Ibid.
247 Ibid. p. 1087.
Chapter Four: Medusa’s Laugh

Introduction

This chapter is intended to be a feminist critique of those aspects of corporate law introduced in chapter 3. My analysis will be limited in nature and will leave many questions unanswered. However part of my objective is to ask more questions, and in turn ask why those questions have not been answered. For instance, why has corporate law and those that create, write and recreate that law, not brought feminist questions into mainstream corporate discourse? Why is it when we talk about women and corporations we limit ourselves to counting the numbers on company board and management seats? Corporate law usually avoids women’s questions by referring us on to labour law or social welfare law. Corporate law is put forward as a neutral structure in which investors may come together to invest their money and recuperate their gains, not as a locus for broader consideration of socio-political/ideological concerns.

Although my critique will attempt to follow the structure set out in chapter 3, the themes will become familiar and will recur throughout the critique. One of these themes is law and economics and I set aside a special section for the feminist responses thereto.
Corporations have become more and more powerful as they wield wealth and influence throughout the world, yet unlike democratic institutions they are not held responsible for much else than the maximisation of their shareholders' profits. They change cultures, alter power balances and touch women's lives in profound and powerful ways. In the developing world, they have become the emissaries of the West, yet do not necessarily represent the freedoms and aspirations we have been led to expect. The law can only touch their power to an extremely limited extent, yet it is a powerful legitimising force in granting their entry to new markets and societies. The Western corporate models have been recreated in the developing nations by Western lawyers working for Western law firms to service their Western clients. Yet, women in paid employment own these corporations through their pension funds, our bodies sell their products and everywhere we buy their goods and use their services. Therefore a critique by a theory that asks the woman question is both necessary and appropriate.

How can feminism begin a critique of corporate law and structure? In this chapter I shall return to the methodologies described in chapter 1 which include (i) considering Exclusion, (ii) asking the woman question, and (iii) Feminist Practical Reasoning. Unfortunately, I have not been able to use consciousness raising to a great extent to explore the question of exclusion of women in corporate law. This has been done for me by the women who have studied women in organisations which I shall refer to below. This thesis' purpose is to

248 This is a paraphrasing of the title of an article by Hélèna Cixous.
249 The Hungarian Companies Act, Act CXLIV of 1997 on Business Associations (Hungary), is based primarily on the German corporate model.
bring feminist ideas and methodology to how we think about companies. I consider that more research and discussion should be done at every level of the corporation to be able to appreciate and include women in creating our theories about companies.

Moreover, I will try to cover what feminist scholarship has already brought to the debate about corporate law. I will attempt to invoke all of these methodologies and writings to examine the corporation and seek out the male bias which lies unexplained.

Law and Economics

The scholarship on the above aspects of corporations is united by one theme: their close scrutiny by law and economics. As I argued in chapter 3, this school of thought has moved from explaining why corporations were created and operate the way they do, to more normative excursions into how the state should regulate or abstain from regulating their operation. The ease in which law and economics scholars have slipped into this role may be explained by the fact that the currency of many of their concepts is liberal theory.251

250 Views on U.S. Corporate Governance at 15.
The theory may be examined on many levels and has been the subject of much feminist discourse, however I will only deal with the presumption of the existence of the liberal individual inherent therein and the larger question of how the economic ideal plays out in theory with reference to Jeanne Schroeder's work on the death of the market.

Feminism first disputes law and economics scholars' tendency to universalise their discipline with claims to neutrality. Not only have women played very little part in creating economics theory but they have very often been absent as a subject for mainstream economics study. It would appear in economics that the woman question has not been dealt with adequately. Other theorists have criticised the law and economics movement for excluding different approaches to the corporate structure. Exclusion is a central theme in feminist theory, and the task of many feminists has been to deliberately seek the inclusion of as many voices in theory. By excluding other possibilities, law and economics falls foul of Postmodern feminism and exposes the risk of essentialism which arises from our "attraction to simplifying categories ... our unconscious attachment to stereotypes, and our participation in a culture in which contests

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255 Ibid. at 3-6.
256 Governance in the United States at 38-39.
257 See What's Distinctive about a Feminist Analysis at 272 and bell hooks, Feminist Theory: From Margin to Center (Boston: South End Press, 1984) [hereinafter From Margin to Center].
258 Supra note 77.
over power include contests over what version of reality prevails." Postmodern feminism calls for the rejection of essentialist theories and the inclusion of many and dissenting voices.

Feminism also questions the individualist nature of law and economics scholarship. The idea of the liberal separate self which grounds much of law and economics theory has been discussed with regard to liberal feminism in chapter 2. This debate had been enriched by the Postmodern feminist movement to critique the liberal notion of a unitary self. Seyla Benhabib traces the development of the idea of the autonomous private self through history, and describes the liberal theory of men as naturally independent and self sufficient sprouting from the earth like mushrooms. Neglecting the small matter that men are produced by women, the original liberal man, Benhabib posits, having sprouted, is free to create "the world in his own image" and fulfil all his desires as necessary. Ultimately the liberal vision, Benhabib argues, is narcissistic and renders the presence of the other threatening. Meeting the other, she explains, the individual experiences both loss (by finding itself through the other) and recovery from that loss (by seeing itself in the other). Law, as the father to control the rivalry of the individual siblings, in the real world under liberal theory controls the original man's (or sibling's) ego and protects it by defining what is his and what is not. Separation and containment are central to the liberal idea of the self, a centrality which Benhabib and many other

260 Benhabib uses Thomas Hobbes' simile here. See Situating the Self at 156.
261 Ibid.
feminists argue excludes women's experience of connection. For Postmodern feminists the separate self does not exist but has been created by the dominant discourse as reality. Thus when law and economics scholars base their theories on the liberal individual as autonomous, wealth maximizing and hedonistic they have excluded the multiple possibilities of women's existence and the lessons that might be learnt from them.

Jeanne Schroeder, who has a background in economic theory, develops an interesting internal analysis of the law and economics approach that exposes the gendered nature of the ideal market. Schroeder examines the concept of the ideal market in economic literature and suggests that in fact the ideal market would mean the end of all markets and therefore is "inadequate to the task of making concrete legal recommendations." She explains this apparent contradiction by analogy with Lacanian psychoanalysis and suggests that the ideal market is in fact the 'Perfect Woman' or the 'Real' in psychoanalytic theory. The 'Real' or the 'Feminine' is the psychoanalytic ideal of either what we want to be or join with. Yet becoming or joining the ideal ultimately means our own destruction, as we cannot begin to comprehend the Real, and rather experience it as an absence. Lacan considers that this absence or loss is 'Castration' or what Schroeder explains as violation, in that somewhere in the subconscious the self

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262 Ibid.
263 See the discussion of difference feminism in chapter 2.
265 In her article A Psychoanalysis of Law and Economics, see note 253.
266 A Psychoanalysis of Law and Economics at 491.
267 Ibid. at 497.
was violated and as a result we experience a sense of having lost something.

From loss comes ‘Desire’ to join with the ‘Real’, and it is ‘Desire’ that makes us human as “there is no subjectivity, no personality, no individuality in the Real”.

Our feelings of loss are, according to Schroeder (interpreting Lacan), translated into the desire for other obtainable things, such as goods, in an attempt to make up the lack. It is these substitute desires that enable markets to operate. In economics the ‘Real’ is the ideal market, in that perfection of the market ideal would lead to the death of the market, whereas the real market is located in the ‘Symbolic’. Schroeder examines each aspect of the ideal market and demonstrates that it is a place without a future, time or space, human consciousness, subjectivity, individuality or freedom. Therefore, Schroeder concludes, the ideal market inhabits the ‘Real’ which does not and cannot exist. Economists, in Schroeder’s view, have failed to address the real challenge put by Coase to empirically establish how markets work as opposed to creating an ideal which cannot be realised and does not teach us how we transact.

Moreover, Schroeder suggests that the obsessive goal of economists to eliminate transactions costs is impossible as its goal involves eliminating what makes us

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268 Ibid. at 512.
269 Ibid. at 506.
270 Ibid. at 515.
271 For example in the ideal market, there would be an “unhindered flow of information” but information also includes knowledge of what will happen in the future, thus in the ideal market the future would be predictable, which would be the end of future as we know it. Schroeder applies the same analysis to all the elements discussed. Ibid. at 532-548.
272 Such as disparity of information, time etc., see ibid. at 530.
human, our individuality, our subjectivity and so forth. Schroeder urges economists to stop looking to the heavens for a definition of earth and urges actual study of the reality of the actual market.273 Her proposal in feminist terms calls for the appreciation of context and reality as all people experience it in economics scholarship, something which she proves is presently lacking.

The Veil Reinterpreted

In this section I will cover a prominent feminist voice in the area of limited liability and deal with more diverse issues arising from Theresa Gabaldon's work274 to further form a feminist critique of the separate legal entity and limited liability of the corporation.

Gabaldon traces the concept of limited liability from its origins, questioning the way the legal system has ritualised the determination of liability so that no one is found liable until certain legal procedures are followed.275 She confronts the law and economics scholars with their presumption of the efficient evolution of legal constructs and undermines their theory of the efficiency and definition of benefit.276 Gabaldon sets forth each of the justifications covered briefly in the economic analysis of limited liability above and distrusts the grand theories of the law and economics scholars who leave significant pieces of reality outside

273 A Psychoanalysis of Law and Economics at 558.
274 The Lemonade Stand.
275 Ibid. at 1398.
276 Ibid at 1403-1404.
Firstly, Gabaldon criticises law and economics scholars’ conclusion that the present system of limited liability merely replaces at a lower cost the contracts that the corporation would conclude with each of its voluntary creditors (which include suppliers, employees and customers). She suggests that customers do not and cannot bargain in the costs of injury by a defective product from an insolvent company in the purchase thereof and that “[e]mployees of corporations, cannily contemplating the possibility of corporate bankruptcy prior to payment of wages in arrears, hypothetically demanded higher wages than they would have had they gone to work for partnerships”.278

Gabaldon uses the Cultural feminist approach to form an image of a feminist model of an organisation although she concedes that a feminist model would be severely constrained by the structure of our present patriarchal and capitalist society. She states,

these organisations clearly would be less hierarchically managed than the entity contemplated by existing corporate law and would tend to be smaller than many corporations are today. The first modification would permit representation of more points of view and life experiences and thus better, more contextualized decisionmaking. Similarly, its flexibility would acknowledge the special talents of each participant and permit shared or alternating leadership as appropriate. The second modification would further assure the ability of decision makers to contextualize the consequences of their decisions in terms of their effects on immediate organizational participants, including employees, and on other constituents.279

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277 ibid. at 1410.
278 ibid. at 1411-1412.
279 ibid. at 1429.
Gabaldon goes on to explain that in her opinion a feminist organisation would not feature limited liability, as the limitation of liability involves the imposition of risks on others, whereas a feminist organisation would pull people closer to their responsibilities rather than letting them be divested. Feminism, she argues, would reject the notion that people should be able to put others at risk while trying to make a profit and that investor ‘passivity’ would amount to exploitation (or a failure to care) which would be unacceptable under feminist principles.\textsuperscript{280}

In response to the law and economics argument that if the law did not provide limited liability people would put it in their contracts, Gabaldon suggests that this evasion would not be permitted to avoid limited liability in the bigger context of feminist organisational rules. Gabaldon also disputes the economists’ argument that limited liability promotes entrepreneurship and offers empirical evidence to support her case, redrawing the possibilities of investment activity in feminist terms.\textsuperscript{281} However, Gabaldon is realistic and does not expect radical change such as the abandonment of limited liability in the corporate world.\textsuperscript{282} She does however proffer, not compromise, but suggestions for the incorporation of feminist values in limited liability.

Gabaldon proposes that investors should be empowered to take control of their

\textsuperscript{280} Ibid. at 1430-1431.
\textsuperscript{281} Ibid. at 1434.
investment rather than abdicating responsibility to professional managers. This empowerment would yield greater influence over the managers of the corporation and could change the passive dynamic that is antithetical to feminist thinking. Gabaldon also considers that to offset the disadvantages suffered by constituents as a result of limited liability, companies should be required to underwrite adequate insurance for their managers which would properly compensate constituents in the event of the company's inability to pay its debt or meet a tort claim. Her schema for determining and implementing the insurance, she states, could have the effect of including community interests in corporate considerations and making managers more aware of the risks of their business to the wider community.

Gabaldon's critique of corporate structure is very extensive, though she is extremely modest in her proposals as to how feminist theory can be presently integrated into the structure and theory of corporations. I wish to add to the voices of dissent by following a feminist methodology.

Asking the woman question can be interpreted in several ways. It is important that the number of women employees, shareholders and directors are established and methods of improving the balance are found. However, given

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282 Gabaldon states "[t]o the extent that limited liability is linked to active trading markets and other vital economic factors...the threat of capital flight would seem to preclude serious political consideration of such a move in any discrete jurisdiction", ibid. at 1447.

283 Gabaldon suggests that a company could be judged properly insured by meeting certain standards set by community groups, so that if the insurance was never tested for real, the obligation would still be enforced, see ibid. at 1450.

284 Ibid. at 1453.
the nature of this thesis and the fact that on its face, or indeed on several deeper levels, corporate law and corporate structure do not discriminate against women, the question must be asked even further beneath these layers. The woman question in this context also asks how limited liability is gendered, how the idea of a separate entity reflects human ideology and how diverse women's experiences are excluded from how we imagine that entity.

The very words 'piercing the corporate veil' are heavy with meaning and put the question of the separate entity and limited liability of a company in a very gendered context. The veil has many allusions to the 'exotic', the unobtainable and the religious. The veil signifies the covered woman, whose dignity is preserved and protected by the veil (yet is otherwise powerless to defend herself). Piercing that veil implies a violation of the woman's dignity, a corruption of society's morality. The use of such gender loaded language could be interpreted to mean that the investor, as the woman, has forsaken her power in return for the protection of the veil: management by third parties and limitation of liability. Piercing the veil is a corruption of that dignity or separateness. The limitation of liability is as natural as the protection of a woman's virtue. Given feminism's experience with society 'protecting' women, it is only logical that we should treat any natural state with suspicion. This

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285 Courtney in Private Companies announces that he will refrain from using the metaphor as it has been considered "singularly unhelpful and confusing" at 106.

286 In its religious context, as the hijab worn by some Muslim women, the veil has political overtones in many Western societies intimidated by the blatant demonstration of (a different) religious affiliation (in some feminist circles it raises questions about Muslim women's status). See Catherine Raissiguier, "The Construction of Marginal Identities" in Feminism/Postmodernism/Development at 84.

287 The Lemonade Stand at 1398.
questioning of the natural calls for an examination of the evolution of the idea of
the separate entity and limited liability of the company.

Feminism could use this interpretation in several ways. I will choose two
avenues to follow a critique of the subject matter: (i) the historical privilege of the
corporate entity and (ii) the problem of corporate groups.

The assumption of a corporation's separate identity as somehow natural and
conclusive should be challenged like the presumption of what society had not
long ago held to be a woman’s privilege.\(^{288}\) Although both Courtney and
Buckley state that the corporate charter was a rare privilege granted by the
sovereign when it was first introduced, the legal language, with phrases like the
one discussed above, helped to normalise the corporation’s place in society.
Gregory A. Mark discusses, in detail, the various ways in which society could
have chosen to conceive of the corporation and how interests contrived to turn
the company into a legal person whose private property rights could be
protected.\(^{289}\) Of these options, Mark specifically refers to the idea that the
corporation could have been considered analogous to a governmental entity,
with all its entailing obligations to society.\(^{290}\)

Feminism can build on the history of the corporation to show how choices about

\(^{288}\) Middle class Victorian Britain considered women’s abstention from public life and business a
privilege.
54 U. Chi. L. Rev. 1441.
\(^{290}\) Ibid. at 1445.
the corporate entity were made and normalised, when in fact corporations could be regarded as entities privileged by society and therefore owing obligations in return (I will develop this idea more under the critique of corporate governance). Feminism, in my opinion, would expose the privilege of separateness and limitation of liability as one given by the people through government and use this to examine whether the corporation fulfils its mutual responsibilities.

This logic could not only be used in supporting Gabaldon's call for shareholder empowerment but could also enhance the debate about limited liability within corporate groups. From the bias that the woman question exposes we may use feminist practical reasoning\(^{291}\) to advance feminist arguments on how corporate groups should be treated in the context of limited liability. This question has preoccupied many in the field of corporate law,\(^{292}\) and feminism with its particular methodology could contribute to the way in which people perceive liability in corporate groups.

Feminism should question why, contrary to popular thinking,\(^{293}\) the corporate veil between corporate groups is not shed more often for the purposes of holding parent companies liable for the debts of their subsidiaries. Given that the privilege of limited liability is bestowed by society - with reference to a feminist analysis of the history of corporate separate identity - feminism could argue that society has temporarily privileged the corporate entity with a separate legal

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\(^{291}\) See chapter 1 above and Feminist Legal Methods at 849.

\(^{292}\) See supra note 191.

\(^{293}\) Piercing the Veil at 383.
personality from that of its shareholders, only to the extent that such would protect more vulnerable investors and more particularly private persons. Feminism would question courts' willingness to ignore the separate legal entity of investors in closely held companies (where those exposed are real people) and yet not apply the same standards to corporate shareholders.

I consider that both Cultural and Postmodern feminism could challenge the separateness of corporate shareholders on the basis of the inherent connectedness of society and the rejection of the existence of unitary separate entities created by imposing universal theories. Feminism would require that corporate shareholders in the corporate group would be liable for the debts of subsidiaries more regularly. Feminism would suggest carefully examining the context of the liability and the persons affected, to ensure that worthy claimants such as employees, small creditors, customers and victims of tortious acts be adequately compensated by corporate shareholders. Thus, courts would not be held to rigid doctrines of fraud and capital maintenance for the separate entity of companies within a group to be disregarded. Feminism forces context and this context, it can be argued, is a valid basis for the rejection of the limited liability of corporate shareholders in a group when their subsidiaries are unable to meet the valid claims of corporate constituents and third parties.

294 Supra notes 32 and 65.
295 Seyla Benhabib discusses the notion of liberal autonomy (or unitary self) which has internalised anxiety about the male self and excluded women's experience in *Situating the Self* at 156.
Decisions without Hierarchy\textsuperscript{297}

I shall discuss corporate governance in the context of how feminism would enhance the present debate about ownership and control. Firstly, the problem with much of the debate about corporate governance is its emphasis on the binary relationship between shareholders and managers\textsuperscript{298} to the exclusion of the other constituents of a corporation. This analysis would specifically respond to the woman question discussed above and in chapter 2. Secondly, feminism suggests ways in which we could think differently about corporate governance beyond legal rules, and how we can work within those rules and develop beyond them to new ideas about the corporation.

Feminism, in asking the woman question, identifies where in the corporation women are represented. We can most certainly establish that women are employed in corporations, women are customers of corporations, we are corporate creditors and equally, though perhaps in a smaller number, women are managers, directors and shareholders of corporations. Thus, the corporation reflects how women are integrated into society, primarily at the lower levels with less power (the customer and the employee) with some representation at the upper echelons of directorships and professional managers.\textsuperscript{299} In the light of this weighted model, feminism is able to respond to the corporate governance

\textsuperscript{296} For suggestions on how claimants could be properly compensated for tortious acts and a feminist appraisal thereof see Feminist Tort at note 64 above.
\textsuperscript{297} This phrase is borrowed from Kathleen Iannello, see note 312 below.
\textsuperscript{298} Governance in the United States at 39.
debate by seeking to include the constituents who have not featured as prominently in the discourse.

The idea that the market should regulate the struggle between managers and shareholders to decide who should be replaced first in a takeover bid, does not respond to feminist concerns about the other constituents whose livelihood may be at stake with or without the bid. Therefore to more properly protect other constituents feminism would probably favour implementation and regulation of constituent rights. Indeed, both Adolf Berle and Gardiner Means have stated that "neither the claims of ownership nor those of control can stand against the paramount interests of the community ... It remains only for the claims of the community to be put forward with clarity and force". They reasoned that shareholders who had surrendered their right to control the corporation and the entailing responsibility could not expect the corporation to be run for their sole benefit.

Although the question of shareholder passivity raises some feminist concerns, the basis of Berle and Mean's statement could form the grounding of a feminist approach to corporate governance. Basically, large corporations in which governance problems arise are answerable to very few. Feminism can respond to Berle and Mean's request to define the claims of the community with clarity and

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299 Women fill approximately 1.92% - 6.6% directorships in Canada, see Canadian Directorship Practices, No. 1 at 18.
300 Adolf Berle and Gardiner Means quoted in Corporate Social Transparency at 1220.
301 Ibid.
302 See The Lemonade Stand at 1431.
force.

Catharine MacKinnon’s involvement in the legislative process surrounding pornography and sexual harassment\(^\text{303}\) could be used as an example of how feminists may push for legislation to include other constituents in corporate governance. Using Dominance analysis, it could be argued that women have been ghettoised into the powerless ranks of corporate structure, in an attempt to subordinate them to the male corporation and patriarchal society. Moreover, despite various equality measures, the situation has not improved for low paid employees, who inevitably are women,\(^\text{304}\) and customers and small creditors who always suffer the greatest from a corporation’s change of policy, management, ownership or direction. These factors, it could be argued, justify the enactment of measures to force corporations to give disempowered constituents a greater say in governance.

On the other hand, feminism could move the legislature to address the problems created by governance structures which favour managers and owners.\(^\text{305}\) This redress would involve higher taxes on corporate earnings to provide for more social benefits for the low paid, the imposition of larger minimum redundancy payments and the extension of the full gambit of employment rights to part-time employees. Feminism rejects the idea that the maximisation of the benefits of the

\(^{303}\) See supra note 121.

whole is adequate to protect the interests of the less powerful and would ensure that the constituents lower down on the corporation food chain had certain guarantees and rights against the arbitrary exercise of power. One could also justify the call for these measures by describing the corporation as a network which should include Cultural feminist values of care and connection.306

Thankfully, changes are already underway. Although none have been directed at women expressly, institutional shareholders have become more proactive in demanding good management, consumers have reacted strongly against tales of corporate misbehaviour in environmental and labour issues,307 and corporations in response are beginning to adopt voluntary codes of conduct in relation to the treatment of their employees and the environment. These changes do not empower women in the way feminism would encourage, however. For that we need a feminist theory of the organisation.

Part of this movement is already taking place in organisational theory with a feminist approach.308 These theories study how bias, such as male centred career goals or work ethic, is absorbed into organisations to subtly disfavour women.309

Taking from the lessons of postmodern critique, gender metaphors and symbolism in organisations are also examined to teach how the powerful

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305 Karen Gross discusses how community interests can be taken into account in bankruptcy in Community Interests In Bankruptcy. Her arguments could equally be used in corporate governance.
306 As Leslie Bender does for torts, see Feminist Tort and Lawyers Primer.
308 See in general From Classicism to Feminism.
309 See Yvonne due Billing and Mats Alvesson, Gender, Managers and Organizations (Berlin: de Gruyter, 1993) at 222-223.
language used in business affects the way gender is constructed and dealt with in organisations, and can therefore exclude or discourage women from certain positions and careers.310 From these studies feminism has proposed alternative ideas about how an organisation could be more feminist. Rosabeth Kanter, a leading thinker in organisational theory, has suggested that a feminist organisation would promote 'flatter' corporate structures, decentralisation and distribution of power as well as improving communication and participation on all levels.311

Following Kanter's lead, Kathleen Iannello312 has developed the theory and observed the reality313 of feminist organisations in Decisions Without Hierarchy. Iannello describes the successful non-hierarchal organisations as resolving critical issues as a collective and delegating horizontally more routine decisions, while developing strategies to ensure that the non-hierarchical structure remained in place.314 Through the recognition of ability or expertise these feminist organisations were able to maximise "the skills of its membership".315 The organisations, Iannello shows, created space for their members to develop personally and maximize empowerment while maintaining the organisations' clearly set consensual goals. These studies suggest that the alternatives to the

310 Ibid. at 228-245.
311 From Classicism to Feminism at 547-548.
313 Such as a feminist Peace Group and a Women's Health Collective, ibid.
314 I specifically call these feminist, as opposed to women's, organisations which are not necessarily governed by the feminist principles described herein. Women are equally capable of creating hierarchal and oppressive organisations, see Jeanne de Bruijn and Eva Cyba eds., Gender and Organisations-Changing Perspectives: Theoretical Considerations and Empirical Findings (Amsterdam: VU University Press, 1994).
hierarchical governance structure are both feasible and desirable. In invoking the real experiences of women within feminist organisations such as those studied by Iannello, feminism can learn to more concretely formulate its obligations to incorporate women in corporate governance.

The Connected Market

Women participate directly and indirectly in the world’s securities markets merely by the fact that they represent over half of the economic globe. But how does insider trading effect women? For every insider there is the outsider who buys or sells the securities from him. bell hooks evokes the image “[w]e could enter the world but we could not live there. We always had to return to the margin ... acknowledg[ing] that we were a necessary vital part of that whole”, 316 which could be used as an analogy of how women participate in the cut-throat arena of global finance.

Insider trading (as discussed in the previous chapter) is about privilege and access to that privilege. Women traditionally are excluded from the privileged world of corporate confidences. But feminism does not seek inclusion if our movement from the periphery means that we must play the losing game against those in the know. Feminist theory recognises that the Outsider/Other/Woman317 suffers from a system that rewards male privilege.

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315 Ibid. at 119.
316 From Margin to Center at 12.
317 Feminist Legal Methods.
Catharine MacKinnon has demonstrated the domination of women through patriarchy. Postmodern feminism questions the necessity of constructing the Other in opposition to Man, suggesting more fluid boundaries for the construction of self. The Outsider/Other created by the security market does not have access to privileged information which can be used against her in a trade. A feminist theory of insider trading would seek to redress the situation and to implement some kind of parity of advantage for all.

A perusal of the commentators favouring insider trading exposes motives that attempt to maintain the advantage in favour of insiders. Efficiency claims that seek to preserve the status quo would run foul of feminist priorities to include the Other. It could be argued that only a few women are actually affected by insider trading and thus time and resources should not be spent on preventing such a small crime. However, given that insider trading is used against the Outsider who does not have access to the privilege of inside information, feminism, which attempts to redress injustice among all the oppressed, might support the allocation of some resources to preventing or policing insider trading to protect the Outsider.

The current legislation regulating insider trading addresses feminist concerns to some extent. However, courts, especially those in the United States where insider trading litigation is very advanced and influential on other jurisdictions, tend to

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See discussion above.
shy away from an equality of information approach.\textsuperscript{319} These judgements have moved further from the 'fairness' vision of 10b-5 (discussed in chapter 3) to a convoluted test of duties that must be breached before liability will occur. Feminism could be employed to address the exclusionary practice pervasive in the ideology, discussed in chapter 3, that acknowledges that the market is skewed in regards to information.

Carol Gilligan's work in alternative moral approaches to issues of conflict would appear to be a good place to start in order to respond to the question of how the problem of insider trading could be approached from a feminist perspective. Gilligan explains that categories of knowledge as we know them are a mere construction of different subjectivities and that the feminine subject has been excluded from mainstream theories as an aberration rather than an alternate way of knowing. Gilligan explores this alternate way of knowing and concludes that many women approach problems and conflict from a different perspective than men. She explains that this perspective is more contextual and concerned with how solutions will work themselves out in relations as opposed to individualistic discrete decision-making. This, she suggests, is a result of women's experiences of connection as opposed to separation (encouraged by the liberal theory). Thus some feminists see that women's way of knowing (and decision-making) may be used in contexts where people are connected together; for example through a tortious act or in the context of a corporation.

\textsuperscript{319} Also known as the 'parity of information' approach. \textit{Rounding the Peg} at 1113.
If one looks at the market as a series of relations between people who have agreed to invest and receive capital there is a specifically 'masculine' edge to the race for competitive advantage. The game is about individual pitted against individual in the contest for monetary gain which denies the interdependency between the actors. This is reflected in courts' reasoning in insider trading cases, in that they acknowledge the sophisticated (insider) methods developed by large brokerage firms to forecast prices and advise clients accordingly. In the famous Dirks' case the Supreme Court of the United States acquitted Dirks, an investment analyst who acted on vital inside information concerning a fraud in an insurance company. He used the information to ensure that his clients deserted the company's sinking ship before the information became public. The court stated:

[i]mposing a duty to disclose or abstain solely because a person knowingly receives material non-public information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognises is necessary to the preservation of a healthy market ... The analyst's judgement ... is made available [in various ways] to clients of [his] firm. It is the nature of this type of information, and indeed of the markets themselves, that such information cannot be made simultaneously available to all the corporation's stockholders or the public generally.321

The Court supported Dirks' efforts maintaining that if he was convicted it would discourage other analysts from conducting similar investigations in the future.322

The court made no investigation as to how the data could have alleviated the huge losses incurred by others who were unaware. Thus the cycle of privilege is

321 Corporations at 847.
322 From Fairness to Contract at 36.
Feminism would reconsider the focus of Dirks' obligation. As a participant in the market, feminism would place Dirks in a context of a web of co-operation and agreements. Acting as a member, he would become part of the co-operative in the exchange of capital. The co-operative involves corporations, investors and their agents as well as the public at large.

Once corporations have received the investment tendered for they have little direct benefit from the ensuing exchange of their securities. Nevertheless, it is in their interests to make the market as freely available and as inexpensive to access as possible, with some assurance as to return on capital for their shareholders.

Investors, as other members, vary by the kind of risk they are willing to take, from long term equity or debt holders to speculators. They seek a continuation of the markets to earn interest on their capital. The public in general has a stake in ensuring that business has access to the capital resources required to expand and develop the economy. In the market these interests and priorities are brought together. Without any of these actors there is no market and their dependency on each other, for this very reason, could be the basis for a vision of co-operation.

Feminism would emphasise the importance of this co-operation to the continued relationship between the parties. Interest pitted against interest is not conducive to the trust involved in exchanging capital. Unlike the precedent in Dirks, parties
should be more interested in dealing with the impending volatility of the market in the case of a disaster. The Bre-X scandal of 1997 on the Toronto stock exchange demonstrated the shockwaves that are created in times of corporate disaster. The event undermined the Canadian mining industry world-wide\textsuperscript{323} and it took many months to rebuild confidence in this sector. The culture of autonomy of individuals does not fit with the interdependence that Quebec pension fund holders felt when Bre-X broke.\textsuperscript{324}

The exchange of funds on a global scale is a recent phenomenon. Like Amy\textsuperscript{325} faced with a new moral dilemma, it is not necessary to fit new problems into old dichotomies. The liberal notion of the 'bounded self' informs theories that humans do not need others for growth, when in fact "what actually makes human autonomy possible is not isolation but relationship".\textsuperscript{326}

Liberal theory has sequestered us in individual worlds where we compete, rather than co-operate, with rights, money and privilege. This idea influences and creates expectations of how to deal with societal relations. This competitive game imbues our transactions with a violent, aggressive flavour. There are always market winners and market losers pitted against each other. Securities' jargon is dangerous and exciting: 'control', 'poison pills', 'white knights' and 'empire building'. Feminism could help reshape this culture of dominance and

\textsuperscript{323} The (Canadian) Globe and Mail (8 April 1997).
\textsuperscript{324} The drop in the price of Bre-X shares pulled many other securities down with it, thereby reducing the value of investments, like pension funds, in securities.
\textsuperscript{325} One of Gilligan's subjects, see Different Voice.
\textsuperscript{326} Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self" (1990) 30 Representations 162.
subordination into connection and co-operation. This approach, as pointed out by Gilligan, is "a different history of human attachment, stressing continuity and change in configuration, rather than replacement and separation".327

In my opinion this would change the dynamics of the markets to a considerable extent. Responsibilities to the other parties in the market would hold equal weight with any rights. Inevitably the risks would be reduced with the obligation to share information under a kind of 'disclose or abstain' rule. This would require traders to make any confidential information they had available before trading in a security. Unfortunately this would not be an effortless task, since it may sometimes be difficult for a broker to determine what information her client is acting on. Time, which is now the essence of the market, may constrain the effective communication of data in order for it to be absorbed and understood. It is often difficult to trace the transaction to particular persons, making it impossible to hold traders accountable.

There are other complications in the insider trading debate, for the people on the other end of the inside trader are not the only ones to lose when the truth gets out. People who have bought or sold their securities in the same direction as the outsiders also suffer the loss of not appreciating the true price of the security before the disclosure. In the same way, brokers who have traded and profit because they dealt like the insiders, but without knowledge, take part in the gain.

327 Different Voice at 48.
Feminism would seek to even out the consequences of a sudden shock to the market. Prices could be determined by averages of a day or week to reduce extreme losses. This would discourage parties from seeking to use to their advantage non-public data, as the market's reaction to their trade would be a substantial factor in the resulting average price they would pay. I do not regard this method as being completely foreign to securities culture since the index of stock exchanges (which are average evaluations) are frequently used as a scale for trade. This calculation method would have a negligible effect on long-term investors but would contribute to the stability of their stock price. Corporations would benefit from the increased confidence in the market. However securities would be seen as less disposable by speculators and this factor could have an effect on the price if not the tradability of the security. The whole arrangement would reflect the longer term outlook of the market and the mutual interest of those committed to market integrity. Privilege would be divided amongst all the participants.

If feminism is to propose a theory on which the market could be based it must look for practical solutions. Legislation can only go part of the way in resolving insider trading conflicts. If we want to change the culture of the market it is important to use feminist methods of working at the grassroots level to change attitudes and prejudices. Work on a more local level could challenge the prevailing norms. Indeed the absence of conflict to bring these issues to the fore
may in itself require an altering of attitudes. Jennifer Stoddart has discussed the importance of such an approach in the women’s movement in Quebec and I think the same course of action would be suitable to deal with the ingrained practices in securities markets.

The discussion should begin from within, questioning how the system perpetuates dishonest and exclusionary behaviour. In feminism the relationship between theory and practice is linked by consciousness raising. Applied to the present situation it might involve inquiring into the different conceptions, expectations and experiences various players in the market have. Discussion would take place on a small informal level from which it could open up into thinking about how these views could move forward into a co-operative framework. The idea of a social contract in the widest sense of the word might be used to promote the kind of mutuality the process would need. The emphasis should be directed away from mere rights assertions to acknowledgement of the connection between the parties to the proper continuation of the market. This process might lead people to re-evaluate the processes of the market. At least reflection would be promoted, and change if it did happen would be part of that movement. Furthermore, as the debate expanded the administrators of the markets, such as the stock exchanges and the brokerage firms, could become part of the consciousness of connection.

Securities law is currently enforced through criminal, civil and administrative

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328 Jennifer Stoddart, “Des lois et des droits. Consideration à propos d’un cheminement distinct”
sanctions. Insider traders are subject to criminal prosecution as well as civil and administrative action. It is necessary to reconsider the efficacy of these options in the light of feminist thought. As resources are limited it is doubtful that securities matters would be placed high on a feminist agenda. The inherent patriarchal structure of the market is rather a symptom than a cause, even though it perpetuates the problem.

At present, means spent on criminal litigation for highly publicised individual cases have not questioned and do not engage in a debate of the basis on which the market is already biased against outsiders. The very fact that legislators deem it appropriate that dishonesty on such a sophisticated level is viewed as criminal, when the common law does not recognise an equivalent duty amongst ordinary people, is controversial. It is clearly a case of male dominated business protecting its interests with a criminal penalty. Also criminal trials in this area are difficult and rarely result in a successful conviction. The burden of proof is hard to meet when most of the evidence involved is circumstantial and the accused is not compellable.

On the other hand, administrative action taken by experienced authorities is often more effective in dealing with a wrongdoing and creating the proper penalty than overburdened courts. Feminism, with its focus on healing as

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329 Usually the Securities Commission of the different provinces impose administrative sanctions. An example of a penalty would be a ban on being allowed to buy or sell securities.
330 Supra note 245.
331 Ibid at 1086.
opposed to retribution, would similarly put more emphasis on just treatment and the correct cure. Securities commissions may also learn to appreciate the importance of market integrity and the interdependent existence of the market better than a court which is accustomed to polarising rights claims.
Chapter Five: Conclusion

It could be argued that feminism, like revolutionary science, proposes a change of ‘paradigm’. Nations, institutions, bureaucracies and language are steeped in patriarchy. They “are signifying systems which inscribe ideology and are actually constitutive of reality”. Like Copernicus and others thinkers who questioned whether the universe was earth-centred, feminism challenges the centrality of patriarchal assumptions to our existence. By taking corporate structure and law as an example, I hope to confirm that these neutral entities too are gendered in such a way as to exclude women’s experiences from their formation, governance and ownership.

The law and economics movement as a central narrative in corporate law is prime material for a feminist analysis, and has been subject to much feminist deconstruction. In chapter 4 I have disassembled two aspects of the law and economics movement with reference to the work of Seyla Benhabib and Jeanne Schroeder. As feminists, they undermine the assumptions of economic theory in brilliant and challenging ways, reaffirming the importance of feminist theory to challenging other ideologies.

332 See Jeanne Schroeder’s discussion of revolutionary science according to Karl Popper, Thomas Kuhn, Imre Lakatos and Paul Feyerabend in Feminist Methodologies at 161ff.
334 Feminist Methodologies at 165.
The corporate separate entity reflects liberal theory’s fixation with autonomy and separation. Feminism, I proposed, would reinterpret this separation and limited liability by suggesting that the corporate boundaries become more fluid in recognition of a company’s interdependence with its consumers, creditors, employees and society. I have engaged with Postmodern feminism to examine the symbol of the corporate veil. Drawing on Theresa Gabaldon’s work I examined how as a feminist she deals with the subject of limited liability. I suggested that feminism could draw on the historical notion that separate corporate status is a privilege in adding to the debate of disregarding separateness in corporate groups.

In engaging with the debate on corporate governance I placed feminism within the heart of present mainstream concerns about the corporation. I argued, taking from the Dominance feminist school of thought, that feminism would require that the debate be reframed from a binary contest between shareholders and managers to a multiple debate in light of the subordination of women both physically and spiritually in the governance structure.

Finally, using Cultural feminist methods, I touched on how securities markets could be viewed from the feminist idea of interconnection. Cultural feminism, which arose out of Carol Gilligan’s work (among others) on the different moral development of women and girls, I deduced could be used to respond to the problem of insider trading. The markets as loosely woven interests of companies,
investors, society and capital could respond well to this particular feminist way of reasoning. Feminism could, in my view, work on this interdependence. Feminism could reason that to expect society’s trust in a market place for capital, the market should forsake the centrality of efficiency and work more towards ensuring that all participants are treated fairly. The rewards to be experienced in a more feminist market would, in my opinion, offset in real and important ways the apparent reduction of ‘efficiency’.

I recognise that my thesis is about trapping corporate law and structure to be able to pin a feminist critique thereon. Feminism insists that we release notions of what is woman, gender and so forth. Thus it could be argued that my method is patriarchal by limiting what corporate law and structure is. However, this surely is what a thesis is about: to critique is to make a choice about what something is and set it up for a fall. My excuse for doing so (and I hope the reader will forgive me) it that I write all this in the constant awareness as a feminist that things are not reducible to a few pages of text. Even if I were to go on writing in a kind of thesis continuum, the text as language inherently fails to completely signify the signified.335

This gap between reference and the referred to is where resistance exists. Where patriarchy fails to be complete, resistance breathes revolution. Corporate law and structure are not simply patriarchal monoliths. Just as women are part of the structure and work with, and in it, women and men work against the notions of
individuality, hierarchy and competition. There are sites of resistance that people create: friendship within bureaucracy, understanding within markets, laughter on the factory floor. Smaller companies, I think, could be the source of much feminist work. This must be the topic of another thesis.

Although I talk about the replacement of paradigms, feminism is not a paradigm to replace a paradigm. Feminism is plurality, the plurality of discourse about exclusion, and resistance to that exclusion. My thesis has attempted to resist women's exclusion and reincorporate women into corporate law and structure.

By reading the thesis, it is torn and scattered against the wind of exclusion and patriarchy. Having as many mothers as readers, these opaque pieces of paper, like children, will wreak havoc on notions of separation and autonomy. The letters and words thereon will cling to awkward places and make us feel uncomfortable. Patriarchy will deny its paternity and set a bonfire. But scattered, the thesis will blow about. And people will read it inadvertently stuck onto corporate logos. Subverting absence and counting the voices we can now hear.

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335 See Feminist Jurisprudence at 185 for an explanation of Jacques Derrida's theories on semiotics.
336 See What's Distinctive.
Books:


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337 I have deliberately chosen to include the first names instead of initials to identify the writers more properly.


Helena Kennedy, *Eve was Framed: Women and British Justice* (London: Blackstone
Press, 1993).


Carol Smart, Feminism and the Power of Law (London: Routledge, 1989)
Articles

Kathryn Abrams, "Hearing the Call of Stories" (1991) 79 Calif. L. Rev. 971.


Kathleen A. Lahey & Sarah W. Salter, “Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism” (1985) 23 No. 4 Osgoode Hall L. J. 543.


Robert B. Thompson, “Piercing the Corporate Veil; An Empirical Study” (1991) 76 Cornell L. Rev. 1036.


