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The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders

Theresa A. Gabaldon*

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I. AN EXTENDED INTRODUCTION

A. *The Lemonade Stand*

The sultriness that was summer in D.C. blanketed the pedestrians returning to Capitol Hill. Trickling toward home through air that passively resisted, I almost overlooked a shape emerging from the haze of

my own street. It might have been some atmospherically-induced apparition; rather, there, in the 1990s, in front of a well-kept urban rowhouse with door adorned by yuppie wreath, sat an immaculate child, seraphically presiding over a linen-covered table bearing a pitcher made of Tupperware. His neatly lettered sign, presumably prepared by an invisible caregiver in endorsement of his enterprise, read "Lemonade - 50 Cents."

The little boy with the pitcher became a fixture of late August. Each business day, he held his post from four to six p.m. Although I never patronized his stand, I watched others who did. He seemed quite pleased as each quarter clinked into his pocket, and he never failed to thank each customer and to suggest a repeat transaction.

There may be some romantic explanation for the young merchant's dedication. He might, after all, have been contributing to a shortfall in the family mortgage payment consequent to the recession that rippled across the Washington legal community—in this scenario, the briefcases and well-tailored suits sported by both his parents might just have been a brave front. He might have been saving for a life-preserving operation for a younger sister (who, to the best of my knowledge, did not exist). Although I occasionally amused myself by speculating about his motives, I eventually concluded that I would really rather not know what they were. As it is, he can remain to me an intriguing symbol.

One of the things the little boy symbolizes is good old American enterprise. He saw a need and he filled it. Better yet, he created it: after all, did people only yards from their own GE appliances really need lemonade that, to all appearances, wasn't even sugar-free?

To any reasonably imaginative alumna of the first year of law school, the little boy also embodies liability waiting to happen. Lemons are produce—that means pesticides, doesn't it? Suppose there are seeds in the lemonade, waiting to choke an unwary customer. And sugar causes tooth decay. In the event the lemonade is sugar-free, what might that mean? Can a few oversaturated test rats really be trusted? Of course people know about these risks when they consume lemonade, but has that line of argument been quite the slam-dunk the tobacco companies would have liked?

Today, the little boy, whom I will now call Todd, may have an insurance policy in the form of his chubby cheeks and adorable cowlick. In our increasingly litigious society, however, I wouldn't count on it. Besides, Todd is probably not going to be cute forever. If, when he was counting the start-up capital in his Ninja Turtle bank, Todd had realized that he was putting at risk his tricycle and college education, would Capitol Hill have been minus one lemonade stand?

B. *The American Dream Meets Dr. Frankenstein*

A significant part of the story of American enterprise has been written by state legislators hoping to stimulate entrepreneurship and investment.¹ As a result, there are several forms of business organizations that at least ostensibly will permit an economic actor to limit the amount that she puts at risk.² The most popular of these forms is the corporation.³

If it was ever true that limited liability was necessary to encourage economic development,⁴ it is arguably even more necessary today. The litigious society facetiously posited as a foil for young Todd does exist.⁵ Moreover, the statistics indicating the chance of success for any new business are frightening: the majority of start-up enterprises fail,⁶ leaving debts in excess of assets. Even traditional bastions of investment security seem to be collapsing in record numbers.⁷ Since these facts logically compel a perception that the "upside" potential of entrepreneurship and investment is limited, it may make sense to assure that

1. See Henry Winthrop Ballantine, *Questions of Policy in Drafting a Modern Corporation Law*, 19 Cal. L. Rev. 465, 466 (1931); Martin E. Gold, *Economic Development Projects: A Perspective*, 19 Urban Law. 193 (1987); Wiley B. Rutledge, Jr., *Significant Trends in Modern Incorporation Statutes*, 3 U. Pitt. L. Rev. 273, 278-79 (1937). Note that the statement in the text reflects generally accepted wisdom, but probably overstates the deliberate nature of legislative action.

2. For a brief discussion of several forms, including the limited partnership, the real estate investment trust, and the Massachusetts business trust, see Robert W. Hamilton, *Corporations Including Partnerships and Limited Partnerships* 119 (West, 4th ed. 1990); Harry G. Henn and John R. Alexander, *Law of Corporations* § 34 at 43-46 (West, 3d ed. 1983). For a discussion of the ways in which the ideal of limited liability may fall short of the reality, see notes 82-84.

3. See Henn and Alexander, *Law of Corporations* § 1 at 2; E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law*, 50 Harv. L. Rev. 27, 29 (1936).

4. See notes 51-60 and accompanying text.

5. See Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 5 (1983); Austin Sarat, *The Litigation Explosion, Access to Justice and Court Reform: Examining the Critical Assumptions*, 37 Rutgers L. Rev. 319 (1985); Patricia M. Graham, Note, *Sanctions Unwarranted by Existing Law*, 52 Brooklyn L. Rev. 609 (1986).

6. See David L. Biddulph, *New Businesses: Profitable Prospects*, Direct Marketing 44, 44-45 (April 1990) (stating that there is a 60% chance a new business venture will either exit or fail within five years); Dana Parsons, *Entrepreneurs Undaunted by Pitfalls of Hairy Business*, L.A. Times B1, col. 2 (Jan. 29, 1992) (stating that more than half of new businesses fail within five years; one-third fail within one year); Cynthia Rigg, *Lack of Curiosity Can Kill Fledgling Firms*, Crain's New York Business 17 (Jan. 27, 1992) (60% failure rate); Paul Schreiber, *How One Start-up Got Started*, Newsday 25 (Feb. 10, 1992) (60% failure rate).

7. See, for example, Jerry Knight and Susan Schmidt, *Brady: Bailout Possible if Bank Bill Fails*, Wash. Post C1 (June 18, 1991) (projecting an increase in the number of bank failures); Stephen Labaton, *House Panel Approves Sweeping New Bank Rules*, N.Y. Times Sec. 1 p. 35 (June 29, 1991) (discussing bank failures). Contrast Christine Winter, *Bank Profits Bounce to Brazilian Beat*, Chi. Trib. C1 (Jan. 22, 1989) (discussing instability in the financial condition of banks).

“downside” possibilities are limited as well.⁸

Limited liability, of course, cannot be regarded as an unmitigated good. If it were, legislators presumably would have conferred it upon all business forms long ago.⁹ As a more general matter, they now would flock to endorse caps on tort recoveries.¹⁰ In fact, even brief retrospection reveals quite an interesting picture of the historically perceived risks of limited liability.¹¹ This historical perception may be described in terms of a morality play featuring two important characters. One of these characters is a hapless public, completely unaware that the smiling individual handing out cups of lemonade is not personally and completely on the line for the contents of those cups.¹² The other is Dr. Frankenstein.¹³

8. These and related arguments are discussed in more detail at notes 281-85 and accompanying text.

9. Note, however, the argument that, by restricting access to organizational forms that confer limited liability on enterprise participants, state legislators enhance their ability to seek “rents” from those desiring such limitations. See Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 Md. L. Rev. 80, 91-92 (1991). Nevertheless, legislative interest in the limited liability company is increasing. At least eight states have adopted statutes permitting the formation of these entities, and several more have indicated some inclination to do so. See note 307; S. Brian Farmer and Louis A. Mezzullo, *The Virginia Limited Liability Company Act*, 25 U. Richmond L. Rev. 789, 790-91 (1991); Susan Pace Hamill, *The Limited Liability Company: A Possible Choice for Doing Business?*, 41 U. Fla. L. Rev. 721, 739 (1989).

On a more theoretical level, it is important to recognize that when liability does not exist, there is no need to limit it. To some extent, then, a primary legislative or judicial refusal to impose liability for some particular activity may substitute for a secondary determination to limit the class of individuals upon which such liability might otherwise be vicariously imposed. See notes 291-94 and accompanying text.

10. Fewer than 20 states have adopted some such cap. See, for example, Ala. Code § 41-9-70 (1975); Cal. Bus. & Prof. Code § 6164 (Deering 1991); Colo. Rev. Stat. § 24-10-114 (1990); Fla. Stat. Ann. § 768.28 (West 1991); Idaho Code § 6-926 (1990); Ill. Ann. Stat. ch. 122, ¶ 825 (Smith-Hurd 1989); La. Rev. Stat. Ann. § 40:1299.39 (West 1992); Minn. Stat. Ann. § 466.04 (West 1991); Neb. Rev. Stat. §§ 13-922, 13-926 (1991); N.H. Rev. Stat. Ann. § 41-4-19 (1990); Tex. Civ. Prac. & Rem. Code Ann. § 101.023 (Vernon 1991); Wisc. Stat. Ann. §§ 893.80, 893.82 (1991); Wyo. Stat. § 1-39-118 (1991).

11. According to a May 25, 1824 editorial in the London Times:

Nothing can be so unjust as for a few persons abounding in wealth to offer a portion of their excess for the information of a company, to play with that excess—to lend the importance of their name and credit to the society and then should the funds prove insufficient to answer all demands, to retire into the security of their unhazarded fortune, and leave the bait to be devoured by the poor deceived fish.

Similarly, J. K. McCollish, the first professor of political economy at the University of London (1859) is quoted as saying, “[w]ere Parliament to set about devising means for the encouragement of speculation, over-trading and swindling, what better could it do?” Aubrey L. Diamond, *Corporate Personality and Limited Liability*, in Tony Orhial, ed., *Limited Liability and the Corporation* 22, 42 (Croom Helm, 1983).

12. Legislative concern that the corporate format will mislead the public is apparent both in the requirement that corporations make public filings and in the requirement that their names give notice of their status. See, for example, Rev. Model Bus. Corp. Act §§ 2.01, 4.01.

13. See Mary W. Shelley, *Frankenstein* (Dodd, Mead, 1983) (novel depicting a scientist’s failure to control his own inhuman creation).

According to this Frankensteinian view, irresponsible corporate impresarios regularly dispatch inhuman corporate entities to roam the countryside in search of profits. Lacking both conscience¹⁴ and capital,¹⁵ these entities will inflict injuries for which they cannot, and their heedless inventors need not, pay. In an uncharitable, but not necessarily unrealistic, permutation, the corporate scientist quite deliberately may design the creature to generate short-run gains for the creator, while surreptitiously imposing tremendous costs on third parties.¹⁶

During recent decades, a succession of extremely nonanthropomorphic cost-benefit analyses have lulled these vivid images into slumber.¹⁷ Nonetheless, ascription to the gothic corporate model once again may be on the rise. For example, in the 1980 enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),¹⁸ Congress provided that "operators," as well as corporate waste-generators themselves are liable for environmental clean-up costs.¹⁹ Courts recently have interpreted this provision as an invitation to impose liability on corporate parents for the pollutive defalcations of actively managed subsidiaries.²⁰ More generally, interest in meaningful criminal sanctions for corporate acts has been increasing.²¹ In all likelihood, some especially modern horror stories have prompted these developments and, in the public mind, given new life to the gothic view.

14. There is a substantial literature discussing how diffusion of responsibility among corporate decisionmakers has caused a general lack of corporate ethical conscience. See, for example, Donald J. Miester, Jr., Comment, *Criminal Liability for Corporations that Kill*, 64 Tulane L. Rev. 919, 921 (1990); Paul H. Weaver, *The Suicidal Corporation* 182-93 (Simon and Schuster, 1988).

15. Minimum capital requirements were a usual feature of early corporate charters and enabling statutes. See note 55 and accompanying text; Henn and Alexander, *Law of Corporations* § 126 at 295 (cited in note 2); Bruce E. Douglas, Note, *Statutory Minimum Capitalization Requirements*, 5 Willamette L. J. 331 (1969).

16. See Miester, 64 Tulane L. Rev. at 921; see also sources cited in note 126 (discussing the importance of undercapitalization in determining the propriety of piercing the corporate veil to impose liability on corporate shareholders); Weaver, *The Suicidal Corporation* at 182-96 (cited in note 14).

17. See Part II.C.

18. 42 U.S.C. §§ 9601-9675 (1988).

19. *Id.* § 9607(a).

20. See, for example, *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24 (1st Cir. 1990); *Cooper Development Co., Inc. v. First National Bank of Boston*, 762 F. Supp. 1145 (D.N.J. 1991); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345 (D.N.J. 1991); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988). But see *Joslyn Manufacturing Co. v. T.L. James & Co., Inc.*, 893 F.2d 80 (5th Cir. 1990) (holding that CERCLA did not impose direct liability on a parent corporation for violations of its wholly owned subsidiary).

21. See Truxtun Hare, Comment, *Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. Pa. L. Rev. 935 (1990); Jay C. Magnuson and Gareth C. Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 Notre Dame L. Rev. 913 (1987); Barbara H. Doerr, Comment, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. Detroit L. Rev. 659, 664-65 (1985).

As Pintos explode²² and oil soaks the Alaskan coastline,²³ passion once again is beginning to infuse arguments that for an interim period had become extremely dry.

C. *Mary Shelley Was a Woman*

The developments described above set the stage for a reevaluation of limited liability. Such a reevaluation demands acknowledgment and at least brief discussion of basic corporate principles and the prevalent economic thinking with respect to those principles. This reevaluation need not, however, merely rehash the primarily historical.

Recently popularized feminist philosophies provide fresh analytic tools that may be applied to the question of limited liability.²⁴ These philosophies provide entirely new organizing structures and concepts—new perceptions of reality.²⁵ These perceptions tend to reorder a world in which, to date, the irresistible force of social need has done battle with the immovable object of innate self-interest.²⁶

Most inquiries based on feminist methods have addressed areas far afield from corporate law. These inquiries often have suggested that society and its institutions have failed to respond to the basic needs of at least a portion of humankind.²⁷ Occasionally, descriptions of the lost subjunctive—that which might have existed but demonstrably does not—have had decidedly Marxist overtones.²⁸ Competing perceptions of reality notwithstanding, recent history appears to constrain the immediate utility of this type of analysis. In the last two years, the western

22. See *Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067 (9th Cir. 1975); *Anton v. Ford Motor Co.*, 400 F. Supp. 1270 (S.D. Ohio 1975); Miester, 64 Tulane L. Rev. at 927 (cited in note 14).

23. See Andrew N. Davis, Note, *Protecting Antarctica: Will a Minerals Agreement Guard the Door or Open the Door to Commercial Exploitation?*, 23 Geo. Wash. J. Int'l Law & Econ. 733, 763 n.220 (1990); Gary V. Perko, Note, *Spillover from the Exxon Valdez: North Carolina's New Offshore Oil Spill Statute*, 68 N.C. L. Rev. 1214 (1990). For further discussion of recent business scandals see Patrick Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute's Principles of Corporate Governance*, 66 Wash. L. Rev. 413, 415-17 (1991).

24. See Part IV.

25. See Part III.B.2.d.

26. Note that some aspects of this conflict already have been reconciled to the satisfaction of many economists by the device of the invisible hand. Thus, commentators from Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 423 (Modern Library, E. Cannan ed. 1937), to Milton Friedman, *Capitalism and Freedom* 4, 14-15, 196-200 (U. Chi., 1962), have argued that because each actor in the market is guided by the invisible hand of self-interest, the society as a whole reaps the benefit of the greater sum of wealth produced. See also Alan Greenspan, *Antitrust*, in Ayn Rand, ed., *Capitalism: The Unknown Ideal* 56 (New Amer. Lib., 1967); Alan Greenspan, *The Assault on Integrity*, in Ayn Rand, ed., *Capitalism: The Unknown Ideal* 112 (New Amer. Lib., 1967).

27. See Part III.B.1.

28. See notes 186-89 and accompanying text.

world has seen the virtual collapse of socialism as a dominant motivating ideology.²⁹ It therefore seems prudent to circumscribe reconstructive efforts by reference to practical human desires.³⁰

The tasks of this Article, then, are as follows. The first is to briefly describe the "official story" of limited liability. This description will encompass both basic corporate principles and related economic analysis. The second task is to formulate practically circumscribed criticisms of the official story premised on feminist assumptions and methods. The Article's final endeavor is to bring what appear to be competing analytic strands into informative balance.

II. LOOKING BACK: FRANKENSTEIN'S CONTRACT

A. *A Definition and Brief History of Limited Liability in America*

The term "limited liability" typically describes a situation in which one placing capital at the disposal of an enterprise risks loss of that capital, but no more.³¹ In the context of the laws of business associations, the concept of limited liability distinguishes the posture of the corporate shareholder³² from that of the general partner or sole proprietor.³³ Discussions of this distinction frequently reflect a perception that unlimited liability is the natural consequence of carrying on a business,

29. See, for example, Francis Fukuyama, *The End of History*, National Interest 1 (Summer 1989); Alan Riding, *The New Europe of 1992 is Closer in Economics than in Politics*, N.Y. Times § 5 at 2 (June 16, 1991); Nicolaus Mills, *The Culture of Triumph and the Spirit of the Times*, in Nicolaus Mills, ed., *Culture in an Age of Money* 26-27 (I.R. Dee, 1990) (discussing Fukuyama's essay); James Atlas, *What is Fukuyama Saying? And to Whom is He Saying It?*, N.Y. Times § 6 at 38 (Oct. 22, 1989) (discussing Fukuyama's essay). But see Robin Blackburn, ed., *After the Fall: The Failure of Communism and the Future of Socialism* (Verso, 1991) (broadly looking to a revival of socialist energies).

30. In fact, since early legal commentators first took to cuneiform, most of their references to "basic human needs," "practical desires," or the like necessarily have been matters of pure theory or anecdote or both. As interdisciplinary adulterations to straightforward legal analysis become increasingly acceptable, however, it may be possible to anchor discussion in at least some amount of empiricism. There may, in other words, be at least piecemeal "scientific" responses to some "legal" questions previously answered by assumption. For purposes of this Article, the foremost of these questions would be whether humans are, indeed, so risk-averse that limited liability is necessary to stimulate entrepreneurship and investment. For a nonempirical discussion along these lines, see notes 264-87 and accompanying text.

31. See Frank H. Easterbrook and Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 90 (1985); Ribstein, 50 Md. L. Rev. at 81 n.1 (cited in note 9).

32. See, for example, Henn and Alexander, *Law of Corporations* § 24 at 74 (cited in note 2); Note, *Should Shareholders Be Personally Liable for the Torts of Their Corporations?*, 76 Yale L. J. 1190, 1191 (1967).

33. The term also describes the position of the limited partner or investors in esoteric entities such as the limited liability company. See, for example, Larry E. Ribstein, *An Applied Theory of Limited Partnership*, 37 Emory L. J. 835, 841 (1988).

and limited liability is a special benefit conferred in exchange for the expense and constraints of the corporate format.³⁴

Like the corporate stockholder, the enterprise creditor—that is, one who puts capital at the disposal of a business without receiving an equity position³⁵—historically has enjoyed an assumed limit on exposure to loss in excess of the initial investment.³⁶ Indeed, most would consider the possibility that a creditor might be liable for a borrower enterprise's activity quite startling, and more than a little troublesome.³⁷ Thus, limited liability is the popularly viewed natural state for creditors,³⁸ regardless of the type of business entity that receives the credit.

As a historical matter, differences in the extent of liability attaching to particular investment positions became distinct in the nineteenth century. Commentators have described prior American thought on the question of limited liability as “almost nonexistent.”³⁹ This inattention is not altogether surprising, given, among other things, the relative infrequency of litigation during early American history⁴⁰ and the original strictness of privity requirements.⁴¹ The first corporate charters thus

34. See, for example, Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va. L. Rev. 259, 262 (1967); Ribstein, 50 Md. L. Rev. at 81 (cited in note 9) (discussing this perception).

35. “Equity” has been defined as follows: “A stockholder[’s] proportionate share (ownership interest) in the corporation’s capital stock and surplus. The extent of an ownership interest in a venture.” *Black’s Law Dictionary* 540 (West, 6th ed. 1990).

36. Compare Easterbrook and Fischel, 52 U. Chi. L. Rev. at 90 (cited in note 31), with Kerry L. Macintosh, *Am I My Borrower’s Keeper?*, 50 Ohio St. L. J. 1197, 1200-07 (1989) (discussing traditional reasons why lenders or other suppliers are not held liable for a borrower’s use of funds).

37. See, for example, Nill V. Toulme and Douglas E. Cloud, *The Fleet Factors Case: A Wrong Turn for Lender Liability Under Superfund*, 26 Wake Forest L. Rev. 127 (1991); M. Joan Cobb, Comment, *Where Will It End? Increased Risks to Lenders Under CERCLA Secured Creditor Exemption Law*, 40 Wash. U. J. Urban & Contemp. L. 249 (1991); Sean P. Madden, Comment, *Will the CERCLA be Unbroken? Repairing the Damage After Fleet Factors*, 59 Fordham L. Rev. 135 (1990). See generally Daniel R. Fischel, *The Economics of Lender Liability*, 99 Yale L. J. 131 (1989); Troy H. Gott and William L. Townsley, III, Note, *Lender Liability: A Survey of Theories, Thoughts and Trends*, 28 Washburn L. J. 238 (1988).

38. But see the authorities cited in note 37 (discussing recent developments in lender liability).

39. See E. Merrick Dodd, *American Business Corporations Until 1860* 120, 369 (Harvard, 1954); Oscar Handlin and Mary Flug Handlin, *Origins of the American Business Corporation*, 5 J. Econ. Hist. 1, 16-17 (1945). See also Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573, 588 (1986) (discussing other sources). But see *id.* at 588 (discussing discrete instances in which limited liability was granted in early charters). Corporate law, in general, was virtually nonexistent in America before the 19th century. Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations* 309 (Harvard, 1917); Samuel Williston, *History of the Law of Business Corporations Before 1800* (pt. 2), 2 Harv. L. Rev. 149, 165-66 (1888).

40. Compare Davis, *History of American Corporations* at 294 (unable to locate any example of creditor loss from business failure in the two decades following the American Revolution).

41. See, for example, *Winterbottom v. Wright*, 152 Eng. Rep. 401 (Exch. 1842); Alex Devience, Jr., *The Developing Line Between Warranty and Tort Liability Under the Uniform Commercial Code: Does 2-318 Make a Difference?*, 2 DePaul Bus. L. J. 295, 297 (1990); *Coffin v.*

were silent on the question of limited liability.⁴²

When American⁴³ courts originally addressed the question of whether liability incurred by a corporation should pass through to its shareholders, they tended to focus on the separate juridical stature of the corporation for purposes such as holding title.⁴⁴ The judicial conclusion, then, was that shareholders did possess limited liability.⁴⁵ When called upon to choose for themselves, however, early legislators often indicated a different selection.⁴⁶ In keeping with the popular suspicion of the artificial corporate entity,⁴⁷ a provision imposing unlimited liability on shareholders became a usual feature of corporate charters granted in the first quarter of the nineteenth century.⁴⁸

Before much time had passed, however, a precursive version of the states' "race to the bottom"⁴⁹ evidently influenced legislative reversal on the liability issue.⁵⁰ Thus, by the mid-1800s, industrial lobbying cou-

Rich, 45 Me. 507 (1858) (refusing to hold shareholders liable to corporate creditors because of lack of privity).

42. See Blumberg, 11 J. Corp. L. at 580 (cited in note 39).

43. For a discussion of the earlier British experience, see, for example, Blumberg, 11 J. Corp. L. at 577-81, 585-87; Lawrence E. Mitchell, *Close Corporations Reconsidered*, 63 Tulane L. Rev. 1143, 1155-60 (1989). For a discussion of the separate derivations of American and British corporate law, see L. C. B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 Harv. L. Rev. 1369, 1371-72 (1956).

44. See, for example, *Bank of Augusta v. Earle*, 38 U.S. 519 (13 Pet. 1839); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173, 185 (1985).

45. See, for example, *Wood v. Dummer*, 30 F. Cas. 435 (C.C.D. Me. 1824); *Spear v. Grant*, 16 Mass. 9, 14 (1819); *Nichols v. Thomas*, 4 Mass. 232, 233-35 (1808); William P. Hackney and Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. Pitt. L. Rev. 837, 848 (1982). Contrast *Tippetts v. Walker*, 4 Mass. 595, 597 (1808).

46. See, for example, Act of March 3, 1809, ch. 65, § 6, 1806-1809 Mass. Laws 464, 466; Dodd, *Corporations* at 365, 374, 387 (cited in note 39); Blumberg, 11 J. Corp. L. 588, 591; Dennis S. Karjala, *An Analysis of Close Corporation Legislation in the United States*, 21 Ariz. St. L. J. 663, 664 (1989).

47. See Blumberg, 11 J. Corp. L. at 591; Karjala, 21 Ariz. St. L. J. at 664. Dodd details numerous instances of early hostility to corporations. See Dodd, *Corporations* at 27 n.42, 56, 57 n.41, 105, 114, 208-09, 269-70, 274, 275 n.11, 277-89, 311-13, 319, 367, 390, 393-95, 403-07, 410, 414-17, 422-26, 432, 435-37.

48. Dodd, *Corporations* at 374, 387; Blumberg, 11 J. Corp. L. at 591.

49. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 564-77 (1933) (Brandeis dissenting); William L. Cary, *Federalism and Corporate Law Reflections Upon Delaware*, 83 Yale L. J. 663 (1974); Andrew G. T. Moore, II and Bayless Manning, *State Competition: Panel Response*, 8 Cardozo L. Rev. 779 (1987). See generally Henry N. Butler, *Nineteenth Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. Legal Stud. 129, 143-46 (1985). But see Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 Nw. U. L. Rev. 913 (1982) (discussing the competition for corporate charters from an economic perspective).

50. See Joseph Kinnicut Angell and Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* 362 (Little Brown, 6th ed., 1832); Joseph G. Blandi, *Maryland Business Corporations 1783-1852*, 46, 55 (Johns Hopkins, 1934); Dodd, *Corporations* at 378-79 (cited in note 39); Karjala, 21 Ariz. St. L. J. at 664 (cited in note 46); Shaw Livermore, *Unlimited Liability in Early*

pled with interstate competition for economic development prompted many state legislatures to confer limitations on shareholder liability.⁵¹ This reversal was not universal⁵² and was not without debate;⁵³ there is no doubt that the gothic view of corporations still lived in the public consciousness.⁵⁴ Complicating the picture was the fear that corporations might as easily possess too much economic viability as too little. Special charters conferring limited liability and specifying both minimum and maximum amounts of capital were thus quite common.⁵⁵

Displaying a mildly perplexing lack of gratitude for this legislative largess, business entrepreneurs did not respond to the prospect of limited liability with an immediate rush to incorporate.⁵⁶ This inertia may have been a matter of economic happenstance⁵⁷ or a practical response to the difficulty of the chartering process.⁵⁸ Nonetheless, the rate of incorporation increased throughout the nineteenth century, as did the rate of American industrialization.⁵⁹ Academics have summarized these

American Corporations, 43 J. Pol. Econ. 674, 677 (1935).

51. See Dodd, *Corporations* at 387-89 (cited in note 39) (discussing the trend in major northeastern industrial states); Mitchell, 63 Tulane L. Rev. at 1166 n.87 (cited in note 43) (all states but California had adopted some limitation on shareholder liability by 1900).

52. In fact, pockets of shareholder liability continued to exist well into the 20th century. See, for example, William L. Cary and Melvin Aron Eisenberg, *Cases and Materials on Corporations* 1130 (Foundation, 6th ed. 1988); Blumberg, 11 J. Corp. L. at 596-602 (cited in note 39); Horwitz, 88 W. Va. L. Rev. at 208 (cited in note 44).

53. See, for example, Dodd, *Corporations* at 380-81 (cited in note 39).

54. For a discussion of the opposition by Jacksonian Democrats to the principle of limited liability, see Dodd, *Corporations* at 384-85; Blumberg, 11 J. Corp. L. at 595. See also note 47 and accompanying text.

55. *Liggett Co.*, 288 U.S. at 550 (Brandeis dissenting); James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* at 27, 45, 51 (Univ. of Va., 1970). This format also was adopted in the early acts of "general incorporation" or "self-incorporation." See, for example, Act of June 10, 1837, Conn. Public Statute Laws, May 1836-May 1837 Sessions, c. 63, § 3 p. 49 (permitting self-incorporation for corporations with capital not more than \$200,000 or less than \$4000); Act of May 15, 1851, Mass. Acts and Resolves 1839-99, c. 133, §2, p. 633 (providing for self-incorporation of industrial companies with an authorized capital of not more than \$200,000 or less than \$5,000); Act of July 7, 1866, New Hampshire Laws 1866, c. 4224, § 6, p. 3246-47 (providing for self-incorporation of manufacturing and other companies with capital of not more than \$300,000 or less than \$5,000).

56. See Dodd, *Corporations* at 383 (noting only four such corporations in Massachusetts in first year but steady increase in following few years); Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861*, 162 (Belknap, rev. ed. 1969); Blumberg, 11 J. Corp. L. at 594.

57. Thus, general economic conditions may have influenced decisions to start new business enterprises. See Stuart Bruchey, *The Roots of American Economic Growth, 1607-1861*, 139 (Harper & Row, 1968) (industrial techniques that required large amounts of capital were not developed until after 1835); compare Dodd, *Corporations* at 383 (cited in note 39) (for five years after limited liability was adopted in Massachusetts, the rate of incorporation remained stable; then, there was a large increase in incorporating activity in 1836 and 1837, followed by a sharp decline, presumably due to economic depression).

58. Dodd, *Corporations* at 382-83.

59. Note too the development of general incorporation statutes. See generally *id.* at 390.

developments as proof that a system of factory production can survive under a regime of unlimited liability, but will grow faster with limited liability.⁶⁰

The foregoing conclusion and its subsumed assumptions as to the desirability of industrial growth were wholeheartedly—almost gleefully—embraced at the beginning of the twentieth century. Distinguished men said, in public places and presumably with straight faces, “in my judgment the limited liability corporation is the greatest single discovery of modern times. . . . Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it.”⁶¹ It was left to later, and more cynical, commentators to remind us what some of the early legislators feared: in modern terms, a “moral hazard” arises whenever one group may capture the benefits of an enterprise without being wholly responsible for its risks.⁶²

B. *A Little (Still Historical) Reinterpretation*

The previous Section commenced with a claim that unlimited liability is the popularly perceived natural state for equity owners.⁶³ By contrast, limited liability is seen as natural for creditors.⁶⁴ The treatment of corporate shareholders diverges from the natural state, presumably for some reason.

Arguably the line dividing corporate shareholders⁶⁵ from other eq-

60. *Id.* at 436; see also *id.* at 290.

61. Nicholas Murray Butler, President, Columbia University, 1911, quoted in William M. Fletcher, 1 *Cyclopedia of the Law of Private Corporation* § 21 (1917). Similarly: “[Limited liability is] by far the most effective legal invention . . . made in the nineteenth century.” Charles W. Eliot, President, Harvard University, quoted in Bernard F. Cataldo, *Limited Liability With One-Man Companies and Subsidiary Corporations*, 18 *L. & Contemp. Probs.* 473 (1953).

62. See, for example, Paul Halpern, Michael Trebilcock, and Stuart Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 *U. Toronto L. J.* 117, 148 (1981). See also note 360 and accompanying text.

63. See notes 33-34 and accompanying text.

64. In fact, in a world where liability attaches only after a plaintiff meets some burden of proof and taps into a line of precedent reflecting fairly ritualized policy considerations, general lack of liability may be seen as the natural state, and liability itself the exception.

More specifically, however, the line generally perceived between creditors and equity investors may very well be a natural one, given common-law concepts developed apart from the laws of business associations. In other words, since the law of agency requires an ability to control in order to create the principal-agent relationship and the law of tort frequently calls for demonstrations of culpability and causal relationships, a case-by-case determination of the enterprise liability of creditors probably would exempt most traditional lenders from such liability. This state of affairs is formalized in an assumption that is infrequently questioned. But see the authorities cited in note 37 (discussing recent developments in lender liability). These observations are basically a contraction of the arguments made below with respect to corporate shareholders. See notes 65-80 and accompanying text.

65. The argument in the text also would apply to limited partners.

uity investors is just as natural as the one separating creditors from equity investors and may exist for many of the same reasons. In this light, the rule of limited shareholder liability could be described as primarily a statement of legal economy: with this class of defendants, plaintiffs typically need not waste their own, and the courts', time. Only when special factors are present should the plaintiff seek, and will the judiciary be willing, to pierce the corporate veil.⁶⁶

As some evidence of the "naturalness" thesis, courts had recognized limited shareholder liability well before it was statutorily articulated.⁶⁷ Even if this development were no more than a response to the corporation's juridical stature, it is a logical response and therefore significant.⁶⁸ Perhaps more importantly, institutional constraints on shareholders' formal ability to control corporate activity also support the logic of limiting shareholder liability.⁶⁹

Thus, the basic concept of limited liability for those with limited control seems to respond to some of the same basic equity notions that are reflected in, say, substantive tort law.⁷⁰ There, the liability-prec-

66. See David H. Barber, *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371, 374-76 (1981) (listing 19 factors and describing two-prong test); G. Michael Epperson and Joan M. Canny, *The Capital Shareholder's Ultimate Calamity: Pierced Corporate Veils and Shareholder Liability in the District of Columbia, Maryland, and Virginia*, 37 Cath. U. L. Rev. 605, 612 (1988) (describing two-prong test); notes 83 and 125-31.

67. See notes 43-45 and accompanying text.

68. Thus, given that legislatures created the corporation as a separate legal entity, a status not enjoyed by the partnership, joint stock association and the like, limitation on the pass-through of liability is hardly surprising. But see William Zebina Ripley, *Main Street and Wall Street* 66 (Little, Brown & Co., 1927) (contending that the entity theory is inappropriate for close corporations); Blumberg, 11 J. Corp. L. at 577 (cited in note 39) (limited liability "arose in the wake of the acceptance of the entity concept, but not as a necessary consequence"); Mitchell, 63 Tulane L. Rev. at 1168 (cited in note 43) (same, at least as regards close corporations).

69. Early statutes requiring that corporations be managed by the board of directors were interpreted to prohibit shareholders from making agreements about matters relating to corporate management. See, for example, *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 297 N.Y. 174, 77 N.E.2d 633 (1948); *McQuade v. Stoneham*, 263 N.Y. 323, 189 N.E. 234 (1934); *Manson v. Curtis*, 223 N.Y. 313, 119 N.E. 559 (1918). Despite some relaxation on this point, *Galler v. Galler*, 32 Ill.2d 16, 203 N.E.2d 577 (1964), there continues to be interest in the concept of "proper subjects" for shareholder action. See, for example, *Somers v. AAA Temporary Services, Inc.*, 5 Ill. App.3d 931, 284 N.E.2d 462 (1972); see also Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 Ga. L. Rev. 97 (1988). Another restraint on shareholders' ability to participate in management is the statutory imposition of formal requirements on enforceable voting trusts. For discussion of such requirements, see, for example, *Lehrman v. Cohen*, 43 Del. Ch. 222, 222 A.2d 800 (1966); *Abercrombie v. Davies*, 36 Del. Ch. 371, 130 A.2d 338 (1957); see also William K. S. Wang, *Pooling Agreements Under the New California General Corporation Law*, 23 UCLA L. Rev. 1171 (1976).

Statutory restraints on a limited partner's assumption of a controlling role reflect similar concerns. See Revised Uniform Limited Partnership Act § 303, 6 U.L.A. 307-08 (1990); Uniform Limited Partnership Act § 7, 6 U.L.A. 582 (1969).

70. The same general themes are echoed in the capacity requirements of contract and criminal law.

ing requirements of culpability⁷¹ and causation⁷² indicate a profound social queasiness⁷³ about imposing legal responsibility on individuals who may in any sense be thought "innocent" with respect to a particular occurrence.⁷⁴ The historical difficulties courts have experienced in dealing with joint, concurrent, and supervening causation illustrate this discomfort.⁷⁵ In terms of nineteenth-century tort law, then, the idea that numerous shareholders contributing capital each could be regarded as "causing" some later corporate act, actually conceived and executed by other human actors, is quite farfetched.

Given the law as we know it, only the rules of agency even arguably could provide the bridge to shareholder liability.⁷⁶ These rules stipulate, however, that vicarious liability arises only when the agent is subject to

71. Strict liability, of course, does exist for some torts. For instance, strict liability for trespass certainly preceded development of any substantial body of corporate law. William L. Prosser and W. Page Keeton, *Law of Torts* § 6 at 30 (West, 5th ed. 1984). Although there was a period when American courts were quite interested in imposing culpability requirements, id. § 75 at 535, arguably in order to aid developing businesses, that period passed. Strict liability now exists in a number of circumstances, including the very important area of product liability. Id. § 98 at 692-94. It is thought, moreover, to be increasing in significance. Id. § 75 at 536-38. Nonetheless, strict liability typically does not dispense with requirements that cause be shown. Id. § 79 at 560.

72. Compare Leon Green, *Rationale of Proximate Cause* 132 (Vernon, 1927) (stating that "[c]ausal relation is the universal factor common to all legal liability"), with Stephen Shavell, *Economic Analysis of Accident Law* 109 (Harvard, 1987) ("A basic feature of all legal systems is that a party's behavior must have been what has here been called a necessary cause of an accident for liability to be found."). Courts do, of course, from time to time vary the rigor of the required demonstration of factual causation. The plaintiff usually must introduce evidence from which reasonable persons might conclude that it is more probable than not that the defendant's conduct caused the injury in question. See, for example, *Maryland v. Manor Real Estate & Trust Co.*, 176 F.2d 414, 418 (4th Cir. 1949); *Simpson v. Logan Motor Co.*, 192 A.2d 122, 123-24 (D.C. Cir. 1963). For some purposes, a certain level of statistical correlation between two occurrences may suffice to sustain liability unless the defendant disproves cause. See, for example, *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1524 (D. Mass. 1985); *Sindell v. Abbott Laboratories*, 163 Cal. Rptr. 132, 607 P.2d 924, 930 (1980). Contrast *Burnside v. Abbott Laboratories*, 351 Pa. Super. 246, 505 A.2d 973, 985 (1985). See generally Note, *Compensating Victims of Occupational Disease*, 93 Harv. L. Rev. 916 (1980); Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L. Rev. 963 (1978).

73. But see the arguments made by legal economists discussed in text accompanying notes 88-94.

74. Conversely, to the extent a person's ability to direct an action, enjoy its benefit, and still remain free of liability seems unfair, the imposition of restrictions on control to avoid this result is not surprising. See the authorities cited in note 69.

75. See Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 Stan. L. Rev. 60, 88-97 (1956); Paul J. Zwier, "Cause in Fact" in *Tort Law—A Philosophical and Historical Examination*, 31 DePaul L. Rev. 769, 803 (1982).

76. The statement in the text contemplates imposition of vicarious liability; nevertheless, it is also possible that some sort of direct liability might arise for fault in selection or supervision of an agent, see Restatement of the Law of Agency § 213 (1933) (indicating that such direct liability exists), although demonstration of the agency relationship would encounter the same difficulties discussed in note 79.

control by,⁷⁷ and acts for the intended benefit of, the principal.⁷⁸ To the extent that corporate law restricts the matters to which shareholders may speak, the first of these requirements is problematic. To the extent that the corporate format contemplates group ownership, both requirements present difficulties that are simultaneously theoretical and real.⁷⁹ As a result, even without formal limitations, it is unlikely that courts would impose pass-through liability on the owners of publicly held corporations.⁸⁰

In the case of closely held corporations, shareholders do possess the actual ability to control. Together with the relatively modern development of close corporation statutes that permit such control to be exercised quite directly,⁸¹ this may be evidence that a "naturalness" thesis

77. The requisite is a right to control rather than actual control. Section one of the Restatement provides that "[a]gency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement of the Law of Agency §1.

78. The usual articulation of this requirement is that the agent must act "on behalf of" the principal. *Id.* See Robert A. Koenig, Note, *Personal Jurisdiction and the Corporate Employee: Minimum Contacts Meet the Fiduciary Shield*, 38 *Stan. L. Rev.* 813, 819 (1986); Kenneth M. Koprowicz, Note, *Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety?*, 52 *Brooklyn L. Rev.* 183, 187 n.16 (1986).

79. Thus, short of group unanimity, minority interests will be unable to control putative agents. Similarly, a particular act by a putative agent may represent a benefit to some and a distinct detriment to others. These same theoretical difficulties are, of course, tolerated in the context of general partnerships. Note, however, that as a formal matter, it is co-ownership rather than control that is the requisite for partnership liability. See generally Allen R. Bromberg and Larry E. Ribstein, *Bromberg and Ribstein on Partnership* §§ 2.07 (d)-(e) at 67-73 (Little, Brown, 1988). According to Ribstein, "control may be more important in determining agency than in determining partnership because of the various partnership indicia of monitoring status other than control, which are not typically present in agency cases. Thus, 'continuous subjection to the will of the principal' is necessary for agency, while a mere right to be consulted may be enough for partnership." Ribstein, 50 *Md. L. Rev.* at 97 n.68 (cited in note 9) (citations omitted).

Note, however, the modern attempt to establish that partnerships are themselves entities rather than mere aggregates. See Hamilton, *Corporations* at 55-66 (cited in note 2). Moreover, to the extent that the corporate format invites participation by large groups, the amount of individual control and the likelihood of mutuality of interest among corporate shareholders are substantially diminished.

80. See Ribstein, 50 *Md. L. Rev.* at 94 n.57 (cited in note 9). See generally Robert Hessen, *In Defense of the Corporation* (Hoover Institution, 1979). Holders of widely dispersed shares simply lack both the formal and real ability to control either the entity or its agents and therefore cannot themselves be considered principals.

81. See, for example, Ala. Code § 10-2A-308 (1975); Cal. Corp. Code § 300 (West 1990); 8 Del. Code Ann. § 351 (1983); Ill. Ann. Stat. ch. 32, ¶ 2A.45 (Smith-Hurd 1982); Kan. Stat. Ann. § 17-7211 (1981); 13-A Me. Rev. Stat. Ann. § 407(5) (West 1981); Md. Corps. and Ass'ns. Code Ann. § 4-401 (Supp. 1983); Ohio Rev. Code Ann. § 1701.591 (Baldwin 1985); 15 Pa. Stat. Ann. § 2332 (West 1992); Tex. Rev. Civ. Stat. Ann. art. 12.37(B) (Vernon 1982). These statutes simply may be reactions to the formalism that already permitted shareholders to act as corporate directors and agents without imperiling the limited liability attached to their shareholder status. See Kelvin H. Dickinson, *Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership*, 33 *Am. U. L. Rev.* 559, 565-66 (1984); Frank H. Easterbrook and Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 *Stan. L. Rev.* 271, 273 (1986); Mitchell, 63 *Tulane L. Rev.* at

is incomplete. Corporate texts commonly observe, however, that limited liability is not of particular consequence for the very closely held corporation, given the likelihood that voluntary creditors will ask for personal guarantees and that shareholders, acting as corporate agents, will already be liable for their own torts.⁸² In addition, "piercing the corporate veil" to impose corporate liability is most likely in the close corporation context.⁸³ As a practical matter, then, those with significant actual control frequently will endure liability that is substantially coterminous.⁸⁴

The important point to be made, however, is that limited liability for corporate shareholders is no particular sore thumb on the hand of American law. Criticisms of limited liability thus extend to other features of the law that reflect the same themes, and vice versa. A related point is that the hazards presented by limited shareholder liability are not dramatically different from those presented by limited creditor liability, or from those imposed by the practical reality that the individuals who back sole proprietorships or partnerships may be unable to make good on the debts incurred by their business enterprises. Nonetheless, naturalness, in terms of nonaberration, does not necessarily translate into moral correctness or permanent desirability. This theme will be revisited in some depth in Part III.

C. *Economic Perspectives: The Convincing, the Credible, and the Strained*

Since the 1970s, economic analysis has held the academic playing field in the area of corporate law.⁸⁵ This school has, of course, had its

1151 (cited in note 43).

82. See, for example, Hamilton, *Corporations* at 120 (cited in note 2). The textual reference to the shareholder's "own" torts would include direct liability for negligent selection or supervision of subagents.

83. Robert R. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 *Cornell L. Rev.* 1036, 1047, 1054-55 (1991). In fact, there seem to be no known instances in which the corporate veil of a publicly held corporation has been pierced to impose liability on individual shareholders. *Id.* at 1047. But see Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 *Del. J. Corp. L.* 283, 289 n.11 (1990) (discussing a possible exception). Note also that close corporation statutes offset the threat of veil-piercing by relaxing the requirements for certain corporate formalities. See generally William K. S. Wang, *The California Statutory Close Corporation: Gateway to Flexibility or Trap for the Unwary?*, 15 *San Diego L. Rev.* 687 (1978); Hugh G. Martin, Comment, *Corporations—Close Corporations—Strictness of Requirements at Meetings of Shareholders and Directors*, 14 *S.C. L. Q.* 408 (1962).

84. There are exceptions; for instance, shareholders of a close corporation may succeed in avoiding liability to small trade creditors and employees. See Hamilton, *Corporations* at 121 (cited in note 2). Note that the statement in the text is close to the simplifying assumption made by economists as discussed and criticized in notes 132-34, 150-51 and accompanying text.

85. For a sample of the influential economic literature addressing various aspects of the corporation, see Armen A. Alchian and Harold Demsetz, *Production, Information Costs, and Eco-*

critics,⁸⁶ and some free spirits have managed to stay out of its vortex entirely. Nonetheless, the economists' vocabulary of "risk-bearing," "risk-shifting," and "nexus of contracts" has dominated the literature.⁸⁷

As an initial matter, it should be noted that the general approach of the law-and-economics movement is itself a type of naturalness thesis. The movement frequently attempts to demonstrate that long-lived legal constructs can be explained primarily as tending toward economic efficiency.⁸⁸ To the extent that the starting premise of a tendency toward efficiency is correct, one should observe inescapable commonality throughout the law.

In the view of most law-and-economics scholars, a result is "efficient" if those benefited gain more than those detrimented lose.⁸⁹ Benefit is assessed in terms of "willingness to pay," basically by postulating a model of pre-act bargaining.⁹⁰ The efficiency analysis is unaffected,

omic Organization, 62 Am. Econ. Rev. 777 (1972); Steven N. S. Cheung, *The Contractual Nature of the Firm*, 26 J. L. & Econ. 1 (1983); R. H. Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937); Eugene F. Fama and Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & Econ. 301 (1983); Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305 (1976); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. Pol. Econ. 110 (1965); Manne, 53 Va. L. Rev. at 259 (cited in note 34).

86. For criticism of the view that an individual's preferences are best for him or her, see Mark Kelman, *Choice and Utility*, 1979 Wis. L. Rev. 769. See also Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384 (1985); Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451 (1974); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"*, 80 Harv. L. Rev. 1165, 1214-15 (1967) (discussing transaction costs).

87. See, for example, Nicholas Wolfson, *The Modern Corporation: Free Markets Versus Regulation* (Free Press, 1984); Barry D. Baysinger and Henry N. Butler, *Antitakeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation*, 71 Va. L. Rev. 1257 (1985); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 Geo. Mason U. L. Rev. 99 (Summer 1989); Henry N. Butler and Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 Brooklyn L. Rev. 767 (1989); Daniel R. Fischel, *The Corporate Governance Movement*, 35 Vand. L. Rev. 1259 (1982).

88. See notes 89-91 and accompanying text. See also Richard A. Posner, *Economic Analysis of Law* 229-45 (Little, Brown, 3d ed. 1986); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977).

89. See William Landes and Richard A. Posner, *The Economic Structure of Tort Law* 16 (Harvard, 1987).

90. See, for example, Posner, *Economic Analysis* at 7-15 (cited in note 88). The proponents of this method recognize that in many cases advance negotiation is not feasible. *Id.* See generally *id.* ch. 13.4 at 351 (discussing the merits of ex ante vs. ex post control in such circumstances). For criticism of the elimination from the efficiency calculation of nonmonetary factors, see generally Mark A. Lutz and Kenneth Lux, *Humanistic Economics: The New Challenge* (Bootstrap, 1988); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191 (1980) (challenging wealth maximization as a social value); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. Legal Stud. 227 (1980) (attacking the normative principle of wealth maximization); Frank A. Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev.

however, by whether or not actual compensation moves from the benefited to the detrimented; it is societal, not individual, wealth maximization that is sought.⁹¹ Although this school acknowledges that society may wish to forsake efficiency⁹² in favor of wealth distribution concerns,⁹³ it regards these concerns as outside the parameters of its own inquiry.⁹⁴ The excesses of the strict economic approach toward this dichotomy have been sternly criticized,⁹⁵ as has the narrow economic definition of benefit.⁹⁶

In the context of limited liability for corporate shareholders, prevailing economic theory has produced a number of interesting arguments.⁹⁷ Even staunch critics would find some of these arguments intuitively convincing, if not desirable, in terms of underlying value judgments.⁹⁸ Another category of economic arguments about limited shareholder liability includes those that are credible, but subject to logical debate. In addition, there exists a third class of economic argument on the subject that one frankly doubts the proponents themselves could believe. Examples of all three categories are set out below.

307 (1979) (arguing that wealth maximization is a principle biased in favor of the wealthy); West, 99 Harv. L. Rev. at 384 (cited in note 86) (saying that Posnerian wealth maximization leads to tragic lives of humiliation and alienation).

91. An efficient result in this sense is distinct from one that is Pareto-preferred. Landes and Posner, *Economic Structure* at 16 (cited in note 89). A result is Pareto-preferred if no one can be made better off without making someone else worse off. *Id.* See also A. Mitchell Polinsky, *An Introduction to Law and Economics* 7 n.4 (Little, Brown, 1983).

92. Polinsky, *Law and Economics* at 105-13.

93. According to Polinsky, "[e]fficiency corresponds to 'the size of the pie,' while equity has to do with how it is sliced." *Id.* at 7.

94. Thus, according to Polinsky, "[e]conomists traditionally concentrate on how to maximize the size of the pie, leaving to others—such as legislators—the decision how to divide it." *Id.* at 7.

95. See, for example, Guido Calabresi, *The New Economic Analysis of Law: Scholarship, Sophistry or Self-Indulgence?*, LXVIII Proc. Brit. Acad. 1 (1982).

96. See, for example, Lutz and Lux, *Humanistic Economics* (cited in note 90); Dworkin, 9 J. Legal Stud. at 191 (cited in note 90); Kronman, 9 J. Legal Stud. at 227 (cited in note 90). Obviously, those who disagree with the law-and-economics school on these or related matters will find many of its findings to be of dubious utility.

97. See, for example, Hessen, *In Defense of the Corporation* at 17-18 (cited in note 80); Posner, *Economic Analysis* at 269-72 (cited in note 88); Blumberg, 11 J. Corp. L. at 615-16 (cited in note 39); Easterbrook and Fischel, 52 U. Chi. L. Rev. at 89 (cited in note 31); Halpern, Trebilcock, and Turnbull, 30 U. Toronto L. J. at 144 (cited in note 62); Manne, 53 Va. L. Rev. at 262-63 (cited in note 34); Susan Woodward, *Limited Liability in the Theory of the Firm*, 141 J. Institutional & Theoretical Econ. 601, 602-06 (1985).

98. For a critical assessment of the value judgments made by the law-and-economics movement see, for example, Lutz and Lux, *Humanistic Economics* (cited in note 90); Michelman, 46 U. Chi. L. Rev. at 307 (cited in note 90); West, 99 Harv. L. Rev. at 384 (cited in note 86). See also Part IV.B.1.

1. With an Air of Conviction

For purposes of this subsection, three lines of argument will suffice to exemplify the most intuitively convincing category of economic analysis.⁹⁹ The first concerns the effect of limited liability on development of an active trading market. Economic commentators have noted that, as a matter of common sense, investors made fully liable for the debts of the enterprises in which they invest could not sensibly choose to invest in more than a few entities.¹⁰⁰ Moreover, because variance in personal wealth would result in variance in the risk associated with a particular investment, investors with different amounts of wealth would tend to place different values on the same shares (with the ironic result that "high-risk" shares would be worth more to those with less wealth).¹⁰¹ This variance in share valuation would reduce the ease and availability of market transactions.¹⁰² Accordingly, limiting shareholder liability is one way to facilitate the development and continuation of active securities markets.¹⁰³

Also intuitively attractive is the economists' observation that shareholders with limited liability will be less intent on monitoring the performance of corporate managers than otherwise would be the case.¹⁰⁴ In

99. In evaluating these arguments, it is important to observe that, in their simplest forms, they are convincing because they reflect commonly shared assumptions about attitudes toward risk. They differ from the other, less convincing forms of economic argument, which typically make more specialized assumptions about human motivations and behavior.

100. See, for example, Easterbrook and Fischel, 52 U. Chi. L. Rev. at 90 (cited in note 31); Manne, 53 Va. L. Rev. at 262 (cited in note 34). As posited by my colleague, Larry Mitchell, when the entities involved are extremely large and shareholder participations quite small, this analysis might break down. The debts incurred by General Motors, for example, would have to be immense before any shareholder would incur more than a few cents of obligation per share under a pro rata liability regime. As a practical matter, small investors probably also would have little to fear under a joint and several regime.

101. See, for example, Halpern, Trebilcock, and Turnbull, 30 U. Toronto L. J. at 130 (cited in note 62).

102. Easterbrook and Fischel, 52 U. Chi. L. Rev. at 92; Halpern, Trebilcock, and Turnbull, 30 U. Toronto L. Rev. at 130-31. Note that buyers and sellers who place the same value on shares presumably could find one another; to do so, however, would require additional cost and effort. See also Henry Hansmann and Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L. J. 1879, 1904-05 (1991) (arguing that the market effects described in the text could be reduced by adopting a rule of pro rata, rather than joint and several, shareholder liability).

103. Some economists suggest that there may be methods of abolishing limited liability without completely destroying the capital markets. In particular, Hansmann and Kraakman have argued that although significant legal restructuring would be required, an active market could co-exist with unlimited shareholder liability for corporate torts. See Hansmann and Kraakman, 100 Yale L. J. at 1879.

104. Easterbrook and Fischel, 52 U. Chi. L. Rev. at 94-95 (cited in note 31). Limited liability also may reduce the costs of monitoring other shareholders to assure that they maintain enough wealth to bear their fair share of pass-through liability. See *id.* at 95; Halpern, Trebilcock, and Turnbull, 30 U. Toronto L. J. at 130, 136 (cited in note 62). But see note 100 (discussing role of

the economic mind, however, this argument interacts with the last: at the same time that limited liability reduces a shareholder's motivation to act as management's overseer, it permits development of an active securities market that facilitates a different kind of superintendence.

This marketplace supervision is said to take the spectral form of a constant threat of management-ousting takeovers launched by potential acquirers that identify a shortfall between present market price and the price that would prevail under superior management.¹⁰⁵ Law-and-economics scholars regard monitoring by potential acquirers as more effective and less duplicative than that forthcoming from "ordinary" investors, and thus, from a societal standpoint, as wealth maximizing.¹⁰⁶ The argument complements itself once more with the recognition that because those who could hope to acquire control of an entity typically will be wealthier than "ordinary" investors, limited liability assures that potential acquirers attach a theoretically sufficient control premium to their share valuation to pose a credible threat to present management.¹⁰⁷

A third argument is similar to the second in that it is logically, if not morally, compelling so long as kept modest. This argument maintains that a limitation on investors' liability permits management to undertake higher-risk ventures than otherwise would be the case. At a simple level, this means that to the extent shareholders pay attention to what management is doing,¹⁰⁸ they may acquiesce in strategies entailing a high risk of loss of their initial investment in exchange for a relatively low probability of a return that is sufficiently huge.¹⁰⁹ Were sharehold-

size of enterprise).

105. See Frank H. Easterbrook and Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & Econ. 395 (1983); Frank H. Easterbrook and Daniel R. Fischel, *Corporate Control Transactions*, 91 Yale L. J. 698 (1982); Manne, *Market for Control* (cited in note 34).

106. See the authorities cited in note 105; Frank H. Easterbrook and Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981); Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Tex. L. Rev. 1 (1978).

107. Easterbrook and Fischel, 52 U. Chi. L. Rev. at 96 (cited in note 31). Somewhere in the coils of this self-embellishment the original conviction of the "ordinary" reader may begin to fade. These elaborations thus may fall in the category discussed in Part II.C.2.

108. This monitoring might be accomplished by the shareholders acting on their own behalf or, according to the economists, through the proxy of the efficient market. Research into the efficiency of American capital markets in allocating information typically takes one of three forms. "Weak form" tests measure whether the market fully reflects historical price data. "Semi-strong form" tests study whether all publicly available information is reflected. "Strong form" tests study whether both public and nonpublic information is reflected. Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383, 388 (1970) (Session Topic: Stock Market Price Behavior).

109. Thus, the prospect of finding gold at the bottom of a mine shaft might justify paying the likely succession of claims by injured miners. Presumably, so long as the product of the probability of loss multiplied by the amount of the possible loss is less than the product of the

ers' entire personal fortunes at risk, this calculation would change, and management would have to behave more conservatively.

As part of the high-tech economic model, however, the basic argument supposes that once shareholders possess the limited liability that permits diversification, they logically will choose to diversify their non-systemic investment risk.¹¹⁰ This diversification will encourage management to engage in high-risk strategies, which, when coming croppers, will be offset by the successful high-risk strategy decisions made by managers in other industries. Economists regard this result as socially beneficial in that high-risk strategies may produce significant technological and other innovations.¹¹¹

2. Risk-Shifting and the Nexus of Contract: Finding What You Seek

Less intuitively accessible is a body of economic analysis based primarily on the economists' own version of the "naturalness" thesis and its underlying assumptions. As indicated above, economists presuppose that resilient legal constructs more or less uniformly reflect movement toward efficiency and that efficiency more or less is a matter of real or hypothetical pre-act negotiation.¹¹² It is then a short step to the argument that the legal construct of limited liability for shareholders duplicates, at a lower transaction cost, the contract that shareholders would enter if permitted or required to bargain with third parties beforehand.¹¹³ It is mildly surprising that this and related arguments could be promoted as anything other than restatement of basic premises.¹¹⁴

probability of gain multiplied by the amount of the possible gain, a person would be acting rationally in choosing to invest.

110. For a succinct discussion of portfolio theory, see John H. Langbein and Richard A. Posner, *Social Investing and the Law of Trusts*, 79 Mich. L. Rev. 72, 77-83 (1980). For indications that portfolio diversification is the only rational investment strategy for the risk-averse individual investor, see Dennis W. Carlton and Daniel R. Fischel, *The Regulation of Insider Trading*, 35 Stan. L. Rev. 857, 879 (1983); Easterbrook and Fischel, *Corporate Control Transactions*, 91 Yale L. J. at 712-13 (cited in note 105). But see John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 Va. L. Rev. 717, 748-49 (1984) (discussing why investors may choose to hold undiversified portfolios). From the viewpoint of the individual, the modern trend toward increased use of institutional surrogates seems to support the proposition that investors will diversify their investments. See Richard M. Buxbaum, *Institutional Owners and Corporate Managers: A Comparative Perspective*, 57 Brooklyn L. Rev. 1, 13 (1991) (stating that the concept of institutional prudence has been "recharacterized in recent years as a diversification imperative").

111. See, for example, Easterbrook and Fischel, 52 U. Chi. L. Rev. at 97 (cited in note 31). For discussion of management's innate tendency toward risk aversion, see, for example, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. Pol. Econ. 288 (1980).

112. See notes 89-91 and accompanying text.

113. See Roger E. Meiners, James S. Mofsky, and Robert D. Tollison, *Piercing the Veil of Limited Liability*, 4 Del. J. Corp. L. 351, 364 (1979); Robert B. Ekelund, Jr. and Robert D. Tollison, *Mercantilist Origins of the Corporation*, 11 Bell J. Econ. 715 (1980).

114. The attempted proof of underlying assumptions consists of a chain of possible justifica-

As the restatement goes, the risk of a particular investment is always reflected in its price.¹¹⁵ Since the presence or absence of limited shareholder liability affects the risk of a given investment, it will also affect market price. Accordingly, although the choice of liability rule may not seriously affect the likelihood of profitable investment outcomes as far as equity investors themselves are concerned, it will either shrink or expand "the pool of funds available for investment in projects that would subject investors to risk."¹¹⁶ In other words, risky investments will attract less capital investment under a rule of unlimited liability. So far, so good: this reasoning is not vastly different from the intuitively appealing argument acknowledged in Part II.C.1.

Limited liability, then, expands the pool of funds available for risky investments. This presumably means that more risks will be taken. Limiting shareholders' liability, however, does not make risks evaporate; it simply makes sure they do not fall on shareholders. Thus, one of the economists' main points seems to be that those voluntarily doing business with a corporation are willing to accept this residual risk. We know this because, under the current law, they do accept it whenever they do not affirmatively seek shareholder guarantees or the posting of some other security.¹¹⁷

As rational economic actors, voluntary corporate creditors are then assumed to extract a price concession—higher interest rates for lenders, lower product prices for consumers—in exchange for the increased risk imposed on them by limited liability for shareholders.¹¹⁸ Naturally, the

tions backing up from a conclusion that is taken as a given. See the text immediately below. Compare Herbert Hovenkamp, *Positivism in Law & Economics*, 78 Cal. L. Rev. 815, 822-23 (1990) (stating that very little writing on law and economics could be described as a rigorous attempt to falsify alternative explanations for a given phenomenon; the more usual approach is to provide anecdotal data supporting the thesis). This is not, however, necessarily the case in all economic analysis.

115. According to Easterbrook and Fischel, 52 U. Chi. L. Rev. at 97 n.13 (cited in note 31), this is the clear implication of the Coase Theorem. See generally R. H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960). Note the argument that, given a general rule of limited liability for shareholders, market price reflects additional information about value and risk. This is because limited liability facilitates the development of one "fair" price. See Easterbrook and Fischel, 52 U. Chi. L. Rev. at 96; James Hirsh Lorie and Mary Hamilton, *The Stock Market: Theories and Evidence* (Irwin-Dorsey, 1973); Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1 (1982); Ronald J. Gilson and Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549 (1984).

116. Easterbrook and Fischel, 52 U. Chi. L. Rev. at 97. One of the mechanisms giving rise to this phenomenon is said to be that limited liability permits risk diversification. *Id.* at 96.

117. Compare *id.* at 105.

118. *Id.* Transactions allocating risks in this manner presumably take place because someone is benefiting; otherwise they would waste time and impose needless transaction costs. But see Ekelund and Tollison, 11 Bell. J. Econ. at 715 (cited in note 113) (arguing that the benefit to stockholders of limited liability is exactly offset by the detriment to creditors); Meiners, Mofsky, and Tollison, 4 Del. J. Corp. L. at 351 (cited in note 113) (arguing that the benefit to stockholders

price that shareholders are willing to pay for limited liability must at least equal the minimum that creditors would be willing to accept. Thus, the monetary value to shareholders of what they are receiving must at least equal the cost to creditors of what they are surrendering. An excess of value over cost, and thus social wealth maximization, can arise if creditors are better than shareholders at minimizing, bearing, or at least tolerating risk, and thus willing to accept less than the maximum that shareholders would be willing to pay for the transfer.¹¹⁹

Economists give a number of reasons why allocating risks to creditors does, in fact, maximize social wealth.¹²⁰ One of these is the argument that because order preferences in the event of liquidation mean that equity investors will lose their investment before creditors, it is more important to equity investors to monitor managers.¹²¹ Thus, limited liability should reduce equity investors' attempts to monitor by more than creditors' efforts are expected to increase.¹²² This does not, of course, translate into more or better monitoring; it suggests instead that there will be less monitoring, but that the saved cost is a social benefit.¹²³ A more reassuring argument is that institutional creditors, who presumably comprise a smaller group than diversified investors, will be more able monitors and less subject to the costs and disincentives of coordinating monitoring activity.¹²⁴

Some scholars extrapolate from these and related arguments in an attempt to explain judicial willingness to pierce the corporate veil in exceptional cases.¹²⁵ For instance, the factor of undercapitalization, often mentioned by courts on their way to piercing a veil,¹²⁶ assumes economic significance as a type of unusual capitalization that should be

of limited liability is exactly offset by the detriment to creditors).

Consider also the argument that these transactions simply might reflect innate disparities in attraction or aversion to risk. See Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499, 507-08 (1976) (creditors may be less risk-averse than shareholders or may have better information).

119. Compare Easterbrook and Fischel, 52 U. Chi. L. Rev. at 98 (cited in note 31).

120. See, for example, Posner, 43 U. Chi. L. Rev. at 499 (cited in note 118); Easterbrook and Fischel, 52 U. Chi. L. Rev. at 91.

121. Easterbrook and Fischel, 52 U. Chi. L. Rev. at 99.

122. *Id.*

123. Presumably, the specter of takeovers provides all the effective monitoring that is needed, see notes 105-07 and accompanying text.

124. See, for example, Easterbrook and Fischel, 52 U. Chi. L. Rev. at 100 (cited in note 31); Saul Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 Yale L. J. 49, 55-59, 68-73 (1982).

125. See, for example, Easterbrook and Fischel, 52 U. Chi. L. Rev. at 109-13.

126. See William O. Douglas and Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193, 210-11 (1929); Easterbrook and Fischel, 52 U. Chi. L. Rev. at 113; Thompson, 76 Cornell L. Rev. at 1065-67 (cited in note 83). This argument may fail, however, if the investors involved are institutional.

revealed to creditors to spare the waste of a full credit investigation in the case of small transactions.¹²⁷ Similarly, economists explain the traditional veil-piercing inquiry into whether a corporation perpetrated any fraud or misrepresentation in the course of obtaining credit¹²⁸ in terms of a distorted portrayal of risk.¹²⁹ Obviously if such distortions were protected, creditors would have to guard against them with wasteful increases in investigation or a demand for additional price concessions from the corporate debtor. Finally, the veil-piercing importance of a corporation's status as closely, rather than publicly, held¹³⁰ is explained by the lack of an active securities market to perform the monitoring function that limited liability both permits and demands.¹³¹

3. How People Who Ride in Taxis Get What They Deserve

Most forms of legal commentary attempt to explain why a particular legal result either has occurred or should be reached in the future.¹³² When such an exercise demands reconciliation of the real world with a particular Grand Theory, a funny thing happens to the real world. Little pieces of it start, quite innocently, to disappear. Variances from the Grand Theory are dismissed as aberrational or insignificant—in traditional legal analysis, “*but see*” usually does the trick.¹³³

The law-and-economics movement may not be any more guilty of this “real world simplification phenomenon” than any other school. Nonetheless, the simplifying assumptions made by legal economists are textual—in fact, definitional—rather than by way of footnote, and can-

127. A parallel argument can be made with respect to the foreseeability doctrine in measuring contract damages. See generally Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. Legal Stud. 249, 282-83 (1975).

128. See Cathy S. Krendl and James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 Denver L. J. 1, 31-34 (1978).

129. See Easterbrook and Fischel, 52 U. Chi. L. Rev. at 112; Posner, 43 U. Chi. L. Rev. at 520-24 (cited in note 118).

130. See Thompson, 76 Cornell L. Rev. at 1047, 1054-55.

131. Easterbrook and Fischel, 52 U. Chi. L. Rev. at 109-10.

132. Adherents of the critical legal studies and critical race studies movements are, of course, notable exceptions. See generally Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1979); Robert W. Gordon, *New Developments in Legal Theory*, in David Kairys, ed., *The Politics of Law: A Progressive Critique* 281 (Pantheon, 1982); *Critical Legal Studies Symposium*, 36 Stan. L. Rev. 1 (1988); *Critical Legal Studies Symposium*, 6 Cardozo L. Rev. 691 (1985); Allan C. Hutchinson, *Introduction*, in Allan C. Hutchinson, ed., *Critical Legal Studies* (Rowman & Littlefield, 1985); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 San Diego L. Rev. 1043 (1988); Comment, *The Schism Between Minorities and the Critical Legal Studies Movement: Requiem for a Heavyweight?*, 11 B.C. Third World L. J. 137 (1991).

133. According to *The Bluebook: A Uniform System of Citation* 23 (Harvard L. Rev., 15th ed. 1991), “*but see*” indicates that the cited authority clearly supports a proposition contrary to the main proposition, “*contra*” indicates that the authority directly states the contrary, and “*but cf.*” signals authority supporting a proposition analogous to the contrary. *Id.*

not help but attract controversy.¹³⁴ In the context of limited liability, it is some of these definitional assumptions that ring most hollow.

Recall, once again, the economists' conclusion that a rule of limited liability for shareholders simply duplicates, at a lower cost, the agreement that shareholders would reach with voluntary creditors.¹³⁵ The larger the group of voluntary creditors, then, the greater the explanatory power of the model. In this light, involuntary creditors—those troublesome individuals who allow themselves to be squashed on the public thoroughfare, asphyxiated in their beds by chemical spills, or whatever—could constitute a real flaw on the face of Grand Theory.

For purposes of this Article, one of the most troubling practices of economic analysis is the classification of many corporate creditors as "voluntary" rather than "involuntary." To some law-and-economics commentators, a voluntary creditor is anyone who was not hit from behind by one of the corporation's trucks (an exaggeration, but not a big one).¹³⁶ The range of voluntary creditors thus includes, along with traditional institutional lenders and bondholders, such classes as suppliers, customers, and employees (except maybe those hit from behind by a truck on their day off).¹³⁷

In terms of economic theory, then, consumers who are injured by an insolvent corporation's defective products hypothetically have bargained in advance for price concessions to reflect the possibility that both injury and insolvency would occur.¹³⁸ Taxi cab passengers, injured by a driver's negligence, supposedly made a similar bargain.¹³⁹ Employees of corporations, cannily contemplating the possibility of corporate bankruptcy prior to payment of wages in arrears, hypothetically de-

134. See notes 86 and 90.

135. See notes 112-13 and accompanying text.

136. But see Hansmann and Kraakman, 100 *Yale L. J.* at 1120-21 (cited in note 102) These authors suggest distinguishing voluntary and involuntary creditors according to whether a given victim reasonably can be understood to have contracted with the firm in substantial awareness of the relevant risks of injury.

137. See, for example, Easterbrook and Fischel, 52 *U. Chi. L. Rev.* at 104 (cited in note 31) (stating that "[e]mployees, consumers, trade creditors, and lenders are voluntary creditors," and that "[t]he compensation they demand will be a function of the risk they face"). The greatest concession to reality is made by those scholars who are willing to label these groups "quasi-voluntary" rather than "voluntary;" the analysis, however, seems to remain the same. See, for example, Ribstein, 50 *Md. L. Rev.* at 129-30 (cited in note 9).

138. See, for example, Ribstein, 50 *Md. L. Rev.* at 129-30 (cited in note 9). Professor Ribstein seems to concede that such bargaining is hypothetical, although normatively desirable.

139. The interest in taxi cab hypotheticals is, of course, attributable to the influence of *Walkovsky v. Carlton*, 18 *N.Y.2d* 414, 223 *N.E.2d* 6 (1966), a standard feature of most corporate texts, involving an unsuccessful attempt to pierce the corporate veils between a shareholder and several sibling corporate entities. See, for example, Hamilton, *Corporations* at 267 (cited in note 2). Observe, however, that the victim in *Walkovsky* was a pedestrian rather than a passenger.

manded higher wages than they would have required had they gone to work for partnerships.¹⁴⁰

To some extent, this approach is reminiscent of one of the more spectacularly non-Disney versions of the Cinderella story—the one in which the stepsister cuts off her own big toe and stands in pain proclaiming the glass slipper's perfect fit.¹⁴¹ Once the toe is gone, however, this technique does leave a relatively small blemish on prevailing theory. There are at least three ways to deal with the remaining flaw.

One method is simply to admit, typically as something of an aside in an article largely emphasizing the importance of limited liability, that the blemish of the involuntary creditor exists and may merit creation of some exceptions to the general rule.¹⁴² Another is to minimize the importance of this flaw by assuming that most corporations will carry liability insurance, evidently at the instance of corporate managers who are insuring their own jobs against corporate insolvency.¹⁴³ The third method is to argue that because the social benefits of limited liability for shareholders are so substantial, parties in their "original position"—that is, not knowing if they ever will be involuntary creditors—might very well favor a rule of limited liability.¹⁴⁴ Because the gamble of those who ultimately do become involuntary creditors was a willing one, any blemish on the theory completely disappears.¹⁴⁵

140. Note that the approach developed by Hansmann and Kraakman, discussed in notes 103 and 136, would not assist employees or other groups who lack bargaining power rather than information. Hansmann and Kraakman, 100 *Yale L. J.* at 1879 (cited in note 102). Note also the statutes adopted in a few states that impose personal liability on some shareholders for the wage obligations of their corporations. See, for example, N.Y. Bus. Corp. Law § 630 (McKinney 1992) (imposing liability on the corporation's 10 largest shareholders).

141. See Jakob Grimm and Wilhelm Grimm, *Grimm's Fairy Tales* 172-73 (Golden, 1986) (translated by E.V. Lucas, Lucy Crane, and Marian Edwards).

142. See, for example, Halpern, Trebilcock, and Turnbull, 30 *U. Toronto L. J.* at 145-47 (cited in note 62). Observe, however, the attention devoted by Halpern, Trebilcock, and Turnbull, to other flaws in the economic model. For notable exceptions to the "brief aside" approach, see Hansmann and Kraakman, 100 *Yale L. J.* at 1879; David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 *Colum. L. Rev.* 1565 (1991). The Leebron piece became available after completion of this Article and otherwise would merit more substantial discussion and citation.

143. Easterbrook and Fischel, 52 *U. Chi. L. Rev.* at 107-09 (cited in note 31). This second approach, like the first, more-or-less gracefully admits that the theory is not perfect. *Id.* at 107.

144. See, for example, Ribstein, 50 *Md. L. Rev.* at 128 n.212 (cited in note 9). Note, however, that Professor Ribstein does not seem to regard this argument as compelling. *Id.* at 128-29. The "original position" is a centerpiece of John Rawls' philosophical theory of justice. See John Rawls, *A Theory of Justice* 12 (Belknap, 1971) (describing the original position in greater detail).

145. One might, in fact, argue that residents of some impoverished locale would, on an ex ante basis, accept limited shareholder liability in exchange for economic development, jobs, and the like. Making this argument would be a healthy exercise. Even healthier would be some attempt to involve community representatives in an actual bargaining process, or even some attempt to determine whether such a bargain should be permitted. See notes 262-63 and accompanying text.

4. Summary

If economists both began and ended their analysis with the "intuitively appealing," or "class one," arguments described above,¹⁴⁶ their case in support of limited liability would be a good one. Even then, the analysis would be incomplete; the class one argument merely states the gross social benefits of limited liability and includes neither a refutation nor a weighing of its costs.

Of course, economic analysis does not begin or end with class one arguments; actually, these arguments do not really require economic theory at all. The place where economic theory becomes critical is "class two."¹⁴⁷ Although the "hyperrational bargaining" model may strain credulity, it provides interesting insights into the ways that sophisticated lenders to corporations might conduct themselves. One of the more troubling aspects of this type of economic analysis, however, is that it clearly is intended to be normative.¹⁴⁸ That is, the proponents of these arguments suggest that this is how creditors should, rather than do or might, behave.¹⁴⁹

It is, however, in the "class three" or "real world simplification" category that the most significant harm may occur.¹⁵⁰ The simplifying assumptions and reductionist techniques of class three analysis prevent the other levels from attaining more breadth and depth. More important, this form of argument conveys a consummately uncaring, if not callously indifferent, message about rights and responsibilities in America today. Indeed, the class three arguments relating to limited liability are quite typical of other assumptions for which the economics movement has been taken to task or completely condemned.¹⁵¹

III. THE FEMINIST EXPERIENCE

A. *On Silence When There Is Nothing to Say*

There has been, and continues to be, an explosion of interest in feminist theories and methods.¹⁵² Nonetheless, there have been remark-

146. See Part II.C.1.

147. See Part II.C.2.

148. See generally Dworkin, 9 J. Legal Stud. at 191 (cited in note 90); Kronman, 9 J. Legal Stud. at 227 (cited in note 90).

149. For further discussion of related criticisms, see Part IV.B.1. Note that the above-described "high-tech" embellishments of the "logically compelling" class one economic arguments share this normative character. See notes 105-07 and 110-11 and accompanying text.

150. See Part II.C.3.

151. See notes 86 and 90.

152. For just a few examples, see *Symposium on Women and the Law: Goals for the 1990s*, 42 Fla. L. Rev. 1 (1990); *Symposium on Feminist Jurisprudence*, 25 Tulsa L. J. 657 (1990); *Symposium*, 24 Ga. L. Rev. 759 (1990). Several legal journals now are devoted entirely to feminist

ably few applications of feminist theories and methods in areas related to corporate law.¹⁵³ By contrast, the feminist literature on rape, pornography, spousal battering, and family law has been profuse.¹⁵⁴ This disparity presumably results from the obvious and immediate relevance of gender differences to this latter set of issues, rather than the disinterest in business matters traditionally ascribed to women.¹⁵⁵

In fact, although feminist jurisprudence¹⁵⁶ primarily has devoted its specific analysis and commentary elsewhere, there has been no lack of feminist political theory¹⁵⁷ focusing on aspects of the economy.¹⁵⁸ Thus, for instance, feminist theorists have sought to demonstrate the pervasive, and sometimes devastating, effect of capitalist economic ordering on the lives of women.¹⁵⁹ This discussion of modern market organization has paid little particularized attention to accompanying legal structures. This, too, seems a natural choice of emphasis; to the extent that feminist analysis of market economics to date has been profoundly crit-

literature. See, for example, Berkeley Women's L. J.; Harv. Women's L. J.; Yale J. L. & Feminism; Wis. Women's L. J.

153. Actually, the only strictly relevant feminist analysis located by the author is contained in Kathleen A. Lahey and Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 Osgoode Hall L. J. 543 (1985).

154. See, for example, Susan Estrich, *Real Rape* (Harvard, 1987); Diana E. H. Russell, *Rape in Marriage* (MacMillan, 1982); Susan Estrich, *Rape*, 95 Yale L. J. 1087 (1986); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763 (1986); Charlotte Germane, Margaret Johnson, and Nancy Leman, *Mandatory Custody Mediation and Joint Custody Orders in California: The Dangers for Victims of Domestic Violence*, 1 Berkeley Women's L. J. 175 (1985); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 Or. L. Rev. 393 (1988); Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395 (1985); Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 Mercer L. Rev. 545 (1988); Gerald D. Robin, *Forcible Rape: Institutionalized Sexism in the Criminal Justice System*, 23 Crime & Delinq. 136 (1977); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 Women's Rts. L. Rep. 195 (1986); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. Fla. L. Rev. 45 (1989). This listing could continue at some length.

155. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983) (criticizing the traditional dichotomization of men's and women's spheres of interest and influence).

156. "Jurisprudence," unmodified, has been defined as "consist[ing] of the general theories of, or about, law." Edwin Wilhite Patterson, *Jurisprudence: Men and Ideas of the Law 2* (Foundation, 1953).

157. Patterson distinguishes jurisprudence and political science largely in terms of the intensive scrutiny by the former of the work of courts, leaving to the latter the study of "the structure and functioning of the other departments of government and the general theory of the state." *Id.* at 53. For purposes of this Article, the only distinction intended is one focused on the level of scrutiny attaching to the operation of specific legal principles and doctrines.

158. See, for example, Zillah Eisenstein, ed., *Capitalist Patriarchy and the Case for Socialist Feminism* (Monthly Review, 1979); Marilyn Waring, *If Women Counted: A New Feminist Economics* (Harper & Row, 1988).

159. See the authorities cited in note 158.

ical and has called for clean-sweeping change, attempts to rehabilitate individual legal constructs may appear premature.¹⁶⁰

Are there, however, additional reasons that feminist agendas have ignored corporate and related topics? Is it arguable, for instance, that our present market economy is so dominated by historically male values that feminist inquiry simply has no immediate response other than generalized invocation of the concept of "oppression"? Or that feminists simply have realized that addressing a corporate law audience on feminist concerns would be, for the speaker, a sublime waste of time and, for the most indulgent in the audience, an exercise akin to observing an embroidery demonstration at a board meeting? As the discussion below will indicate, the answer, as to so many multiple choice questions, is both all and none of the above.

B. Themes and Variations

1. In the House There Are Many Rooms¹⁶¹

Although there are many feminist concerns,¹⁶² these concerns share a common focus on the position of women in a patriarchal society and on methods of expunging patriarchy.¹⁶³ In the words of one commentator, the uniting feminist task is "to name, expose, and eliminate the unequal position of women in society."¹⁶⁴ To the casual reader, this suggests that feminist corporate law analysis should be at an end if women are admitted to board rooms and corporate offices. In fact, to such a reader, feminist corporate law analysis need never have started because employment discrimination law—a different subject—is both adequate to, and more appropriate for, the task.

160. At worst, such attempts presumably would weaken the force of arguments that sound primarily in socialism and signal an unintended willingness to compromise.

161. Compare John 14:2 ("In my Father's house there are many rooms; if it were not so I would have told you.")

162. Some feminists now regularly talk of "feminisms" rather than "feminism" in order to reflect the diversity of a theory for all women. See, for example, Sandra Harding, *The Science Question in Feminism* 244 (Cornell, 1986); Elaine Marks and Isabella de Courtivron, eds., *New French Feminisms* (Univ. of Mass. 1981); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 *Stan. L. Rev.* 751, 753 n.11 (1989).

163. Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 *Tulsa L. J.* 775, 780 (1990). It also has been said that "one threshold observation is difficult to dispute. Feminism takes gender as a central category of analysis." Deborah L. Rhode, *Feminist Critical Theories*, 42 *Stan. L. Rev.* 617, 617-18 (1990); see also Deborah L. Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 *U. Cin. L. Rev.* 521, 523 (1987) (stating that "a research agenda sensitive to feminist values would . . . reflect not a common theory but rather certain common commitments" and that "[s]uch an agenda would remain attentive both to women's concrete experience, and to the ways that such experience varies").

164. Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 *Nw. U. L. Rev.* 352, 353 (1988) (book review).

More reflective readers, however, will recognize that inequality also inheres in "one size fits all" social and legal institutions. Thus, an actor may experience unequal treatment¹⁶⁶—and personal discomfort—if required to function in a setting that is adapted to the values, abilities, and needs of others dissimilar to that actor and that therefore fails to accommodate, much less reflect, the actor's own values, abilities, and needs.

Translated into a constitutional law analogy,¹⁶⁶ the problems presented are somewhat reminiscent of those suggested by the First Amendment's promise of freedom of religion, with its perplexing interface of the principles of free exercise and nonestablishment.¹⁶⁷ In the case of feminism, however, the problems are compounded because the suppressed values (1) are not religious ones and thus are not protected by the First Amendment, and (2) have not been articulated by elders in any conveniently dogmatic form and therefore cannot be uniformly understood. In fact, even expression of the problems felt by feminist complainants is impeded because traditional vocabulary and traditional conceptualizations are inapplicable. For instance, the concept of freedom to exercise one's values may be at odds with the very values that are held.¹⁶⁸

The freedom of religion analogy is one derived from liberal, rights-based jurisprudence, which gives primary credence to the importance of the individual.¹⁶⁹ As such, it would be objectionable or meaningless to

165. This reference to unequal treatment is colloquial and not intended to invoke Fourteenth Amendment principles. The dangers of invoking the vocabulary of equality are, of course, manifest to anyone familiar with feminist literature. See also notes 181-84 and accompanying text. See generally Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118 (1986); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L. J. 1 (1985); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279 (1987); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1985).

166. The analogy is acknowledged to be an imperfect one. This imperfection is a function of, among other things, a lack of concepts common to feminist and traditional constitutional analysis. See note 168 and accompanying text.

167. See, for example, Philip B. Kurland, *Religion and the Law of Church and State and the Supreme Court* 112 (Aldine, 1962) (stating that conflict is avoided as long as the law avoids conferring benefits and imposing burdens on the basis of religious classifications); John E. Nowak, et al., *Constitutional Law* 1031 (West, 3d ed. 1986) (stating that there is a "natural antagonism between a command not to establish religion and a command not to inhibit its practice"); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980) (resolving conflict by construing the Establishment Clause as only forbidding government action undertaken for religious purpose and likely to coerce, compromise, or influence religious beliefs).

168. See notes 201-03 and accompanying text.

169. The importance of individual rights in the United States has been said to have both political and environmental roots: political owing to the need to justify the war of independence

some feminists.¹⁷⁰ Nonetheless, it may help explain the division of tasks among various feminist thinkers. Thus, at any given time, some feminists may concentrate on articulating and applying the values that they believe many women hold and eventually may be encouraged to express.¹⁷¹ Some may devote themselves to examining the relationship to gender differences of traditional concepts such as freedom and equality.¹⁷² Others may choose to critique the larger structure of which these traditional concepts are but a part.¹⁷³ Inevitably, these choices will result in analytic gaps and divergences, some of which may appear, and actually be, at immediate odds.¹⁷⁴

2. The House Tour

Systematic identification of analytic divergences, much less imposition of labels upon those divergences, inevitably will reduce some amount of crucial detail to meaningless abstraction. Although this is an

against the British crown; environmental as a result of the need to confront frontier conditions during the 19th century westward expansion. See Maxwell H. Bloomfield, *American Lawyers in a Changing Society, 1776-1876* at 92-102 (Harvard, 1976); Jay Fliegelman, *Prodigals and Pilgrims: The American Revolution Against Patriarchal Authority, 1750-1800* at 136-90 (Cambridge, 1982).

170. See, for example, Elizabeth Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 Geo. Wash. L. Rev. 338 (1986). See generally Annette Baier, *Trust and Antitrust*, 96 Ethics 231 (1986); Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987); Sara Ruddick, *Maternal Thinking*, 6 Fem. Stud. 342 (1980). But see Rhode, 42 Stan. L. Rev. at 633-34 (cited in note 163) (describing benefits conferred by rights-based approach). See also notes 201-03 and accompanying text.

171. See, for example, Carol Gilligan, *In A Different Voice* 5-23 (Harvard, 1982); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis. Women's L. J. 81, 140-41 (1987); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 13-42 (1988). These authors acknowledge, however, that the distinctions between the values held by men and women are not absolute. See *id.*

172. See, for example, Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1 (1975); Kenneth L. Karst, *Women's Constitution*, 1984 Duke L. J. 447; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984). See also the authorities cited in note 184.

173. See, for example, Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard, 1987); Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard, 1989); Olsen, 96 Harv. L. Rev. at 1497 (cited in note 155); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L. J. 1373 (1986).

174. See Carolyn G. Heilbrun, *Writing a Woman's Life* 19-20 (Norton, 1988); Kit Kinports, *Evidence Engendered*, 1991 U. Ill. L. Rev. 413, 414; Rhode, 42 Stan. L. Rev. at 619 (cited in note 163). Martha Minow discusses such divergences among the various branches of feminism and goes on to refute the value of consistency. Martha Minow, *Beyond Universality*, 1989 U. Chi. Legal F. 115, 136; see also Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* 176 (Beacon, 1988) (stating that different voices in feminist analysis are a "sign of our empowerment" rather than a threat to coherence); Leslie Bender, *From Gender Difference to Gender Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 Vt. L. Rev. 1, 11-12, 34-35 (1990) (recognizing divergences in strategies); Marion G. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 Mich. L. Rev. 1155, 1186-87 (1991) (same).

inherent pitfall of human communication,¹⁷⁵ it is one that many modern feminists abhor and attempt to resist.¹⁷⁶ Nonetheless, for those unfamiliar with feminist literature, it may be expedient to provide terms that may be used to suggest a feminist's then-prevailing concern with the overall feminist task.¹⁷⁷ This Article's use of these terms does not suggest that there are rigid delineations between approaches, or that one feminist may not vary her approaches and concerns as occasion and conversation suggest appropriate.

a. *Liberal Feminism*

Liberal feminism seeks the common value of improving the position of women in society.¹⁷⁸ Feminists employing this perspective accept the Anglo-American jurisprudential tradition as a given, either through intellection or practicality, and seek equality for women within its terms.¹⁷⁹ They tend to utilize, then, a "rights-based" philosophy, which works well so long as the rights in question are within ordinary liberal cognizance. The rights to vote and to work the same hours and at the same jobs as men, for instance, have been well served by liberal feminism.¹⁸⁰

Inevitably, however, when rights collide,¹⁸¹ rights-based analysis creates perplexities of the rock-hard place, irresistible force-immovable

175. See, for example, Elizabeth Mertz, *Preface: Alternative Paradigms for Legal Theory*, 83 *Nw. U. L. Rev.* 1, 5 (1989); Gary Peller, *The Metaphysics of American Law*, 73 *Cal. L. Rev.* 1152, 1167-70 (1985) (stating that language is socially constructed and, rather than being a neutral descriptive tool, is a manipulator of understanding).

176. See, for example, Jeanne L. Schroeder, *History's Challenge to Feminism*, 88 *Mich. L. Rev.* 1889, 1889 n.3 (1990) (book review). But see Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 *J. Legal Educ.* 47, 51 (1988) (stating that "[c]ognitively, we need simplifying categories, and the unifying category of 'woman' helps to organize experience, even at the cost of denying some of it").

177. For similar distinctions, see, for example, Patricia A. Cain, *Feminism and the Limits of Equality*, 24 *Ga. L. Rev.* 803, 829-41 (1990) (identifying liberal, radical, cultural, and postmodern schools of feminist thought); Crain, 89 *Mich. L. Rev.* at 1186-92 (cited in note 174) (discussing cultural, radical, and critical race strands of feminism); West, 55 *U. Chi. L. Rev.* at 1 (cited in note 171) (discussing cultural-radical dichotomy).

178. See notes 163-64 and accompanying text.

179. According to Deborah Rhode, "legal rights have a special resonance in our culture . . . they are less readily dismissed than other progressive demands." Rhode, 42 *Stan. L. Rev.* at 634 (cited in note 163). See also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331, 1366-69 (1988); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 *N.Y.U. L. Rev.* 589 (1986); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *Harv. C.R.-C.L. L. Rev.* 401 (1987).

180. See, for example, Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *Yale L. J.* 1860, 1875-77 (1987); Rhode, 42 *Stan. L. Rev.* at 635 (cited in note 163); Schneider, 61 *N.Y.U. L. Rev.* at 589. It is quite probable that some of these goals have been better served than they would have been by some other feminist approaches. See Rhode, 42 *Stan. L. Rev.* at 634.

181. Such collisions are sometimes perceived to occur between maternal and fetal rights. See, for example, Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 *U. Chi. L.*

object, and free exercise-nonestablishment variety. Moreover, when rights-talk is understood in terms of the right of one group to be treated the same as another, when in fact presently relevant and immutable intergroup differences exist, these problems are exacerbated. One therefore occasionally encounters such supposed conundrums as whether denying insurance coverage to all pregnant persons, be they male or female, is sex-equal treatment.¹⁸² Given that the Supreme Court has answered that question in the affirmative,¹⁸³ a further question arises as to whether the position of women in society indefinitely can be improved by a classically liberal framing of issues.¹⁸⁴ As a result, many feminists who otherwise may hold traditionally liberal ideologies have drawn on additional arguments and techniques. Conversely, feminists perceiving inadequacies in liberal rights agendas nonetheless may seek to "recast their content" and "to build on the communal, relational, and destabilizing dimensions of rights-based arguments."¹⁸⁵

b. Socialist Feminism

Socialist feminism has developed "a socialist critique of capitalism that takes account of gender."¹⁸⁶ Those embracing it have argued that capitalism not only has alienated workers from their labor and consumption from production, but also has separated family life and reproduction from the "productive" economy.¹⁸⁷ The all-powerful economy

Rev. 1219 (1986); Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 Georgetown L. J. 641 (1981). They also may occur between maternal and paternal rights and between the rights of white males and those of "affirmative action" candidates.

182. See *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

183. See *Geduldig*, 417 U.S. at 484. Congress overturned the *Geduldig* result by passing the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1988).

184. For example, problems presented for women by the "equalization" of alimony standards have been identified by Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* 163-214 (Free Press, 1985); Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. Family L. 351, 370 (1988-1989); Lynn Hecht Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges*, *Judges' J.* 12, 50-52 (Winter 1985).

185. Rhode, 42 Stan. L. Rev. at 635 (cited in note 163); see also Lacey, 25 Tulsa L. J. at 789 (cited in note 163) (stating that "[e]ven if the criticisms of liberal feminism are valid, as I personally believe they are, they do conveniently ignore one significant aspect of liberal feminism: to a limited extent, it works."); Staughton Lynd, *Communal Rights*, 62 Tex. L. Rev. 1417 (1984) (stating that an approach similar to the one described by Rhode has been employed by other critical theorists); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 612-16 (1983) (same).

186. Lahey and Salter, 23 Osgoode Hall L. J. at 549 (cited in note 153).

187. Dorothy E. Smith, *Women, The Family and Corporate Capitalism*, in Marylee Stephenson, ed., *Women in Canada* 17 (General Publishing, 1977).

has, in turn, intruded into the family and reproductive cycle of at least the middle-class worker, transforming both into reflections of, and breeding grounds for, capitalist values.¹⁸⁸ Female laborers, particularly those working within the home, thus experience exploitation and devaluation to a degree unequalled by the experience of males.¹⁸⁹

Contemporary responses to the socialist feminist analysis may not purport a theoretical, point-by-point rebuttal. In other words, it may for purposes of argument be gainsaid that capitalism has done everything described above. The most predictable resistance offered will, then, be a matter of competing value judgment, as in, "so what's so bad about that?" This type of resistance has garnered empirical support from recent political developments in eastern Europe and the Soviet Union.¹⁹⁰ The cogent modern response to socialism of any variety thus seems to be, "Yes, but we've got blue jeans and liposuction and that's what the world wants."

c. Radical Feminism

Radical feminism might well provide a ready answer to the modern, competing-value-judgment response to socialist feminism, and on this point may converge with socialist feminism.¹⁹¹ The radical answer to many questions is the same: virtually all modern societies have been shaped by dominant male values.¹⁹² Accordingly, capitalism itself reflects an historically male emphasis on competitive profit-seeking and property acquisition.¹⁹³ Similarly, it is male desires that have shaped

188. Id. at 32-33. See also Joan C. Williams, *Deconstructing Gender*, 87 Mich. L. Rev. 797, 829 (1989) (describing the act of keeping women in the home described as a "capitalist tool to privatize the costs of workers at the expense of women").

189. In other words, socialist feminists readily admit that male workers are exploited and devalued but contend that the position of female workers is more dismal. See also Crain, 89 Mich. L. Rev. at 1200-04 (cited in note 174) (discussing the economic function of occupational segregation). See generally the authorities cited in note 188.

For a general discussion of the failures of Marxism and socialism in dealing with the problems of women, see, for example, Richard J. Evans, *The Feminists: Women's Emancipation Movements in Europe, America, and Australasia* 156-77 (Croom Helm, 1977); Philip S. Foner, 1 *Women and the American Labor Movement* 133, 271-85 (Free Press, 1975); Susan Moller Okin, *Justice, Gender, and the Family* (Basic, 1989); Barbara Taylor, *Eve and the New Jerusalem: Socialism and Feminism in the Nineteenth Century* at ix-xviii, 217-60 (Pantheon, 1983); Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism: Toward a More Progressive Union*, in Lydia Sargent, ed., *Women and Revolution 2* (South End Press, 1988).

190. See note 29 and accompanying text.

191. That is, although socialist feminism probably would give the same answer, it is not necessarily the centerpiece of that approach.

192. See generally Andrea Dworkin, *Letters From a War Zone* (E. P. Dutton, 1988); MacKinnon, *Feminism Unmodified* (cited in note 173); MacKinnon, *Theory of the State* (cited in note 173).

193. Compare Lahey and Salter, 23 Osgoode Hall L. J. at 555 (cited in note 153) ("For those who are inclined to the radical feminist perspective . . . the business corporation is a perfection of

consumer demands. A world shaped by practical male desire is no better than, and in fact no different from, a world shaped by male theories. Men and what they want are on the top.¹⁹⁴ Women are on the bottom and by reason of male oppression thus far have been prevented from discovering what their own innate values and desires may be.¹⁹⁵

These basic contentions have been well stated and elaborated elsewhere.¹⁹⁶ It appears that an important part of the radical agenda is to educate the public that oppression exists in both flagrant and subtle forms.¹⁹⁷ Only in quite limited instances does radical feminism attempt to change the law in any manner other than by strict admonitions to men that they may not act in particular ways towards women.¹⁹⁸ This lack of concrete proposals for legal reform is understandable, given the radical position that women cannot yet know the values they ultimately may choose to express.¹⁹⁹ Thus, radical feminist approaches leave an interim void in resolving many legal questions. Realizing this, the radical response is that it is as it must be, lest the energies and attentions of women once again be co-opted and dissipated.²⁰⁰

the masculist vision of self—existence as property, separation of accountability and enjoyment, abstract rules as justice, domination as ownership”); see also Kathy E. Ferguson, *The Feminist Case Against Bureaucracy* (Temple, 1984) (bureaucratic discourse is a refinement of liberal discourse and the distinctly male discourse of power).

194. MacKinnon, *Feminism Unmodified* at 8 (cited in note 173).

195. See the conversation among Carol J. Gilligan, Ellen C. DuBois, Mary C. Dunlap, Catherine A. MacKinnon, and Carrie J. Menkel-Meadow, *James McCormick Mitchell Lecture Series*, State University of New York at Buffalo School of Law (Oct. 19, 1984), reprinted in *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *Buff. L. Rev.* 11, 73-74 (1985) (comments of Catherine MacKinnon); Dworkin, *Letters from a War Zone* at 128-29 (cited in note 192).

196. See, for example, the authorities cited in note 192.

197. This has been said to be the primary task of feminist scholars as a group. See, for example, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. Legal Educ.* 3, 8 (1988).

198. This admonition is an attempt to alleviate the most immediate forms of oppression. Examples include the work of Andrea Dworkin and Catherine MacKinnon toward restraining the use of pornographic images of women and children and toward eliminating sexual harassment. See Paul Brest and Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 *Stan. L. Rev.* 607 (1987).

199. See note 195 and accompanying text. For a related point concerning the silence of women in the process of legal education, see, for example, Catherine Weiss and Louise Melling, *The Legal Education of Twenty Women*, 40 *Stan. L. Rev.* 1299 (1988); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 *J. Legal Educ.* 147 (1988).

200. Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *Signs* 515 (1982). For other expressions of concern about the dilution of women's contributions, see Scales, 95 *Yale L. J.* at 1380 (cited in note 173); Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 *Berkeley Women's L. J.* 64 (1985). Given the radical feminist view that all present social institutions, including the law, are male constructs, legal questions must be regarded as meaningful only in male terms, although the impact of such questions is well-known to women through personal experience.

d. *Relational Feminism*

Relational feminism reflects an effort to identify and apply in legal and other inquiries a set of values based on the shared experiences of women.²⁰¹ Some of these values, such as compassion and caring, may or may not be the product of centuries of male oppression.²⁰² Nonetheless, relational feminists perceive them as socially beneficial, as well as intuitively comfortable.²⁰³ Thus, relational feminism regards women's physical "potential for connectedness" as a positive shaper of values to be cherished,²⁰⁴ while radical feminism views this potential as the primary factor exposing women to male invasion and exploitation.²⁰⁵

Relational feminists often adopt analytic methods that themselves embody the values to be advanced. In fact, many, if not all, of these methods have been developed by or in conjunction with other feminist approaches.²⁰⁶ Primary among these shared methods is the grounding of analysis in the experience of women.²⁰⁷ Part and parcel of this grounding is an emphasis on the actual context in which a particular problem arises.²⁰⁸ Contextualization is thought critical because it arouses empa-

201. See Crain, 89 Mich. L. Rev. at 1187-88 (cited in note 174); West, 55 U. Chi. L. Rev. at 13-21 (cited in note 171). Note, however, the criticism that the experiences drawn upon are those of privileged, white academics. See note 213 and accompanying text.

202. Various attempts have been made to explain the origins of the perceived differences in the outlooks and goals of men and women. See, for example, Bender, 38 J. Legal Educ. at 15 n.38 (cited in note 197); West, 55 U. Chi. L. Rev. at 20-28. See also Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Univ. of Calif., 1978). For critical discussion of this emphasis on "difference" between women and men, see, for example, Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. Legal Educ. 61, nn. 54-76 (1988); Joan W. Scott, *Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 Fem. Stud. 33 (1988); Williams, 87 Mich. L. Rev. at 813-21 (cited in note 188). See also Zillah Eisenstein, *The Female Body and the Law* (Univ. of Calif., 1988) (deconstructing the notion of abiding differences between women and men).

203. For some of the nonjurisprudential work upon which relational feminism has drawn, see generally Chodorow, *The Reproduction of Mothering* (cited in note 202); Gilligan, *In a Different Voice* (cited in note 171); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Univ. of Calif., 1984).

204. West, 55 U. Chi. L. Rev. at 16-18 (cited in note 171).

205. See *id.* at 29.

206. Indeed, much of feminist method has nonjurisprudential roots. See, for example, Dorothy E. Smith, *Women's Perspective as a Radical Critique of Sociology*, in Sandra Harding, ed., *Feminism and Methodology* 84-86 (Indiana, 1987); Hester Eisenstein, *Introduction*, in Hester Eisenstein and Alice Jardine, eds., *The Future of Difference* at xv, xix (Barnard College Women's Center, 1980).

207. See, for example, Littleton, 41 Stan. L. Rev. at 764-65 (cited in note 162); MacKinnon, 7 Signs at 519 (cited in note 200); Rhode, 42 Stan. L. Rev. at 621 (cited in note 163); Schneider, 61 N.Y.U. L. Rev. at 602-03 (cited in note 179). According to Deborah Rhode, "[r]ather than working deductively from abstract principles and overarching conceptual schemes, such analysis builds from the ground up." Rhode, 42 Stan. L. Rev. at 621.

208. See Bender, 38 J. Legal Educ. at 10-11 (cited in note 197); Henderson, 85 Mich. L. Rev.

thy and exposes situational nuances that may permit case-specific accommodations.²⁰⁹ Accordingly, rules derived or applied in abstraction may be regarded as, at best, unreliable and, at worst, dehumanizing and oppressive.²¹⁰

Feminism thus understood appears in the throes of creating a novel world vision, encompassing both a new value structure and a new analytic method. At the same time, however, its chosen method tends to deny that visions should shape the world. This seems to translate into a reluctance to address certain existing areas of legal abstraction, other than to suggest that they should never have developed. It is one thing to say that the "duty of care" in negligence law should be recast as the "duty to care,"²¹¹ the consequences of which will be realized on a case-by-case basis. Is it truly another—outside the self-defined scope of feminism—to contemplate the tremendously impersonal American economy and its historically asserted "need" for transaction-facilitating abstraction?

e. Analytical Feminism

Evident in much modern feminist writing is a trend toward unabashed self-referential analysis. Tendencies in feminist inquiry to date are identified, criticized, and, in some cases, deconstructed.²¹² For in-

at 1577 (cited in note 170); MacKinnon, 7 *Signs* at 537 (stating that universalizing reflects male hegemony); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 *N.M. L. Rev.* 613 (1986); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *Berkeley Women's L. J.* 39 (1985); Scales, 95 *Yale L. J.* at 1388 (cited in note 173) (asserting that feminism rejects abstract universality); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 *J. Legal Educ.* 243 (1988).

209. Compare Menkel-Meadow, 1 *Berkeley Women's L. J.* at 58 (discussing the avoidance of abstract judgments as unworkable in particular cases). In this sense, "accommodation" may mean compromise or the legitimate prompting of decision in one direction or another in order to reflect the special circumstances of each case.

210. Compare Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829, 849 (1990) (discussing feminist "practical" reasoning); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 *Yale L. J.* 293, 321-26 (1988) (stating that individualized factfinding is often superior to the application of bright-line rules); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *Va. L. Rev.* 543, 604-13 (1986) (same).

211. Compare Bender, 38 *J. Legal Educ.* at 28-32, 33-36 (cited in note 197) (postulated duty to aid based on feminist reasoning); Martha Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 *Wis. L. Rev.* 819, 884-97 (describing the ethos of care).

212. Critical feminism and critical race feminism as self-identified schools manifest the themes discussed in this section. See, for example, Sandra Harding, *The Instability of the Analytical Categories of Feminist Theory*, 11 *Signs* 645 (1986); Rhode, 42 *Stan. L. Rev.* at 617 (cited in note 163). Other writers, not identified with these schools, also exemplify this trend. Compare Bartlett, 103 *Harv. L. Rev.* at 829 (cited in note 210) (addressing the epistemological implications

stance, the approach of theorizing from the experience of women is quite aptly described as a process of "essentializing" that precludes consideration of nonconforming experiences.²¹³ The difficulty of confronting issues of concern to women without falling into the essentializing trap is articulated, as is the need to address "intersecting" forms of oppression and injustice.²¹⁴ The importance of avoiding Grand Theories and, instead, focusing on concrete issues is emphasized and examined. Ironically, although the tendency to essentialize may be condemned as a type of hierarchical thinking that is typically and regrettably male, the analytical process through which the condemnation occurs is subject to much the same criticism. In other words, theorizing about theorizing, even with "gender as a central category of analysis,"²¹⁵ is no more nor less than a method of abstraction and prioritization. Similarly, calls for concrete application are, when continued for some period of time, striking in their lack of concreteness.

This observation does not mean that the described analysis lacks worth or that all abstract thought should be replaced by applied emotion. Rather, it recognizes that feminism and most feminist approaches do, on at least some of their own terms, tend toward imperfection. The ultimately nihilistic implications of this recognition need not, however, be the primary concern of every feminist. Staring into the abyss is not, after all, likely to improve the lives of women in any immediate fashion. Moreover, perfection is itself an abstraction that has relatively little to do with the experience (and thus, in some instances, the values and goals) of women.

IV. POSSIBLE FEMINIST VIEWS OF LIMITED LIABILITY

A. *Recapitulation*

As described in Part II, limited liability is "about" the quantification and allocation of risk.²¹⁶ It permits particular actors—who are, in fact, supposed to be nonactors—to calibrate the economic gambles that they are willing to take. Presumably, these actors will take such gambles when the perceived weighted probability²¹⁷ of economic profit exceeds the perceived weighted probability of economic loss. The role of

of feminist legal methods).

213. See, for example, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 *Harv. Women's L. J.* 115 (1989); Spelman, *Inessential Woman* at 176 (cited in note 174).

214. Rhode, 42 *Stan. L. Rev.* at 626.

215. *Id.* at 617-18.

216. See especially notes 118-19 and accompanying text.

217. Weighted probability is determined by multiplying the possible magnitude of an event by its probability. See notes 7-8 and accompanying text.

perception is quite critical: the large number of failing start-up businesses²¹⁸ suggests that many such risk calculations were incorrect ab initio.²¹⁹

The history of limited liability rules in America indicates that such rules may reflect both a social purpose of stimulating economic development, albeit in particular locations,²²⁰ and a prevailing jurisprudential attitude that legal responsibility should be a function of culpability, which itself is a function of control.²²¹ Economic analysis assures us that a rule of limited liability is significant, if at all,²²² because it enhances the profits of society as a whole.²²³ This argument endorses the historical view that a liability rule should stimulate economic development. It does not, of course, address the responsibility-culpability characterization; economic method elides consideration of such matters, especially in the context of distributional questions of individual profit or loss.²²⁴

B. Feminist Responses

Feminist attitudes may be detected both with respect to traditionalist views of limited liability and with respect to economic views. The latter merit a few words on their own, but cannot be completely separated from the former.

1. Economic Man²²⁵

The methods and primary assumptions of the law-and-economics movement expose it to criticism from most feminist perspectives. Its predisposition to work backward from a defense of the status quo²²⁶ and its delight in characterizing virtually all legal questions in economic

218. See note 6 and accompanying text.

219. If the initial assessments were correct, one would expect to find at least as many risks "panning out" as not. On the other hand, the historical long-term increase in the Dow-Jones Industrial Average and other indicators suggests that diversified betting on systemic profit generally will be a winning gamble.

220. See notes 49-51 and accompanying text for a discussion of the significance of interstate competition in the development of legislative attitudes toward limited liability.

221. It is important to note, however, that lack of responsibility was not itself traditionally regarded as any kind of culpability. See notes 70-80 and accompanying text.

222. As explained in more detail at text accompanying notes 112-13, economists regard limited liability as the result willing parties would achieve if left to negotiate independently and thus of slight significance.

223. See note 90 and accompanying text.

224. See notes 92-94 and accompanying text.

225. This heading was inspired by Robin West, *Economic Man and Literary Woman: One Contrast*, 39 Mercer L. Rev. 867 (1988).

226. See note 88 and accompanying text.

terms²²⁷ sets most of the movement at cross-purposes with liberal feminism. Its free-market roots, enthusiasm for the separation of investment from other productive tasks as a form of efficient specialization, and its emphasis on rational maximization of self-interest as the key to social progress are, of course, hideously at odds with the goals of socialism, be it feminist or otherwise.²²⁸ The historical fact that the law-and-economics movement was originally conceived and preponderantly espoused by men necessarily arouses the suspicion and antagonism of radical feminism.²²⁹ Moreover, its insistent decontextualism, its refusal to grant equal recognition to nonmonetary values, and, again, its assumptions about rational self-interest as a laudable motivating force represent a world view that is jarringly inconsistent with that of relational feminism.²³⁰ These aspects of the economic perspective magnify a thousand-fold the essentialism criticized by analytical feminism as present in feminism itself.²³¹

In fact, some established philosophies have been reinterpreted in a manner rendering them more compatible with feminist analysis. Thus, for instance, the philosophy of John Rawls has been translated into feminist terms.²³² This exercise does not appear to be feasible with respect to law and economics; one might attempt some sort of compromise by suggesting overt and significant changes in assumption and method,²³³ but no amount of honest restatement is likely to harmonize economic and feminist differences.²³⁴

Given that the method is largely the message for both the law-and-

227. See, for example, Richard A. Posner, *The Economics of Justice* 84-85 (Harvard, 1981) (stating that "one must not overlook the possibility of extending the logic of certain nuisance cases to Jews, blacks, and other racial, religious, or ethnic minorities"). This comment is discussed in Robin Paul Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 U. Kan. L. Rev. 209, 252-53 (1988). But see Richard A. Posner, *The Ethics of Wealth Maximization: Reply to Malloy*, 36 U. Kan. L. Rev. 261 (1988).

228. See notes 187-89 and accompanying text.

229. See notes 191-95 and accompanying text.

230. See notes 201-10 and accompanying text. Most readers will be familiar with the optical illusion that the viewer may perceive as either an old woman or a young girl. This phenomenon may serve as an analogy for the differing world perceptions of economists and relational feminists.

231. See notes 212-15 and accompanying text.

232. Susan Moller Okin, *Reason and Feeling in Thinking about Justice*, 99 *Ethics* 229 (1989). But see Matsuda, 16 N.M. L. Rev. at 613 (cited in note 208) (criticizing Rawls from a feminist perspective).

233. In this regard, see, for example, the recent literature that attempts to humanize economics: Lutz and Lux, *Humanistic Economics* (cited in note 90); Lewis D. Solomon, *Humanistic Economics: A New Model for the Corporate Constituency Debate*, 59 U. Cin. L. Rev. 321 (1990).

234. This does not mean, however, that feminists should not draw on economic arguments. See, for example, June Rose Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 Vand. L. Rev. 1463 (1990); June Rose Carbone and Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 Tulane L. Rev. 953 (1991).

economics and feminist movements,²³⁵ it is clear that many feminists could not tolerate, much less endorse, the economists' class two and class three arguments about limited liability. Both the techniques of utilizing simplifying assumptions (class three) and the adoption of arm's-length rationality as a descriptive and normative device (class two) dictate that economists remain firmly attached to a part of the elephant upon which feminists have chosen not to place their hands.

A question remains, however, as to the shape of a feminist response to class one arguments.²³⁶ These are arguments that economists have produced or espoused but that have not really required economic analysis. This question will be addressed in connection with possible feminist assessments of the more traditional views of limited liability.

2. Betting the Farm

As an initial matter, it should be recognized that the naked question of whether corporate shareholders should possess limited liability is indeed somewhat outside the specific critical cognizance of the liberal, socialist, and radical feminist approaches.²³⁷ Although some effort at massage might result in at least moderate appeal to liberal introspection, there is no inherent link of this issue to the legal rights of women, as opposed to those of men, and thus no reason for a liberal feminist approach to limited liability to differ from a merely liberal analysis.²³⁸ Socialist feminism has thoroughly condemned the corporation itself for lacking ethical standards, separating labor and capital, and generally facilitating the spread of capitalism.²³⁹ The feature of limited liability logically has enhanced at least the first two of these aspects, and quite possibly the third,²⁴⁰ as a result, it necessarily would share the philosophical fate of the entity it now seems to define.²⁴¹ Radical feminism

235. To some extent, of course, all legal methods have a substantive component. See Bartlett, 103 Harv. L. Rev. at 844-47 (cited in note 210); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Mary Jane Mossman, *Feminism and Legal Method: The Difference It Makes*, 3 Wis. Women's L. J. 147, 163-65 (1987). This point was recognized nearly a century ago. See Sir Henry Sumner Maine, *Dissertations on Early Law and Custom* 389 (Henry Holt and Co., 1886).

236. See Part II.C.1.

237. See Part III.B.2.a-c.

238. This Article does not purport to define the liberal approach to limited liability. Presumably, however, it would emphasize the primacy of private ordering and generally deny the legitimacy of various social responsibility arguments. Compare Robert Nozick, *Anarchy, State, and Utopia* 32-33, 333-34 (Basic, 1974) (discussing the liberal ideal of inviolate individuals that are free to realize ends with the voluntary cooperation of others possessing the same dignity).

239. See Smith, *Women and Corporate Capitalism* in *Women in Canada* (cited in note 187).

240. This depends on whether limited liability effectively encourages private forms of economic organization.

241. See notes 32-34 and accompanying text.

presumably would characterize limited liability as part of the suspect structure of the "master's house,"²⁴² noting the instances in which it may have facilitated the infliction of uncompensated injury on women and other powerless groups.

Because relational feminism manifests a willingness both to claim a special set of values and to employ special methods to evaluate how well existing legal structures reflect those values, this approach emerges as the most likely to justify and sustain a detailed scrutiny of the role of limited liability in corporate law. The following discussion thus draws heavily on the themes of relational feminism. At the same time, it will occasionally employ the insights provided by other feminist voices; in particular, analytical feminism, understood as a method of deconstruction concerned with the use of gender as an organizing category, may provide a useful counterpoint. Above all, this discussion will rely heavily on feminism's shared methods and goals.

The following analysis of limited liability will be postulated in three parts. The first suggests the most general outline of a feminist organizational model. The second assesses the role of limited liability as a stimulant of entrepreneurship and investment. The third examines, from a feminist perspective, the assertion that limited liability is a simple reflection of broader legal themes.

a. A Model for Organization

i. The Model Itself

As a first step, it is useful to contemplate the possible contours of a feminist model for "productive" organizations. It must be recognized, however, that the model will assume different contours depending on the shape of the society in which it is to function. Thus, although initially posited as a feminist model to operate in a feminist society,²⁴³ some redefinition will be necessary to accommodate social reality.

The very notion of modeling a generalized form of business association may be problematic in feminism's own terms. Many feminists would eschew the use of an abstract model for any purpose other than to communicate a suggestion from which context-specific deviation is expected and welcomed. Moreover, a feminist typically would not dichotomize "productive" and other forms of organization or separate monetarily remunerated work—business or industry—from the rest of life. In her view, efforts to produce food, clothing, forms of amusement, and other goods and services should accommodate and incorporate rela-

242. Compare Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *Sister Outsider* 110 (Crossing Press, 1984) (criticizing the approach of liberal feminism).

243. But see note 334 and accompanying text (questioning the vision of a feminist society).

tionships with children and other loved ones and should permit an actor to express care and concern even for those with whom she is not intimately involved.

This articulation does not necessarily return all human enterprise to the cottage and log cabin,²⁴⁴ but almost certainly would suggest the development of organizations not closely resembling the modern corporation. These organizations clearly would be less hierarchically managed than the entity contemplated by existing corporate law²⁴⁵ and would tend to be much smaller than many corporations are today.²⁴⁶ The first modification would permit representation of more points of view and life experiences and thus better, more contextualized decisionmaking.²⁴⁷ 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. These "other constituents" clearly would include consumers and any other members of a community with whom the organization were to interact.²⁴⁸

Moreover, it seems difficult to avoid the conclusion that an organization conceived by feminists would not feature limited liability. If there were no other reason—and there are several²⁴⁹—one would be provided by the destructive social impact of officially endorsing the concept. Limiting liability is about imposing risks that someone else must bear. Liability limitations artificially distance individuals from the real-life effects of the enterprise in which they invest, thus decreasing their acknowledged personal responsibility. Regardless of the legal effect of the policy, the fact that limited liability is enshrined in the law can inflict a separate harm by shaping values and social reality.²⁵⁰

244. Compare Olsen, 96 Harv. L. Rev. at 1568 (cited in note 155) (rejecting romantic returns to simpler forms of life).

245. Compare Rosabeth M. Kanter, *Men and Women of the Corporation* 264, 266 (Basic, 1977) (stating that hierarchical structures result in the fragmentation of groups and, ultimately, dichotomy, competition, and powerlessness).

246. *Id.* at 285 (noting that larger corporations produce problems of size, hierarchy, and organizationally induced sex differences).

247. See *id.* at 273, 276 (suggesting distribution of authority, improving access to information, and increasing worker participation).

248. This also suggests that feminists would reject narrow formulations of fiduciary duty. For a related suggestion not based on feminist assumptions or methods, see Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. Rev. 1165 (1990).

249. See notes 250, 257-59 and accompanying text.

250. John Shotter, *Consciousness, Self-Consciousness, Inner Games, and Alternative Realities*, in Geoffrey Underwood, ed., *3 Aspects of Consciousness* 27, 34 (Academic, 1982) (stating that "no matter what might happen in a person's world, it will be dealt with and understood . . . in the

As a logical matter, the consequences of rejecting the concept of limited liability are not limited to corporate shareholders. Feminists presumably also would attempt to devise methods of discouraging sole proprietors and partnerships from imposing risks that others ultimately may be forced to bear.²⁵¹ Even more dramatically, the reasoning of care and responsibility would extend to lenders, landlords, and others having contact with an enterprise. The employment of one's property for personal profit at the price of uncompensated risk to third parties would be unacceptable in all contexts. A response that lenders and others do not control the actual use of their capital, or the precise risks imposed, would be to no avail; the refusal to exercise all possible care and to seek all practical involvement in decision making could itself be regarded as a culpable omission. This policy would, of course, eliminate many significant distinctions between equity and debt and would wreak havoc upon capital markets as we know them, but political feasibility is the subject of a later section.

ii. Risk-Shifting as Distinct from Passivity

As the application of the reasoning of care to the position of lenders highlights, there are two possible lines of argument on limited liability to be considered. The first condemns attempts to personally profit while consciously risking injury to third parties.²⁵² At first blush, this argument seems to demand the abolition of limited liability. There might be other possible methods of addressing the same problem, such as substitution of equity requirements to be met before any business association, including any sole proprietorship, is allowed to operate; this latter approach, however, presents at least superficially confounding practical difficulties.²⁵³ Moreover, and perhaps more importantly, it exhibits a rigid rule-orientation that is inconsistent with many feminist methods and values.

terms already 'presupposed' in the communally acceptable ways of doing things in the person's society."); Peller, 73 Cal. L. Rev. at 1167-70 (cited in note 175) (describing language as a manipulator of understanding). See also the authorities cited in note 356.

251. See text following note 84.

252. The ostensible willingness of third parties to accept the risk would by no means eliminate this criticism. As one feminist analysis of contract law has suggested, overreliance on assumptions of equal information and bargaining power are serious flaws in the American legal system. See Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U. L. Rev. 1065, 1132-33 (1985).

253. For example, it would be difficult to establish appropriate levels of capitalization for different industries and differently situated entities within those industries, and it would be difficult to enforce these levels, once set. See, for example, Hansmann and Kraakman, 100 Yale L. J. at 1927-31 (cited in note 102). But see Part IV.C.2.b. for discussion of a requirement that business enterprises carry adequate insurance.

The second line of argument goes further, criticizing passivity when involvement is possible. Thus, ignoring the possible exploitation of third parties as one provides the means of exploitation²⁵⁴ is a form of failure to care. It is less extreme than deliberate risk imposition, but it surely is at least as prevalent.

It would, of course, be both difficult and draconian to outlaw passive investment.²⁵⁵ Nonetheless, the image of passivity is deeply ingrained in market ideology²⁵⁶ and current legal structures.²⁵⁷ In fact, the passivity tradition is so strong²⁵⁸ that the simplest solution again seems to be the elimination of limited liability.

Interestingly, the "intuitively appealing" or class one arguments that the legal economists have supplied as the means to facilitate passive investment also suggest the means to discourage it. Thus, dissuading an investor from diversifying his investments might produce a keener interest in the management of remaining holdings. An investor would be less likely to diversify if limited liability did not exist. To the extent that a lack of limited liability also contributed to a decline in active trading markets, so much the better; being tied to an investment for some period of time further should enhance interest in its management.

The key difference between economic and feminist reasoning on this point is, of course, the feminist belief that interest in monitoring is a social good, rather than a duplicative waste.²⁵⁹ Such a belief implicitly is rooted in the view that monitoring need not be exclusively directed to the making of profit. As an illustration, suppose, for a moment, that Ford shareholders themselves had been involved in resolving the issue of the exploding Pinto gas tanks.²⁶⁰ Apart from any loss of secrecy issue, is it likely that they would have voted "Yes, let the tanks explode"?²⁶¹ Is that how *you* would have voted?

254. This is no doubt related to the socialist critique described in the text accompanying notes 186-88, but is distinct in terms of the type of fault perceived.

255. It must be recognized, for instance, that there always will be individuals who are physically, mentally, or emotionally incapable of anything but passivity.

256. See notes 104-11 and accompanying text.

257. See notes 65-84 and accompanying text. See generally Bernard S. Black, *Shareholder Passivity Reexamined*, 89 Mich. L. Rev. 520 (1990).

258. But see notes 277-78.

259. Note that after-the-fact imposition of legal liability is not an acceptable substitute for prevention. This approach simply allows too much risk of underdeterrence and assumes that injuries can be correctly priced. See notes 362-65 and accompanying text.

260. See note 22.

261. Management's willingness to so vote, though initially confounding, presumably is a function of its perception that it has a legal duty to make profit, coupled with fear for its own positions. There has, of course, been a longstanding debate over exactly what duties corporate managers owe and to whom. For a historical perspective, see, for example, A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049 (1931); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 Harv. L. Rev. 1365 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932); E. Merrick Dodd, Jr., *For*

iii. The Empire Strikes Back: Response of the Contractarians

Acknowledging that feminism rejects "hardcore" economic analysis, it nonetheless may be relevant to the undecided to consider the economic response to the postulated feminist position on limited liability. Economists, of course, would say that if limited liability does not exist as a foreordained legal structure, private parties will create it by contract.²⁶² There are several possible rejoinders.

First, one simply may choose to doubt the economists' assessment that human motivation is universal in this regard. If limited liability were not dangled as part of a business "kit" and if there were an accordingly increased social emphasis on personal responsibility, there almost certainly would be fewer attempts to claim limited liability.

Another credible response to the economists' claim might accept, at least for purposes of argument, the proposition that the motivation to achieve limited liability through contract will exist in some cases. The next step could be to forbid the formation or to question the enforceability of liability-shifting contracts. The latter approach would, for a feminist, be the more likely; it would permit a case-by-case evaluation and acknowledge that there might be good reasons for particular individuals, in particular circumstances, to enlist aid in bearing risk.²⁶³

In yet another possible response, feminists might resign themselves to the periodic formation of risk-shifting agreements and even grant their usual enforceability. They nonetheless could be pleased that the most obvious form of official endorsement of limited liability had been removed and gratified that those who do not explicitly agree to accept risk will receive some additional measure of protection.²⁶⁴

Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?, 2 U. Chi. L. Rev. 194 (1935). For a modern statement on the subject, see Section 2.01 of the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* (Tentative Draft No.2, April 13, 1984), which provides that "a business corporation should have as its objective the conduct of [business] activities with a view to enhancing corporate profit and shareholder gain." *Id.* at 28. Section 2.01 does, however, go on to add that a corporation may "devote a reasonable amount of its resources to public welfare, humanitarian, educational, and philanthropic purposes." *Id.* at 39. See notes 312-15 and accompanying text.

262. See note 113 and accompanying text.

263. More generally, from a feminist perspective it is clear that contracts need not ordinarily be regarded as sacred icons. See notes 332-33 and accompanying text.

264. It is quite likely that shareholders deprived of limited liability would seek insurance coverage. See the discussion in text accompanying note 369.

b. *The Effect on Entrepreneurship and Investment*

i. Calling the Question

The foregoing discussion focuses on the value of unlimiting liability and thus modifying social reality. This analysis, however, has not dealt yet with the contention that limited liability promotes entrepreneurship and investment, and therefore the desirable goals of technological and other advancements. In examining the feminist reaction to this argument, it is useful to unbundle the primary concepts.

Entrepreneurship. To traditionalists,²⁶⁵ the term “entrepreneurship” presumably conjures up the image of men in garages building cars, airplanes, computers, and other useful devices, eventually marketed to the public through entities that steadily and quickly increase in size. The imagery is quite important here because it conveys a promise of progress for both society and the individuals involved. The traditionalist version of entrepreneurship is the Great American Dream, and talking about entrepreneurship as a value keeps it alive. Economists, however, reject the view of entrepreneurship in this traditionalist light; they simply have recast the entrepreneurial function, identifying managers and risk-bearers as the lead actors in modern business scenarios.²⁶⁶

The empirical fact of the matter appears to be that “being your own boss” is, for most modern Americans, an impossible (rather than great) dream.²⁶⁷ Nonetheless, small business enterprises continue to play a vital role in the economic life of America. Organizations with fewer than 500 employees comprise four-fifths of all American businesses²⁶⁸ and provide one-half of the country’s jobs.²⁶⁹ Moreover, it is

265. As used in this Article, “traditionalist” loosely contemplates nonfeminist, noneconomically oriented legal and other scholars. This is, of course, a gross simplification.

266. See Fama, 88 J. Pol. Econ. at 288 (cited in note 111) (laying to rest the “attractive concept” of “entrepreneur” and distinguishing the separate functions of management and risk-bearing).

267. According to the U.S. Bureau of the Census, there were 117,342,000 persons employed in America in 1989. *Statistical Abstract of the United States: 1991*, Table 649, at 393 (111th ed.). In the same year, there were 10,008,000 self-employed. *Id.*, Table 647, at 393. Those who are self-employed are somewhat more likely to act in some routinized service capacity than to serve in the role of captain of a start-up industry. Thus, while 3,924,000 of the self-employed reported themselves as engaged in “service,” only 406,000 listed themselves as involved in “manufacturing.” *Id.* Independent contractors thus may or may not be living more pleasurable lives than they would as traditional employees; viewed from a social perspective, however, they seem to perform similar functions.

268. Harold C. Livesay, *Entrepreneurial Dominance in Businesses, Large and Small, Past and Present*, 63 Bus. History Rev. 1, 4 (1989).

269. *Id.* See generally David L. Birch, *Job Creation in America: How Our Smallest Companies Put the Most People to Work* (Free Press, 1987).

said that small companies developed one-half of the innovations now reaching the market.²⁷⁰

The symbols of entrepreneurship are not, of course, a feminist's delight. Neither rugged individualism manifest in solitary garage enterprise nor social progress as a function of self-interest reflect most feminists' sense of themselves and the world around them. Still, as indicated above, the limited initial size of the traditional entrepreneurial enterprise carries substantial feminist appeal. To the extent that small enterprises exist and produce scientific and other advances, the feminist presumably would prefer to see them preserved. At a minimum, this implies a lack of support for any proposal that might favor large businesses over small ones. For instance, any suggestion that limited liability be abolished only for the shareholders of closely held corporations would be coldly received.²⁷¹

Investment. The term "investment," when juxtaposed with "entrepreneurship," seems almost certainly to represent an intended contrast. Since entrepreneurs are clearly "doers," investors evidently are "non-doers." Here, the relevant traditionalist image may be that of the aged widow timidly withdrawing from its hiding place a cash-filled sock.²⁷² Is it not better for all that her crumpled bills be put in circulation? And is it not better for her that she receive the regular dividends or interest payments that will sustain her in her final days?

Traditionalists and economists largely agree on the social value of "investment," although economists may employ less emotive imagery and more argumentative abstraction. Economists might, for instance, claim that because the rational aged widow would herself be a high-cost and therefore inefficient monitor, she indubitably would, if given a chance, engage in a portfolio investment strategy in order to diversify all nonmarket risk.²⁷³ The importance in the effectuation of this strategy of institutional investors, an active trading market, and limited liability are, of course, implicit.

Feminists are not unsympathetic to aged widows. They are, however, more likely than the inventors of any patronizing traditional im-

270. Livesay, 63 *Bus. History Rev.* at 4 (cited in note 268) (referring again to companies with fewer than 500 employees).

271. See note 337 and accompanying text.

272. The more relevant contemporary usage may be that of the institutional investor in whom, in turn, the widow invests. See notes 115-31 and accompanying text for a discussion of the incentives and motivations of such investors. If the widow's use of the institutional surrogate is mandatory—i.e., owing to participation in a compulsory pension plan—individual confidence arguments become less relevant.

273. See note 110 and accompanying text. The individual presumably will invest through an institutional surrogate whose own ability to diversify would, because of its more substantial asset base, be even more threatened by lack of limited liability than would the ability of the individual (a nice bit of circularity).

age to appreciate the ability of the stereotypically unsophisticated to understand their options. At the same time, they are considerably more likely than hardcore economists to appreciate individual diversity, the making of subjectively influenced choices, and, in some cases, the subjective inability to choose.

Most importantly, feminists can maintain their sympathy for the widow and still quite easily reject the black and white world view embodied in the entrepreneur-investor imagery and terminology employed above. The fact that one is neither "captain of one's own ship" nor a least-cost monitor does not necessarily dictate complete apathy as either a rational or desirable reaction. If rationality is a matter of seeking personal gratification,²⁷⁴ a feeling of responsible participation may be more pleasurable, and thus more rational, than apathy. This is particularly true if the effort required for participation is not itself unpleasurable.

It is no answer to say, *ipse dixit*, that if ordinary investors wanted to participate they would do so.²⁷⁵ There is a history and a power to the traditional imagery and an array of legal impediments to investor involvement²⁷⁶ that both reflect and perpetuate the active-passive dichotomy of entrepreneurs and investors. Permitting realistic and effective investor participation may require some reconstructive effort, but that does not prove the perfection of the status quo. This realization comes easily for those whose nontraditional values played little role in shaping present social and legal reality.

There are, in fact, developments already afoot in the investor participation line. Examples include social consciousness movements attempting to influence corporate actions with respect to apartheid, affirmative action, animal welfare, and a broad spectrum of environmental issues.²⁷⁷ In addition, institutional investors have begun to test their ability to claim incremental involvement in more traditional management prerogatives, such as the nomination of directors.²⁷⁸

274. Economists would not necessarily deny this proposition but probably would consider it unhelpful. See Posner, *Economic Analysis* at 12 (cited in note 88) (stating that this use of "willingness to pay" to measure efficiency avoids the extreme subjectivism and arbitrariness otherwise likely to result); Werner Sichel and Peter Eckstein, *Basic Economic Concepts* 433 (1974) (discussing the futility of interpersonal utility comparisons).

275. With respect to the increasing participation by institutional investors, see Black, 89 Mich. L. Rev. at 570-75 (cited in note 257). See also notes 277-78 and accompanying text.

276. See Black, 89 Mich. L. Rev. at 530-36 (discussing impediments).

277. See, for example, *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554 (D.D.C. 1985) (shareholder sought inclusion in management's proxy solicitation of proposal relating to force-feeding geese); see also Hamilton, *Corporations* at 672 (cited in note 2) (listing recent activist proposals); Thomas Lee Hazen, *The Law of Securities Regulation* § 11.7 at 502-510 (West, 2d ed. 1990) (citing recent proposals).

278. See Ryan, 23 Ga. L. Rev. at 97 (cited in note 69); A. A. Sommer, Jr., *Corporate Govern-*

Accordingly, the concept of investment as historically understood should be moderated for purposes of further examination. Deleting passivity as an automatic or necessary part of the investor's image ultimately will clarify the issues of whether it is better for everyone to take money out of their socks and whether limited liability relates to this assumed goal. In answering these questions, the term "enterprise participant" will be used to refer to the investor as thus recharacterized.

ii. The Benefits of Enterprise Participation

This subsection separately considers the benefits of enterprise participation from the perspectives of individual participants and of society as a whole. This division is not intended to suggest that these perspectives are necessarily different but simply to recognize that they are, as a matter of tradition, differently framed. A key feminist insight is that individual and collective interests need not be in opposition and frequently may converge. In other words, the culinary aphorism that it is necessary to break eggs to make omelets need not dictate one's conceptualization of individual participation in collective activity.

The Perspective of the Enterprise Participant. In view of the foregoing discussion and of some feminist views of human nature,²⁷⁹ depriving the widow of her limited liability is not strictly necessary to jolt her out of apathy concerning the possible social misuses of her funds. The question remains whether granting her limited liability nonetheless is necessary to get her life savings into circulation. This answer is more equivocal.

A feminist might hope that potential enterprise participants will be enmeshed in a web of social support; as aged widows have cared for others, others will care for them.²⁸⁰ In this light, the risk of participating in an enterprise could be dramatically different than hitherto perceived. In a society steeped in feminist values, it thus might not be effectively possible to "bet the farm" since various networks would assure that "all" could never be lost. We do not, of course, live in such a society. What, then, of the enterprise participant in actual context?

Absent risk, participation in some kind of enterprise would seem indisputably to be of economic and personal benefit to the participant. Risk aversion,²⁸¹ however, is easy to understand in today's

ance in the Nineties: Managers v. Institutions, 59 U. Cin. L. Rev. 357 (1990). See note 350 and accompanying text for a brief discussion of the feasibility and desirability of a feminist-institutional investor alliance.

279. See notes 201-02 and accompanying text.

280. This may cause an ostensible "loss" of independence, but, from a feminist perspective, no necessary loss of dignity.

281. Economists have explained the concept of risk aversion as follows:

America.²⁸² In this connection, there is no particular reason to think that feminists would be less risk-averse than any other group.²⁸³ In other words, it would be surprising to find them flocking in disproportionate numbers to risk their family homesteads and livelihoods in the name of social benefit or otherwise. It would not, however, be startling to find them conscientiously striving to participate only in humanely managed enterprises that make no attempt to impose risk on others—compensated or otherwise.

This insight is helpful in that it suggests still further “unbundling.” Whereas limited liability traditionally has permitted personal profit while imposing risks on others—risk-shifting—risk aversion may be seen as a question of avoiding risk to oneself and to those to whom one feels most immediately connected.²⁸⁴ This does not, from an entrepreneurial or any related perspective, expressly require imposing risk on others. Such impositions of risk, however, may be a function of greed, indifference to the problem of the commons,²⁸⁵ or indifference to the market abstractions imposed by years of sheer market size, aug-

Where an outcome is uncertain, the economist speaks of it as an ‘expected’ outcome. The ‘value’ of an expected outcome is the dollar value (or cost) of the outcome if it occurs, ‘discounted’ (i.e. multiplied) by the probability of its occurrence. . . . However, the ‘utility’ of the expected outcome may differ from its ‘value.’ Utility may, for present purposes, be defined as the price that an individual would consider equivalent to the expected outcome. Stated differently, the utility of the expected outcome is the sum certain that is subjectively equivalent to the expected (uncertain) outcome. If the utility and value of an expected outcome are identical for some individual, that individual, at least as regards the transaction in question, is said to be ‘risk neutral.’ If the utility to him is less than the value, he is ‘risk averse’; if it is greater than the value, he is ‘risk preferring.’. . . Economists believe that most people in most settings are risk averse; studies of the securities markets . . . have provided . . . quantitative evidence in support of this belief.

Richard A. Posner and Kenneth E. Scott, *Economics of Corporation Law and Securities Regulation* 62-63 (Little, Brown, 1980).

282. See Jerry Adler, et al., *Down in the Dumps*, Newsweek 18 (Jan. 13, 1992) (describing Americans’ economic and other worries).

283. See Stuart H. Blum, *Investment Preferences and the Desire for Security: A Comparison of Men and Women*, 94 J. Psychol. 87 (1976) (noting that the difference in the degree of emphasis placed upon security in investment preferences between men and women is not statistically significant).

284. It might also extend to avoiding risk to a larger circle; the statement in the text is minimalist in nature.

285. The “problem of the commons” or “free rider” problem results from a reluctance to engage in optimal levels of a particular activity, such as monitoring, because the benefits of the activity must be shared with persons not contributing to the activity. See Charles J. Goetz, *Cases and Materials on Law and Economics* 27-28, 90 (West, 1984); James M. Buchanan, *The Demand and Supply of Public Goods* (1968); James M. Buchanan, *Public Goods in Theory and Practice: A Note on the Minasian-Samuelson Debate*, 10 J. L. & Econ. 193 (1967); Paul A. Samuelson, *Pitfalls in the Analysis of Public Goods*, 10 J. L. & Econ. 199 (1967); Jora R. Minasian, *Public Goods in Theory and Practice Revisited*, 10 J. L. & Econ. 205 (1967). Compare Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968) (examining the concept in the context of overpopulation).

mented by decontextual economic analysis.

The argument, then, is that the human interest in connectedness, the economically rational realization that collective enterprise can accomplish more than either individual action or, certainly, nonaction (the sock strategy), and some accommodation of risk aversion will induce enterprise participation as a clear-cut benefit to the participant. Money will move from the sock drawer and into circulation, although it may not be in the hands of the exact entities economists would prefer.²⁸⁶

The Social Perspective. In addition, there remains the putative link of both entrepreneurship and investment to social progress. The foregoing arguments do not suggest that feminists disdain technological progress. Feminists might, in retrospect, have been quite happy to tolerate a somewhat slower rate of some forms of advancement; nonetheless, they probably would be as anxious as anyone for the improvements in health, nutrition, and the like, that technology has rendered. They would prefer that these advances occur in the context of small, sympathetically managed concerns, and would prefer to regard such concerns as capable of producing them.²⁸⁷ Given the realistic admission that small, sympathetically managed concerns are not the necessary order of the modern day, what then? The next task is to develop an approach that accommodates some appropriately targeted accumulation of assets,²⁸⁸ encourages individuals to participate in management, and assures that understandably risk-averse and potentially helpless persons can fearlessly dedicate their funds. This approach cannot practically assume a feminist ground-zero and thus must somehow account for both history and the reality perceived by others.²⁸⁹ Its precise shape will await the commentary on broader legal themes, immediately below.

286. See note 111 and accompanying text. It would be important to acknowledge more fully the costs of sacrificing large, aggressive corporations or active markets if either of these sacrifices were a practical possibility. See notes 287, 336-38 and accompanying text.

287. Resolution of this last point is, however, the type of abstractive argument that is not necessary for feminists to address in light of the practical circumstances that many such advances already have occurred, that small enterprises have contributed to their attainment, see note 270, and that those large organizations that do currently exist are not in the process of disintegration.

288. This simply recognizes that feminists might regard accumulating assets for immunization research quite differently from accumulating assets for development of weaponry. See Ann C. Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 Harv. Women's L. J. 25 (1989).

289. For instance, it must recognize that the hostile world some feminists claim is perceived by men may be real to them. The approach thus must somehow soothe male fears. At this point, it may be helpful to recall the liberal feminist willingness to deal with the law in vocabulary appealing to powerful listeners. See notes 179-85 and accompanying text. This is, by design or consequence, a form of "practical" feminism.

c. *Reflections of Larger Legal Themes*

i. Industry as Favored Child

Legal historians have noted that the first half of the nineteenth century saw enormous flux in the laws affecting budding American industry.²⁹⁰ It was during this period, for instance, that caveat emptor and the "will" theory of contract supplanted the "sound price" doctrine,²⁹¹ that negligence doctrine preempted "no fault" trespass as our dominant tort theory,²⁹² and that the distinct natures of corporations and their shareholders began to weave their way into the fabric of American society.²⁹³ According to Professor Morton Horwitz, once these pro-industry developments became firmly established, they were "frozen" into the law as the courts turned to a rigidly formalistic method of legal analysis.²⁹⁴

The broad legal themes that support limited liability may coincide with those in vogue at the time of its firm New World entrenchment. According to at least some historians, these themes will not coincidentally tend to favor industry.²⁹⁵ One such theme, manifest in both nineteenth century negligence and corporate law, is a willingness to sever the chain of legal liability unless the connection between individual actor and injury is compellingly direct.²⁹⁶ Another, shared by contract and corporate law in the same period, is an emphasis on the utility of private ordering and arrangements in the economic sphere.²⁹⁷

Thus, as posited in Part II of this Article, the shareholder's formal lack of control over corporate activity easily can serve as a theoretical

290. Morton J. Horwitz, *The Transformation of American Law 1780-1860* at 253-55 (Harvard, 1977).

291. Kermit Hall, *The Magic Mirror* 119-20 (Oxford, 1989); Horwitz, *American Law* at 164-66, 180; Lawrence M. Friedman, *A History of American Law* 233-35, 244-47 (Simon and Schuster, 1973); Morton J. Horwitz, *Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917, 945-46 (1974); A. W. B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. Chi. L. Rev. 533 (1979) (criticizing Horwitz).

292. Horwitz, *American Law* at 297-98 n.146; Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359, 360-70 (1951) (also discussing development of "fellow servant" and "assumption of risk" doctrines). See also G. Edward White, *Tort Law in America: An Intellectual History* (Oxford, 1980); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 Yale L. J. 1717 (1981).

293. See notes 43-51 and accompanying text.

294. Morton J. Horwitz, *The Rise of Legal Formalism*, 19 Am. J. Leg. Hist. 251-53 (1975). Compare Stephen B. Presser, *Revising the Conservative Tradition: Towards a New American Legal History*, 52 N.Y.U. L. Rev. 700 (1977) (criticizing Horwitz).

295. See the authorities cited in note 292.

296. See notes 70-75 and accompanying text. In instances in which the corporate veil is pierced, then, such a connection may be found. See notes 66, 125-31 and accompanying text.

297. In this sense, both bodies of doctrine encourage individual or limited group accumulations of capital for the enhancement of the general welfare. For the usual economic view of this approach see notes 26, 91 and accompanying text.

barrier to liability for corporate acts.²⁹⁸ Moreover, in the case of those having contractual dealings with the corporation, what could be more natural to the jurist asked to pierce a corporate veil than respect for the manifest will of the parties as to who is liable and who is not?²⁹⁹ Oddly, however, these themes have substantially eroded in tort and contract law, yet they continue to be enshrined in corporate law.

ii. Separate Spheres

Modern courts are relatively sanguine about the ability of industry to survive and prosper. Accordingly, various doctrines have been devised or modified to hold businesses legally liable for their products. Culpability is no longer an inevitable essential to liability,³⁰⁰ and the importance of showing strict causality has diminished.³⁰¹ Other judicial innovations have reduced the predictability of contract rules. Unconscionability, reliance, and other doctrines thus have made inroads on contractual formalism.³⁰²

By contrast, there seem to be no truly parallel developments in imposing liability on corporate shareholders.³⁰³ Piercing the corporate veil is hardly more popular a judicial pastime today than in earlier years and certainly is no better understood.³⁰⁴ Moreover, relaxation of the formal restrictions on shareholder control of close corporations³⁰⁵ actually has reduced the theoretical justification of shareholder claims to limited liability. Various other developments, such as the relaxation of control restrictions on limited partners³⁰⁶ and the invention of other

298. See notes 69-80 and accompanying text.

299. This thinking also underlies common-law acceptance of the corporation by estoppel and de facto corporation doctrines. See Ribstein, 50 Md. L. Rev. at 121-24 (cited in note 9) (suggesting rent-seeking as the reason for statutory amendment of doctrines). With respect to the significance in actual veil-piercing inquiries of whether the debt in question is contractual or otherwise, see Thompson, 76 Cornell L. Rev. at 1058-59 (cited in note 83).

300. See Prosser and Keeton, *Law of Torts* §§ 75, 98 at 536-38, 692-94 (cited in note 71).

301. See generally Note, 93 Harv. L. Rev. at 916 (cited in note 72) (basing liability on market share); Sheiner, 46 Fordham at 963 (cited in note 72) (same).

302. The most famous expansion on these themes is, no doubt, contained in Grant Gilmore, *The Death of Contract* (Ohio State, 1974). See also Richard E. Spiedel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 Stan. L. Rev. 1161 (1975) (discussing and criticizing Gilmore).

303. But see notes 19-20 and accompanying text with respect to recent instances in which CERCLA provisions have been employed to impose liability on corporate parents actively "operating" hazardous waste sites through subsidiaries.

304. There is now, however, more of an empirical basis for further discussion on the issue. See Thompson, 76 Cornell L. Rev. at 1047-67 (cited in note 83).

305. This relaxation has been both legislative and judicial. See the authorities cited in notes 69 and 81.

306. See Uniform Limited Partnership Act § 303, 6 U.L.A. 343-53 (Supp. 1992). Georgia has dropped the control restriction entirely. See Ga. Code Ann. Section 14-9-303 (Michie, 1989).

limited-liability forms³⁰⁷ have pushed the law of business organizations further adrift from other legal principles.

To an observer in 1992, business law and organizational law may appear to be quite different subjects. The former, which relates to the responsibilities and obligations of an enterprise to the larger society, has undergone substantial change and, in some respects, might be said to have been at least slightly "feminized" vis-à-vis its state in the nineteenth century.³⁰⁸ The latter, which articulates the relationships of those within the enterprise to one another and sustains their lack of relationship to those outside the enterprise, remains mired in earlier theory.³⁰⁹

Business law and organizational law thus may be characterized as occupying quite distinct spheres. The spheres intersect only in the offices of corporate management:³¹⁰ management, of course, must respond to the demands of business law in order to discharge its responsibilities under organizational law.³¹¹

In this regard, the extraordinary difficulty evident in the most recent manifestations of the corporate constituency debate illustrates the separateness of the two spheres.³¹² When, for largely selfish reasons,³¹³ corporate managers became interested in establishing that there might indeed exist some leakage between the world and the hitherto hermetically sealed universe of corporate fiduciary duty, their only resort was to the legislature.³¹⁴ Those statutes that, as a result of their efforts,

307. See, for example, Colo. Rev. Stat. § 7-80-101 (1991); Fla. Stat. Ann. § 608 (West, 1992); 1990 Kan. H. B. 3064; Wyo. Stat. §§ 17-15-101 to 17-15-136 (1977). See generally Hamill, 41 U. Fla. L. Rev. at 721 (cited in note 9); Richard Johnson, Comment, *The Limited Liability Company Act*, 11 Fla. St. U. L. Rev. 387 (1983).

308. See notes 290-94 and accompanying text.

309. Note the traditional lack of responsibility by managers to groups other than shareholders. See notes 261, 312-15 and accompanying text.

310. An intersection also occurs on the rare occasions on which the corporate veil is pierced.

311. See generally Ryan, 66 Wash. L. Rev. at 413 (cited in note 23) (discussing fiduciary responsibility to comply with general law).

312. See generally Richard A. Rodewald, *The Corporate Social Responsibility Debate: Unanswered Questions About the Consequences of Moral Reform*, 25 Am. Bus. L. J. 443 (1987); Fischel, 35 Vand. L. Rev. at 1259 (cited in note 87). In modified forms, this debate has continued since the Berle-Dodd exchange cited in note 261.

313. It is, of course, an open secret that management hoped to invoke constituency interests as antitakeover, self-entrenchment devices. See Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 Bus. Law. 2253 (1990); Roberta S. Karmel, *Is It Time for a Federal Corporation Law?*, 57 Brooklyn L. Rev. 55, 63 (1991); Ellen Lieberman and Jeffrey B. Bartell, *The Rise in State Anti-Takeover Laws*, 23 Sec. & Commodities Reg. 149 (1990).

314. Although courts grant substantial leeway to directors in methods of advancing shareholder interests, the judiciary has indicated quite resolutely that "it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefitting others." *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

cracked the hermetic seal are striking in their lack of guidance about how to value and accommodate the arguably competing interests of various constituencies.³¹⁵

Why have the spheres of business and organizational law developed in isolation? Or, rather, why has one sphere developed much faster and more dramatically than the other? These evolutionary patterns suggest that the separation of capital from business must not only have seemed natural in light of historical enthusiasm for industrial development but also must continue to seem natural.

At this level, there is ample room for speculation about a favored capitalist superclass to which lawyers, judges, and legislators at least subconsciously pander and aspire.³¹⁶ Socialist theory³¹⁷ presumably would accommodate the idea that class distinctions are both reflected in and sustained by legal structures. Less controversial theories could support the same theme. Thus, from a simple, rugged individualism Horatio Alger³¹⁸ standpoint, what could be seriously wrong with permitting those who have hoisted themselves from the masses to enjoy a few well-protected rewards?

A less hostile or image-driven explanation for this divergence could be a simple collapse of imagination after the period of legal formalism was reached.³¹⁹ This explanation is suggested by the general failure of

At last count, 29 legislatures had adopted some sort of multi-constituency statute. Bevis Longstreth, *Reflections on the State of Corporate Governance*, 57 Brooklyn L. Rev. 113, 115-16 (1991).

315. Id. See also, for example, 15 Pa. Cons. Stat. § 1721(c) (1988), repealed by Act of Dec. 19, 1990, Pa. Laws 834, No. 198, § 102:

Consideration of factors—In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors may, in considering the best interests of the corporation, consider the effects of any action upon employees, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors. The consideration of those factors shall not constitute a violation of [the directors' duties of care and loyalty].

A vigorous commentary has attempted to illustrate the folly of tinkering with the traditional view in this area. See, for example, Longstreth, 57 Brooklyn L. Rev. at 113 (cited in note 314). But compare Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 Bus. Law. 1355 (1991) (generally concluding that such statutes are not apt to influence the law significantly).

316. Compare Horwitz, *American Law*, at 188 (cited in note 290) (reflecting on "class bias" in law). Recent restrictions on insider trading might tend to contradict this theme. See note 335.

317. See notes 187-88 and accompanying text.

318. Horatio Alger (1834-1899) was an American author known for 130 popular books "based on the concept that a struggle against poverty and temptation inevitably leads a boy to wealth and fame." James D. Hart, *The Concise Oxford Companion to American Literature* 11-12 (1986). His career as an author flourished after his 1886 ouster as a Unitarian minister for having immoral relations with his choirboys. Id.

319. This might be partially induced by American liberal reluctance to require affirmative acts. In this sense, control is a given: it simply exists or does not exist. In the case of shareholders it does not exist, but in the case of enterprises it does. It presumably would seldom occur to liberal thinkers to compel someone to seek to control. See Alan Brown, *Modern Political Philosophy* 81, 92 (Penguin, 1986) (same); Nozick, *Anarchy* at 26-28, 149 (cited in note 238) (same); Richard A.

legislators and judges³²⁰ to question seriously the centrality of agency theory to the law of organizations.

As a historical matter, agents act subject to the control of the principal.³²¹ Shareholders lack the formal ability to control and thus cannot be principals. As a second historical matter, agents act on behalf of the principal.³²² Corporate management is in fact and law in control, but by law cannot act on its own behalf.³²³ Thus, the single possible principal is the corporation itself—an entity whose only animating conscience is a balance sheet. There is nothing wrong with this conclusion as a matter of formal nineteenth-century logic, but the neglect by modern lawmakers to inquire further—to examine whether agency law is the best possible construct for determining organizational relationships—is perplexing.

There is an explanation, admittedly quite partial, both for the continuing failure to critically examine agency law as the basis for organizational law and for the development of business law and organizational law as separate spheres. That explanation is the power of the law-and-economics movement.³²⁴ The existence and strength of the movement have for a substantial period of time diverted academic attention from more traditional explorations that ultimately might possess more appeal for judges and legislators.

Law-and-economics adherents themselves tend to reject traditional images and constructs.³²⁵ They thus have denounced the cherished image of the corporation as a separate entity, replacing it with a “nexus of contracts.”³²⁶ They have provided, however, their own relatively com-

Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 198 (1973) (placing individual autonomy and liberty to choose not to act—in duty-to-rescue cases—over human needs for assistance in times of danger).

320. But see notes 326-30 and accompanying text for discussion of the efforts of the law-and-economics movement.

321. Restatement of the Law on Agency, § 1 (cited in note 76).

322. *Id.*

323. For a general discussion of the prohibitions against management self-dealing and the related prohibition against the usurpation of corporate opportunities see, for example, Jayne W. Barnard, *Corporate Loans to Directors and Officers: Every Business Now a Bank?*, 1988 Wis. L. Rev. 237; Victor Brudney and Robert Charles Clark, *A New Look at Corporate Opportunities*, 94 Harv. L. Rev. 997 (1981); Michael Begert, Comment, *The Corporate Opportunity Doctrine and Outside Business Interests*, 56 U. Chi. L. Rev. 827 (1989).

324. Propounding the division may be some amount of unintended collusion between traditional American liberalism and the law-and-economics movement. This is manifest in the ideology of freedom of contract. “Freedom”—of will or otherwise—is an appealing liberal value. Contractualization is a centerpiece of economic analysis and thus enhances the importance and credibility of the movement.

325. Law-and-economics scholars have discussed agency law in their own terms. See, for example, Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563 (1988).

326. See, for example, Baysinger and Butler, 71 Va. L. Rev. at 1257 (cited in note 87); Wil-

plete explanation for the "natural" division between investment and other spheres. This explanation, which reinforces the division but does nothing to force traditionalists to reexamine the agency construct, is as follows.

Economic theory suggests that capital provision is a task in which one must specialize to achieve maximum efficiency; because it is a discrete task, it naturally may have rules that differ from those for other tasks. The economic argument, nonetheless, is that underlying these facially divergent rules are identical themes of wealth maximization. Thus, requiring an enterprise to bear the costs of product injuries is wealth-maximizing in those circumstances in which the enterprise is the lowest-cost avoider of such injuries.³²⁷ Because investors themselves are not low-cost avoiders but relatively high-cost interferers, involving them directly in product liability would be inefficient; conversely, reducing their involvement would maximize wealth. Isolating ordinary investors both from enterprise liability and control is therefore quite desirable.

Moreover, to the extent that wealth maximization, narrowly defined, is the goal of the entire analysis, it is easy to understand why no serious challenge is mounted—or intended—to the traditional idea that the balance sheet is management's principal.³²⁸ Even if economists disclaim the corporate entity for purposes of organizational law analysis and regard management as acting on its own behalf except as limited by contract, threat of takeover, or other practical monitoring device,³²⁹ the net effect on society of the contracts entered into by creditors, managers, and investors does not seem dramatically different from the result that would be achieved if management were bargaining with creditors on behalf of the corporation rather than on its own behalf.³³⁰

liam W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 *Stan. L. Rev.* 1471 (1989); Butler, 11 *Geo. Mason U. L. Rev.* at 99 (cited in note 87); Frank H. Easterbrook and Daniel R. Fischel, *The Corporate Contract*, 89 *Colum. L. Rev.* 1416 (1989).

327. This analysis does not suggest that strict liability always will result in optimal resource allocations. See Werner Z. Hirsch, *Law and Economics: An Introductory Analysis* 225-30 (Academic, 2d ed. 1988) (stating that no one rule is best in all cases); Polinsky, *Law and Economics* at 95-104 (cited in note 91) (same). Note that, for this purpose, something like an entity is more or less assumed. In this regard, see generally Coase, 4 *Economica* at 386 (cited in note 85).

328. Admittedly, legal economists tend to focus on the market (or other bargained for) value of shares, which incorporates many financial factors in addition to the corporate balance sheet.

329. See Fama, 88 *J. Pol. Econ.* at 288 (cited in note 111); Eugene F. Fama and Michael C. Jensen, *Agency Problems and Residual Claims*, 26 *J.L. & Econ.* 327 (1983); Fama and Jensen, 26 *J. L. & Econ.* at 301 (cited in note 85); notes 105-06 and accompanying text.

330. It is little wonder, then, that if economists are saying, "Look, you can think about it this way," lawmakers often seem to answer, "Why bother?" See note 335 and accompanying text.

iii. And Back to the Feminists

Feminists presumably would applaud some of the developments in what was referred to above as business law. Product liability doctrine, for instance, can double as a "needs" based theory, providing help for those with need and thus enhancing society's capacity to care for its members.³³¹ Unconscionability, as a context-specific response to rigid contract formalism, also should represent a definite improvement to the feminist thinker.³³² Moreover, the importance of reliance as a justification for enforcing promises has substantial feminist appeal.³³³

The hypothesized enthusiasm for these developments necessarily, if unsurprisingly, suggests that feminists would deplore the nineteenth century state of the law. To the extent that the themes of that era reverberate in present day organizational law, they will continue to incur feminist criticism. The totemism of "will," the rigidity of on-off answers to participant liability questions, and any notion that individuals regularly may be severed from the nonbeneficial consequences of acts from which they themselves were intended to benefit are in any guise objectionable to feminists.

Also deplorable to feminist analysis would be the ritual segregation of various social and legal structures. In other words, the existence of separate spheres for the various tasks of life is disquieting. Compartmentalization requires abstraction, and abstraction values order over context, thus precluding care.

C. A Practical Feminist Solution

1. Goals and Constraints

a. The General

Practicality dictates recognition that there will be no immediate restructuring of society along purely feminist lines. Some critics might applaud this truism, noting that failure to accommodate diverse non-feminist values would be no more fair than the existing failure to accommodate feminist points of view. These critics would simply misperceive feminism, which seeks to accommodate diversity in any non-hierarchical form.

331. See Nancy Fraser, *Talking about Needs: Interpretive Contents as Political Conflicts in Welfare State Societies*, 99 *Ethics* 291 (1989) (arguing for translatability of justified needs claims into social rights).

332. See notes 208-10 and accompanying text.

333. This can be attributed to a focus on need rather than bargain, accompanied by a remedy that is also needs-related rather than based on lost profits. See Restatement (Second) of Contracts § 90 (1979) (promising enforcement and remedy on requirements of justice in cases in which promises induce reliance).

A superficially more telling criticism of a purely feminist society might take the form of a concern that social constructs, including laws, intended to reflect caring and other feminist values may lack deviance control measures and thus may be abused. In addition, such constructs might reflect a lack of willingness, and therefore a lack of capacity, to address certain large-scale, abstract institutional problems that already exist.

These criticisms illustrate the folly of abstract projection of design or consequences and emphasize the reasons that feminists themselves usually eschew utopian visions.³³⁴ Because feminist analysis is firmly grounded in nonutopian experience, it will not, on its own terms, properly dictate a complete theoretical retooling of society or, for that matter, of corporate America. Its most important contribution thus is apt to be a more immediate, if incremental, one. This contribution is the accomplishment of such minimal change as would permit feminists to participate in corporate life without undue discomfort, in the hope that permitting at least some effectuation of personal philosophy within pre-existing frameworks could lead to further evolution.

At this time, the auspices for some amount of nonstructural feminization may be relatively good. The public imagination is seized by the moral and other perils posed by large corporations. Powerful institutions are interested in various investor empowerment reforms. A little *carpe diem* may be in order.

b. The Specific

As indicated above, a feminist generally would disapprove the concept of limited liability. Nonetheless, she might find nothing particularly amiss in the concept of limited risk and might regard various investor empowerment reforms as helpful in liberating any participatory impulses currently stifled by legal and economic tradition.

Certain political and other practical realities will, of course, constrain any specific suggestion or set of suggestions advanced in the hope of actual adoption. For instance, a recommendation overtly based on

334. See Rhode, 42 *Stan. L. Rev.* at 636 (cited in note 163). The main benefit of insisting on purity of theory, and thus of describing "feminist solutions" that are workable in "feminist societies" is to avoid dilution and the risk of ultimate silence. Nonetheless, fringe groups historically have imposed a gravitational pull on society even if they seldom succeed in reshaping it entirely. They must, however, be at least on the fringe of society and not completely beyond its borders. This is the most cogent response to the inevitable criticism that will attach to an "add and stir" approach such as the one proposed in this Article. See Bender, 38 *J. Legal Educ.* at 29 n.111 (cited in note 197); Minow, 38 *J. Legal Educ.* at 55 (cited in note 176) (saying that "we risk becoming embroiled in what we critique, entranced by what we would demystify"); Iris M. Young, *Difference and Social Policy: Some Reflections in the Context of New Social Movements*, 56 *U. Cin. L. Rev.* 535 (1987).

socialist theory or values would not be currently feasible. A feasible recommendation need not, however, conform exactly to the preferences of the law-and-economics movement: legislators have, in recent years, exhibited a cheerful indifference to strict economic analysis.³³⁵

At a minimum, the practical feminist will recognize that eliminating limited liability, either for shareholders or lenders, is roughly as probable as the selection of a female Pope. To the extent that limited liability is linked to active trading markets and other vital economic factors,³³⁶ fear of interstate and international competition is almost dispositive of the issue.³³⁷ Thus, absent worldwide adoption of unlimited liability, the threat of capital flight would seem to preclude serious political consideration of such a move in any discrete jurisdiction, be it a state or the nation.³³⁸

Even without these difficulties, the exposure of shareholders to liability would raise perplexing problems of implementation. For instance, would liability be joint and several or pro rata? A recent, economically-oriented article arguing for the imposition of tort liability on a pro rata

335. They have, for instance, chosen to "interfere" in the market for corporate control, thus hurdening potential acquirers of publicly held corporations and thereby reducing the efficiency of the monitoring device so praised by economists. See, for example, Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 *Stan. L. Rev.* 23, 33-38 (1982); Frank H. Easterbrook and Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 *Stan. L. Rev.* 1, 1 (1982); Lucian A. Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 *Harv. L. Rev.* 1028, 1030-32 (1982); notes 105-07 and accompanying text. They have, moreover, refused economic advice with respect to the regulation of insider trading of securities, characterizing as serious wrongdoing what is, to many economists, a neutral or beneficial device. For discussion of the economic view, see, for example, Dennis W. Carlton and Daniel R. Fischel, *The Regulation of Insider Trading*, 35 *Stan. L. Rev.* 857 (1983); Henry G. Manne, *Insider Trading and the Law Professors*, 23 *Vand. L. Rev.* 547 (1970); Henry G. Manne, *Insider Trading and the Stock Market* (Free Press, 1966); Stephen A. Ross, *The Determination of Financial Structure: The Incentive-Signalling Approach*, 8 *Bell J. Econ.* 23 (1977). For the legislative response see The Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264, codified at 15 U.S.C. §§ 78a, 78c, 78o, 78t, 78u, 78ff (1988); The Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78a (1988).

336. See notes 100-04 and accompanying text.

337. Although imposing liability on the shareholders of closely held corporations might be severable, and slightly more feasible than imposing it on publicly held corporations as well, there are reasons to resist such a severance. Among other things, it would appear to enhance any competitive advantages that larger corporations already enjoy in attracting capital investment. See note 271 and accompanying text. Moreover, it would appear to endorse a "separate sphere" thinking, as well as decontextualization and passivity, in the unaffected realm.

338. Hansmann and Kraakman, 100 *Yale L. J.* at 1922-23 (cited in note 102), argue that the law of the jurisdiction in which business is conducted should be applied and that such a jurisdiction may effectively prohibit a foreign entity from conducting business if its shareholders have not waived limitations on liability. Although their statement with respect to choice of law seems correct, their assessment of the ease with which the organizations of the world may be brought into line is optimistic. Moreover, the idea that state legislatures could muster the political will for the experiment seems farfetched.

basis discusses additional practical difficulties at some length.³³⁹ When, for instance, would liability attach?³⁴⁰ At the time of injury? The time of discovery? The time a claim is made? How would manipulation be avoided? Moreover, what about the theoretical obstacles and practical costs presented by collection?³⁴¹ Despite the genuine appeal to feminist audiences of the basic suggestion, the struggle with these mundane issues overwhelmingly burdens an already politically dicey proposal.

2. A Recommendation

There is, however, a simpler and, presumably, more politically feasible approach that still would address immediate feminist concerns. The first step would call for the adoption of various investor empowerment reforms. The second would retain limited liability for shareholders and lenders but would impose a requirement that all business enterprises, corporate or otherwise, carry adequate insurance.

a. *Investor Empowerment*

There now exists a fairly rich literature discussing the merits and demerits of various methods to empower investors.³⁴² Proposed methods include facilitating the communication of information among shareholders,³⁴³ enlarging the range of matters that shareholders may call upon management to include in its annual proxy statement,³⁴⁴ and developing a "new breed" of professional director elected to represent the interests of institutional investors.³⁴⁵

Progress of sorts already has begun.³⁴⁶ This progress does not indicate that the current state of investor participation is satisfactory, however;³⁴⁷ the continuing waves of proposals indicate that, in the views of

339. *Id.* at 1896-902; Leebron, 91 Colum. L. Rev. at 1578-84 (cited in note 142).

340. Hansmann and Kraakman, 100 Yale L. J. at 1896-99.

341. *Id.* at 1899-901.

342. See, for example, Black, 89 Mich. L. Rev. at 520 (cited in note 257); Alfred Conard, *Beyond Managerialism: Investor Capitalism*, 22 U. Mich. J.L. Ref. 117 (1988); George W. Dent, *Toward Unifying Ownership and Control in the Public Corporation*, 1989 Wis. L. Rev. 881, 908.

343. See Karmel, 57 Brooklyn L. Rev. at 83-85 (cited in note 313).

344. *Id.* at 84.

345. See Ronald J. Gilson and Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 Stan. L. Rev. 863 (1991).

346. Thus, the SEC has proposed various proxy reforms popularly regarded as pro-investor. 24 Sec. Reg. & L. Rptr. (BNA) 895 (1992).

347. Some might argue that any such progress is more apparent than real. Thus, while there have been numerous reform proposals, presumably heightening sensitivity in this area, few of these proposals have been adopted. See Karmel, 57 Brooklyn L. Rev. at 64-67, 83-84 (cited in note 313); Longstreth, 57 Brooklyn L. Rev. at 113 (cited in note 314). Some commentators have denounced as steps backward such events as the D.C. Circuit Court's invalidation of the SEC's "one share-one vote" rule, *Business Roundtable v. SEC*, 905 F.2d 406 (1990), and various developments in state

many, much remains to be done. Nonetheless, recent interest and actual developments in this field suggest that feminists need not wage this particular campaign alone. This area, therefore, presents a promising opportunity to attain practical results and to provide willing feminists a relatively rare opportunity to apply their theoretical tools quite directly to the world of business.³⁴⁸

From a critical perspective, it should be acknowledged that to the extent that investor empowerment schemes are successful, investors might obtain more of the control that seems to render the state of unlimited liability "natural."³⁴⁹ If, for the reasons described above,³⁵⁰ that state is in no event perceived to be forthcoming, a projection of the drawbacks of unlimited liability onto shareholder empowerment might preclude empowerment reforms in the first place. Fortunately, however, the vanguard of the shareholder empowerment movement includes politically powerful institutional investors not apt to be troubled by the theoretical asymmetries of their own demands.³⁵¹

Nonetheless, in the sharp eye of the legal economist, investor empowerment would be of doubtful utility, particularly to the small investor. The economic model suggests that rational, diversified investors simply will not involve themselves in the management of business enterprises.³⁵² As animal-rights sympathizers and anti-apartheid activists have shown, however, economic rationality can be quite overrated.³⁵³

b. Adequate Insurance

Different readers will place primary emphasis on different criticisms of the proposal that all business enterprises be required to carry adequate insurance. The primary such criticisms concern the following: (1) the impracticability of propounding schedules of adequate insurance, (2) the theoretical and practical difficulty of enforcement, (3) the unavailability or expense of insurance against contract liability and some types of tort liability, (4) the immorality of quantifying possible

approaches to antitakeover devices. See Karmel, 57 Brooklyn L. Rev. at 72-81 (cited in note 313).

348. One of the goals of such an application would, of course, be erosion of the line separating this world from the rest of life.

349. See notes 65-75 and accompanying text.

350. See notes 335-40 and accompanying text.

351. To the extent that institutional investors would become more powerful to the exclusion of other types of investors, new problems might arise. Adding a layer of actors between individuals and ultimate consequences might decrease individual feelings of connectedness, responsibility, and control. This concern could be a matter of mere imagery, however; if investors have choices about their institutional surrogates, they might perceive themselves as responsibly pooling their efforts with others of like mind.

352. See notes 104-10 and accompanying text.

353. See note 277 and accompanying text.

human injury in insurance dollars, and (5) the moral hazard posed by insurance.

Some criticism may be deflected by rendering the proposal more precisely. Let us presume that the relevant enforcement mechanism is some type of sanction against individual management³⁵⁴ and that it will apply only when a private claimant is unable to recover from the enterprise. Detection thus would be in private hands, which admittedly would allow some instances of inadequate insurance to go unexposed. Enforcement against management would be far simpler than penalizing shareholders and would permit the capital markets to continue relatively unperturbed, although any increased cost of insurance or management salaries presumably would have an effect on valuation. Prudent managers might extract higher compensation for the new risk they would bear, but nonetheless should be more likely to see that the enterprise is adequately insured.

Adequacy of insurance need not be determined with scientific precision, and any pretense that precision is possible would be foolhardy. Rather, for purposes of the sanctions described above, a conclusive presumption of adequacy might arise from compliance with the periodic recommendations of a panel of community volunteers. Many such panels could convene in each jurisdiction; in fact, their number need be limited only by the exhaustion of civic spirit. A recommendation of the amount of insurance to be carried by each enterprise would be issued after a presentation by management and such supplementary investigation as the panel chose to make. Community involvement of this sort would, of course, raise a few additional practical issues. Suppose, for instance, that the panel acts capriciously and issues an unnecessarily high recommendation? Suppose, in the alternative, that it is captured by management and issues a recommendation that is too low?

In the event management thinks a recommendation is unduly high, the enterprise probably should be able to submit the issue to a second panel. If management disagrees with the second panel, the enterprise might choose to disregard both recommendations, relying on (1) its own informed opinion that the amount of insurance management chooses would sufficiently assure that no private claimants would be uncompensated or (2) its belief that it could prove that a reasonable person would have concluded that the amount of insurance chosen by management

354. These sanctions could be any appropriately calibrated form of criminal or civil penalty. One possibility would be to impose liability on management for unpaid corporate debts. For discussion of such a proposal without respect to any mandatory insurance requirement, see Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 *Yale L. J.* 857, 869-71 (1984). See also Hansmann and Kraakman, 100 *Yale L. J.* at 1929 (cited in note 102) (generally dismissing the proposal to impose unlimited liability on management).

was adequate, notwithstanding the opinions of the panels. Nonetheless, if recommendations are high, the proposed system admittedly might result in some instances of overinsurance.

Conversely, the problem of regulatory capture presents the distinct possibility of underinsurance. The issue of capture is, of course, one that is always with us.³⁵⁵ However, assuming that community volunteers are subjected to the same governmental ethics restrictions, including sanctions, that govern professional regulators, the capture problem should be no more extreme in this area than in any other.

In summation of this particular problem area, there need be no claim that instances of overinsurance and underinsurance will be negligible or cancel each other out on a systemic basis. At least some of the benefits of the proposal are intended to be symbolic—because symbols are important. Labels, for instance, quite apart from content, help structure our perception of reality and thus our response to it.³⁵⁶ If an adequate insurance requirement permits us to conceive of entities in terms of limited risk, rather than limited liability, this simple adjustment ultimately may affect our perception of permissible economic goals and, consequently, our economic morality.

Several other practical issues, however, still remain. First, suppose that the panel bases its recommendation on an evaluation of the books, records, and business plan presented by management, but that these materials are incomplete. Or suppose that management simply changes its plans post-presentation. Do these possibilities indicate that the risk of evasion is unacceptably high? Open flaunting of even a largely symbolic regulatory structure clearly is not to be desired.

At a minimum, the possibility of evasive actions suggests that management should bear the burden of establishing that the enterprise's actions were within the realm of those contemplated by the panel at the time the recommendation was issued. Thus, when invoking the protection of the conclusive presumption of adequate insurance, management would have to demonstrate that whatever action is complained of was fairly described in its presentation to the panel. The testimony of panel members themselves in such situations themselves presumably would be highly influential.³⁵⁷

355. See, for example, David B. Frohmyer, *Regulatory Reform: A Slogan in Search of Substance*, 66 A.B.A. J. 871, 871-73 (1980) (criticizing capture theory); Louis L. Jaffe, *The Independent Agency—A New Scapegoat*, 65 Yale L. J. 1868 (1956) (discussing claims of industry-oriented regulation).

356. Mary Daly, *Beyond God the Father* (Beacon, 1973); Dale Spender, *Man Made Language* 163-90 (Routledge & Kegan Paul, 2d ed. 1985); Minow, 38 J. Legal Educ. at 51 (cited in note 176). See also the authorities cited notes 195 and 250.

357. Note that this line of reasoning suggests that community panel members should be afforded immunity from the consequences of a recommendation that results in underinsurance.

Also in the practical realm is the criticism that some types of risk—such as contract liabilities—are uninsurable. The demand placed on an enterprise's resources by these types of risk would, however, be considered in determining the amount of insurance to be carried against other perils. Moreover, a panel might decide that an enterprise's uninsurable risks are so great that the panel simply could not recommend adequate insurance. This situation would expose management to some risk of later sanction and thus presumably induce caution. The uninsurable risk problem would seem to affect small enterprises more than larger "self-insurers," but this may be the inescapable consequence of any attempt to match fiscal and moral responsibility.

Moreover, to the extent that some uninsurable risks are contractual in nature, some amount of creativity may be in order. Suppose, for instance, that unpaid debts to such quasi-voluntary creditors as employees would expose management to sanction if left unpaid and underinsured.³⁵⁸ Even if wage insurance is not now common, it is entirely foreseeable that a new insurance product could be developed and made widely available. Although such insurance clearly would not be cost-free, neither is nonpayment of wages. The question to be resolved is whether there should be community involvement in determining how these costs are to be shared.³⁵⁹

The primary remaining criticisms are more theoretical in nature but no less significant. These concern the monetarization of injury and the moral hazard of insurance. The latter, however, is the easier issue.

Insurance is said to create a moral hazard in that actors are more likely to take risks if they do not bear the ultimate costs.³⁶⁰ Thus, if an enterprise is fully insured, its safety precautions may decline. This moral hazard is no different in kind than the one created by limited liability itself. In the case of insured risks, however, it is the willing insurance provider rather than some possibly unwilling third party who is the ultimate risk-bearer in terms of dollar cost.³⁶¹ This alone is an improvement. Moreover, to the extent that insurance providers have

358. This contemplates either that any shortfall in an enterprise's ability to pay would be charged against management or that management's exposure would be limited to specific types of shortfalls, including amounts owed to employees.

359. This discussion is slightly blithe in its disregard of loading costs, which exceed one-quarter of all insurance premiums. See Louis De Alessi, *Why Corporations Insure*, 25 *Econ. Inquiry* 429, 432 (1987). It would also be possible to include specific informed releases of some types of creditors in the "insured" category. These types almost certainly would not include employees.

360. Note that insofar as corporate entities are concerned, management decides which risks to take, but does not directly incur the consequences. Nonetheless, the consequences of the risks taken presumably will indirectly affect management's salaries, bonus plans, and continued employability.

361. See immediately below for recognition that dollar compensation may not truly make victims whole, indicating that they, too, are inescapably risk-bearers.

the ability to impose certain restraints on the actions of the insured, such as conducting periodic inspections of equipment in exchange for reduced premiums on liability insurance, the real-world consequences of moral hazard may be reduced.³⁶²

More importantly, if business plans are exposed to community representatives, the act of exposure itself is apt to serve as a moderating influence. This would be true even if the community representatives had a duty of nondisclosure until called upon to testify as to the availability of the conclusive presumption of adequate insurance. One can easily believe that as management pictures itself articulating some particularly odious plan, which it presumably would have an incentive to reveal in order to assure the availability of the presumption, it may find ways to amend its original scheme.³⁶³ The expense of amendment is, like the price of insurance, a cost the recommendation presupposes a concerned society is willing to bear.

Reliance on a plan of insurance clearly does accept the prevailing legal and economic tendency to reduce all injuries to dollar valuations.³⁶⁴ Such reliance permits decision makers to detach themselves, as human beings, from the consequences of their decisions to other human beings. There presently is some interest in feminist circles in restructuring tort remedies to combat the tendency to monetarize. Thus, for instance, there have been recommendations that tortfeasors personally render care to their victims.³⁶⁵ If this recommendation were adopted, it might reduce the need for insurance as we know it.³⁶⁶

More practically, it may be very well to say that in a society even loosely structured on feminist principles, personal care would be preferable to dollar recoveries. In our actual society, however, assuring adequate funds for medical treatment and other needs is essential. In the foreseeable future, then, personal care reforms may no more than supplement the more traditional structure of remedies.³⁶⁷

362. Consider also the argument that the payment of higher premiums for the privilege of engaging in high-risk activities will have a moderating influence. Easterbrook and Fischel, 52 U. Chi. L. Rev. at 108 (cited in note 31).

363. It is thus apparent that the proposal made in the text has implications for the constituency debate described in notes 261 and 312-15.

364. Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 Duke L. J. 848, 853.

365. *Id.* at 905-06; Leslie Bender, *Changing the Values in Tort Law*, 25 Tulsa L. J. 759, 771-72 (1990).

366. A supplemental means of addressing the same problem would take the form of creativity in designing the sanctions for the failure to insure.

367. Nonetheless, the concern raised in the text suggests that effort devoted to refining the concept of insurance would be time well spent, both in terms of the proposal made in this Article and in general. Why, after all, should insurance always be monetary? Could it not take the form of some other type of plan for responding to injury?

In addition, what appears to someone who stands to profit from a particular act to be no more than an offsetting loss on a financial statement may look quite different to a community volunteer. Simply reminding management of that fact may have a moderating influence. Thus, an executive might think more than once before announcing to an insurance panel, "We know that our infant seat restraints will fail at X rate, so we will carry Y amount of insurance."

As a final note, it is interesting to observe that, aside from suggesting that there may be practical difficulties, as well as problems of moral hazard, economists have been relatively receptive to mandatory insurance schemes.³⁶⁸ This relative lack of objection may be slightly unnerving to feminist groups.

The economist's lack of objection is, predictably, premised on a belief that a mandatory insurance scheme would tend to duplicate the voluntary arrangements that would otherwise be made.³⁶⁹ It is important to recognize, however, that even if there already is a substantial volume of voluntary insurance transactions, an insurance requirement still has significance. The mandate of enterprise responsibility would serve as an important affirmation of the social values of care and responsibility. Moreover, the significance of the opportunity for community involvement would, from a feminist perspective, be difficult to overestimate.

V. CONCLUSION

A. *The Revisitation*

As the discussion in Parts I through IV indicates, the construct of limited liability for corporate shareholders is firmly entrenched in American law and society. There is, as well, substantial popular and legislative interest in expanding its coverage to investors in other entities.

Logical arguments establish the significance of limited liability for the existence of an active trading market and the ability of investors to diversify. As others have recognized, these arguments tend to support limited liability for the shareholders of publicly held entities but not for those of entities that are closely held. Supporting the extension of limited liability to both classes of shareholders is a set of traditional argu-

368. See, for example, Easterbrook and Fischel, 52 U. Chi. L. Rev. at 115 (cited in note 31); Hansmann and Kraakman, 100 Yale L. J. at 1927 (cited in note 102). For a suggestion that a tort of failure to insure adequately be recognized, see Leebron, 91 Colum. L. Rev. at 1632-36 (cited in note 142).

369. See notes 112-13 and accompanying text; Easterbrook and Fischel, 52 U. Chi. L. Rev. at 107-09 (cited in note 31).

ments about the need to stimulate investment and entrepreneurship, respectively.

One contention of this Article is that, insofar as the foregoing arguments are concerned, the concept of limited risk is a more than suitable surrogate for limited liability. It is a further contention that limited risk is a concept more compatible with the precepts of feminism. As a theoretical matter, it would be fairly simple to accomplish a substitution of concepts by implementing a plan of mandatory enterprise insurance.

From a feminist standpoint, the mandatory enterprise insurance plan has the distinct advantage of using community viewpoints to establish the adequacy of the insurance an enterprise will carry. To the extent this involvement constrains other management decisions, the further advantage of a moderating influence may be perceived. Overall, it is hoped that community input will reduce the level of concern about the moral and related hazards of insurance.

Reform in at least the corporate arena would be incomplete without liberalizing the rules that constrain the ability of shareholders to participate in management. In light of traditional agency and other legal analysis, increased participation may create an imbalance: control historically has been associated with liability, either direct or vicarious. Amending the enterprise participant's position from one of limited liability to one of limited risk may or may not address this theoretical imperfection. In either event, there is no particular reason to think that the traditional model is the only one possible. For instance, a feminist might find a lack of desire to participate in management itself to be a kind of culpability justifying imposition of liability, were such an imposition feasible. This is, of course, a rejection of the traditional model.

The attempt to address a basic concern with limited liability in any sort of piecemeal fashion will, to some, lack aesthetic appeal.³⁷⁰ One person's clutter, however, is another's context. A drive to streamline articulations of problems and to discover one true answer to the spare models thus produced is, from a feminist's perspective, a profound flaw in existing legal analysis.

B. And What About Todd?

All this being said, a year has passed since I first saw Todd. As the dog days once again wear on, the cardtable and pitcher have reappeared, and the quarters again are starting to accumulate. I imagine the

370. Critics also quite correctly may contend that the concern with limited liability expressed in this Article is a type of surrogate for expression of an opinion on the constituency debate. See notes 261, 312-15 and accompanying text. The fact that the traditional model presents multiple and intimately related problems should in no way be remarkable.

scene repeating itself in various eastern European locales, with appropriate substitutions of currency.

The point is not, I suppose, consternation about "playing entrepreneur." Neither is it any serious worry about whether Todd has yet given thought to incorporating. Rather, it is concern with the thoughtless acceptance and replication of the status quo. No matter how strong, how traditional, some images may be, no matter how strongly ingrained some values, there are questions worth asking. Not every group will, or should, agree that these are our images and these are our values.