1

Introduction to the *Feminist Judgments: Corporate Law Rewritten Project*

ANNE M. CHOIKE, USHA R. RODRIGUES, AND KELLI ALCES WILLIAMS

The modern American public corporation is at the center of various forms of inequality in our society. Large corporations employ over half of the American workforce,[1] and the majority of those large corporations have settled or lost at least one employment discrimination or sexual harassment claim in the last 21 years.[2] They provide the vast majority of products we use and so determine the quality of those products, and they set prices that influence what tools of upward mobility are available to what portions of society. They affect our physical environments through pollution, conservation efforts, and the use of natural resources. Deleterious environmental impacts tend to be concentrated in poorer communities.[3] The ubiquity of corporate influence makes corporate law a prime starting point for an intersectional analysis that considers the struggles and injuries corporations impose on under-resourced or marginalized populations, including people whose gender expression is non-male,[4] people who are members of racial and ethnic minority groups, and people who are working class and poor.

[1] Andrew Lundeen & Kyle Pomerleau, *Less than One Percent of Businesses Employ Half of the Private Sector Workforce*, Tax Found. (Nov. 26, 2014), https://taxfoundation.org/less-one-percent-businesses-employ-half-private-sector-workforce/.

[2] Philip Mattera, *Big Business Bias: Employment Discrimination and Sexual Harassment at Large Corporations*, Good Jobs First (Jan. 2019), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/BigBusinessBias.pdf.

[3] Cheryl Katz, *People in Poor Neighborhoods Breathe More Hazardous Particles*, Sci. Am. (Nov. 1, 2012), https://www.scientificamerican.com/article/people-poor-neighborhoods-breate-more-hazardous-particles/ ("Tiny particles of air pollution contain more hazardous ingredients in nonwhite and low-income communities than in affluent white ones. . .").

[4] Corporate law has assumed "cisgender man" as a default and "cisgender woman" as implicitly the other. Many feminists have done the same, intentionally or not. This assumption has at times consequently discounted the experience of transgender women and other non-cisgender non-male people across the full gender spectrum, including nonbinary gender. We acknowledge the complex network of identities that exist outside of the cisgender binary. However, given the challenges of concisely describing this reality, throughout this chapter we use

In this introductory chapter, the editors provide an overview of corporate law and of this volume and its relationship to the global and US Feminist Judgments Project. We explain how cases were selected and the parameters provided to authors and commentators. We identify common themes, feminist theories, and methods in the rewritten opinions and the contract in this volume, and we situate this work in the context of larger concerns about gender equality and justice. This chapter concludes by briefly suggesting some reasons for introducing these critical concepts into doctrinal, clinical, and practicum courses, as well as some pedagogical opportunities for doing so.

A. INTRODUCTION

Corporations affect all of us every day, and corporate and securities laws set the terms upon which corporations accept responsibility for the influence they have on society. Corporate law defines the purposes of corporations and thus determines whether – and to what extent – businesses can or must consider the costs their decisions may impose on employees, consumers, communities, and the environment. It also sets the standards by which corporate actors are monitored and it defines who is primarily responsible for corporate activity. Corporate activity affects the domestic and global economies and determines the value of the retirement savings of just about everyone who has them. If we want corporations to behave differently, to be good citizens, to be responsible stewards of retirement savings, then we must look to corporate law for protection and accountability. Corporate and securities laws are the filters through which corporations interact with and affect the global economy and citizens going about their daily lives. The effects that corporations have on global well-being reach into every level of our society.

Although corporations are a legal abstraction, and corporate law thus may appear neutral, corporate law decisions implicitly involve issues relating to race, gender, and class, because they involve corporate officers, directors, and shareholders – most of whom are white and male and relatively affluent. Yet, most business actors fail to consider the gendered implications of corporate law and governance. This is likely attributable to the fact that in US culture generally and its corporate culture especially, maleness is the default, the presumed standard by which most things are measured. Very few corporate legal decisions directly address women, people of color, or other disadvantaged groups as parties in interest. Yet those decisions can profoundly affect these groups.

A dominant organizing principle of corporate law is the shareholder primacy norm, which requires that corporate managers make decisions primarily for the

"woman" and "women" as a metonym or shorthand for the complex network of identies that exist outside of the cisgender male identity that has for so long dominated corporate law and corporate scholarship.

benefit of shareholders rather than other corporate stakeholders. Hence, "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[5] The shareholder primacy norm itself is all that the law *requires* and, as applied, that law is capacious enough to allow corporate actors to consider the effects of their decisions on stakeholders like employees, the larger community, and the environment – as long as the ultimate goal of the decision is to enhance shareholder value in some way. This legal requirement of shareholder primacy is a somewhat vexed question on its own terms. The desire for a corporate form that can serve other ends besides shareholders has led to forms of business organization such as the benefit corporation, a for-profit corporation that is required to consider the societal impact of its business.

Some scholars, commentators, and businesspeople have transmuted the shareholder primacy norm into a shareholder wealth *maximization* imperative – that the duty of the corporation is to to maximize shareholder value, even sometimes short-term shareholder value, to the exclusion of other corporate constituents. The law manifestly does not require maximizing short-term shareholder wealth except in specific limited circumstances.[6] Nonetheless, the maximization imperative and its less onerous cousin, the shareholder primacy norm, either encourage or – in strong form – actually force wealthy, mostly white, mostly male corporate officers and directors to focus exclusively on corporate outcomes that largely produce benefits for the few and privileged. Many Americans do not own stock in corporations, even in retirement savings. Yet corporate decisions aimed at maximizing profit affect all of us by determining the health of our economy, the availability of credit, the availability of safe and affordable products, the availability of jobs and a living wage, and the sustainability of a healthy environment.

Corporations have long been governed by and for the benefit of a privileged few, to the detriment of women, children, racial minorities, and low-income workers. Corporate law and governance have the capacity to address the reality of the significant role that corporations play in the lives of people beyond the director or shareholder classes. Even when corporate leaders are not white males, they tend to be wealthy, and they may be blind to the many ways in which corporations touch all of our lives. Because of the outsized role that corporations play in society and in the well-being of virtually all of our population, this book and its themes should resonate with anyone interested in justice and prosperity in our society.

The purpose of this book is to broaden to corporate law the inquiry begun with the original volume in the US Feminist Judgments Series, Feminist Judgments:

[5] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

[6] *See, e.g.*, *Revlon*; *In re* Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013); LC Capital Master Fund v. James, 990 A.2d 435 (Del. Ch. 2010); Equity-Linked Inv's v. Adams, 705 A.2d 1040 (Del. Ch. 1997); Katz v. Oak Indus., 508 A.2d 873 (Del. Ch. 1986).

Rewritten Opinions of the United States Supreme Court (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016). The same inquiry continued with other books in the series, such as Rewritten Tax Opinions (Bridget J. Crawford & Anthony C. Infanti eds., 2017); Reproductive Justice Rewritten (Kimberly M. Mutcherson ed., 2020); Family Law Opinions Rewritten (Rachel Rebouché ed., 2020); Rewritten Employment Discrimination Opinions (Ann C. McGinley & Nicole Buonocore Porter eds., 2020); Rewritten Trusts and Estates Opinions (Carla Spivack, Browne C. Lewis & Deborah S. Gordon eds., 2020); Rewritten Torts Opinions (Lucinda Finley & Martha Chamallas eds., 2020), and Rewritten Property Opinions (Eloisa C. Rodriguez-Dod & Elena Maria Marty-Nelson eds., 2021). Specifically, the task for this volume's contributors is to engage explicitly with feminist issues – gender, privilege and oppression, and intersectionality, among others – in corporate law decisions, where such issues are relevant but typically overlooked.

Most people understand that feminist reasoning has tremendous potential to affect, for example, the law of employment discrimination, sexual harassment, and reproductive rights. On the other hand, the challenge for the contributors to this volume on rewritten corporate law is that the question posed in the inaugural volume of the Feminist Judgments Series – "What would United States Supreme Court opinions look like if key decisions on gender issues were written with a feminist perspective?" – does not apply in a straightforward manner in the corporate law context. Corporate law decisions rarely address directly the kinds of gender equity issues that can be seen in a superficial reading, because women are largely absent from the conflicts those decisions resolve. Because women are not key players in many of the decisions, it is easy to overlook the effect the law will have on women. This volume seeks to remedy that oversight.

In this chapter, we offer two organizational perspectives on the opinions and the contract in this volume. One introduces how the authors of the rewritten opinions and contract use feminist legal methods, especially the six "moves" of feminist critical legal analysis developed by feminist scholar Martha Chamallas; the other perspective presents the rewritten texts by corporate law topic. Although we ultimately chose to organize the cases using the latter approach (as we anticipate that a primary use of this text will take place alongside traditional corporate law casebooks in introductory corporate law survey courses), we nonetheless wanted to provide multiple entry points to the volume to make it accessible to readers new to feminism, corporate law, or both areas.

B. WHAT IS CORPORATE LAW?

Corporate law governs a certain form of business organization. It establishes legal entities for conducting economic, social, and/or cultural activity, and it provides the

rules governing the management of those legal entities.[7] While the principal focus of corporate law often centers on the investor-owned corporation, other organizational forms are also commonplace and encounter challenges similar to those of investor-owned corporations. Therefore, the terms "corporate law" and "corporation" as used in this introduction encompass not only the body of law governing investor-owned corporations, but also other legal entities (for example, general partnerships; limited partnerships; limited liability companies; trusts; nonprofit corporations; cooperative corporations; most recently, benefit corporations; and even special purpose governments) that share certain fundamental characteristics. These basic characteristics are legal personality (recognizing an entity as a separate person in the eyes of the law) and, relatedly, "entity shielding" (recognizing an entity's assets as being distinct from those of the entity's owners and beyond the reach of an owner's creditors). In addition to sharing the two basic characteristics of investor-owned firms, these other organizational forms often also encounter similar challenges in defining and shaping the relationships among corporate constituencies.

In setting forth the rules governing corporations, corporate law has a principal function of mediating relationships among the three categories of corporate constituencies.[8] These constituencies can be roughly grouped into (1) the owners of the corporation, if any (shareholders); (2) the managers of the corporation (officers and, if any, directors – who may be the same individuals in a closely held entity, or separate from the owners in a widely held public corporation); and (3) non-manager, non-shareholder constituencies, such as creditors or employees of the corporation. As corporate law has developed, it has primarily focused on the first two groups.[9]

Beginning in the 1980s, the law and economics movement gained ascendency in the United States. Law and economics offered a radically privatized version of corporate law and corporate governance – which refers to the medley of the principles, rules, and norms that govern relationships among corporate officers, directors, and shareholders. The shareholder primacy norm was thus converted into an imperative to treat the corporation as a "contractual arrangement for maximizing short-term share price in a laissez faire global marketplace,"[10] albeit with statutorily defined default rules. From there, a widespread belief developed that "firms must *maximize* shareholder profits (i.e., get every last bit of profit they can) to the

[7] *See generally* Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?*, *in* ANATOMY OF CORPORATE LAW 1–19 (Reinier Kraakman et al. eds., 2004).
[8] *Id.*
[9] *See generally* Dalia Tsuk Mitchell, *Corporations without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861 (2003).
[10] Kellye Y. Testy, *Capitalism and Freedom: For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 88 (2004).

exclusion of any other goal,"[11] even goals related to recognizing the various guises of inequality.[12]

The law and economics movement casts itself as a collection of neutral and self-evident principles governing corporate law, ones rooted in protecting private ordering and the market as much as possible.[13] Under its view the goal of corporate law is to enable individuals to engage in private ordering – to get out of the way, in other words, and allow the free functioning of markets to create wealth. By virtue of the neutral veneer of this dominant corporate law movement, discourse about the implications of corporate law and corporate governance for questions of gender, gender identity, race, and class have occurred mostly in scholarly, rather than judicial, writing or transactional drafting. This volume seeks to change that scenario and to model what explicit engagement with issues of concern from a feminist perspective might look like in corporate law.

C. WHAT IS A FEMINIST JUDGMENT?

This section explains each chapter, provides an overview of the process for creating the judgments (from the perspectives of both the authors and the volume editors), briefly describes the ways in which a judgment can be feminist, and addresses the goals and rationale for rewriting corporate law decisions. In one case, given the emphasis that corporate law places on private ordering, a private contract is rewritten. For convenience and to honor the idea of a contract as "private law," we refer to all these different rewritten texts as "opinions."

Each chapter contains a commentary and the rewritten opinion, beginning with the commentary, in which scholars explain the importance of the original opinion and its background. The commentaries also explore how the feminist opinion differs from the original and the impact that the rewritten feminist opinion or contract might have made, had it been made law. Following each commentary is the feminist judgment itself, which may be a majority opinion, concurrence, or dissent – and, in one case, a contract.

The rules of the Feminist Judgments Series are simple: the rewritten opinions must work within the same precedent that bound the original decision-makers (whether judges or private parties) at the time of the original opinion. However, the authors of the rewritten opinions bring to decision-making and opinion-writing

[11] Julie A. Nelson, *Does Profit-Seeking Rule out Love? Evidence (or Not) from Economics and Law*, 35 WASH. U. J.L. & POL'Y 69, 70 (2011).

[12] *See generally* Theresa A. Gabaldon, *Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders Symposium: Women and the New Corporate Governance*, 65 MD. L. REV. 538 (2006).

[13] Professor Robin West famously interrogated the notions of autonomy and consent underpinning shareholder wealth maximization in *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).

their feminist perspectives on the facts and the law. One of the underlying claims of this book is that even seemingly objective questions – such as what the purpose of a corporation is, what the duty of care requires, how much loyalty shareholders owe one another, and whether someone is a fiduciary – are affected by judicial experiences, perspectives, and reasoning processes. The book demonstrates that incorporating feminist theories and methods into corporate law cases and contracts can be consistent with judicial and managerial duties and accepted methods of interpretation. Moreover, applications of feminist theories and methods can enrich and deepen the process by which judicial and managerial decisions are made.

Our process for choosing corporate law for feminist rewriting was deliberate and thoughtful. We began by putting together a list of cases culled from our own teaching, knowledge, and scholarship. We were interested in cases that rather explicitly implicate gender, such as cases involving female corporate actors, cases that address obligations to treat women with care and respect while conducting corporate business, and a case that addresses the consequences of sexual harassment liability. Although we selected several U.S. Supreme Court or Delaware corporate law cases, we also included cases from other federal and state courts. We were mindful to select cases that are generally taught in most business associations courses as fundamental to the development of various corporate law doctrines. We ultimately selected the fourteen cases and one contract in this volume, and a roster of thirty-three authors to rewrite the cases and comment upon them, with the goal of choosing the most qualified and diverse authors for the book. Throughout the process, we also took into account the input of our advisory board and suggestions from the authors themselves by way of a public call for proposals.

Additionally, we identified and invited scholars who possess expertise in specific subject areas and/or represented demographically diverse perspectives as well as a spectrum of seniority and roles within the academy and beyond. Of the thirty-six volume co-editors, contributors, or advisory panelists who participated in our survey regarding the volume's diversity,

- Most (90 percent) identified their gender expression as female, 8.3 percent as male, and 2.8 percent as gender fluid;
- Just over a tenth (11.1 percent) identified their sexual orientation as other than heterosexual;
- Approximately 20 percent identified as citizens of nations other than the United States of America, with one contributor self-identifying as an immigrant; and
- Approximately 20 percent identified as Asian, 20 percent as Black or African, and 3 percent as Indigenous, in addition to a contributor who identified as a member of a biracial, multi-ethnic family.

We also invited our volume participants to self-identify with other identities salient to them. Some contributors highlighted their religious identities (a member of a

religious minority and other participants who identified as Evangelical Christian or Catholic). Several mentioned class, identifying as first-generation lawyers (two of whom were also first-generation college graduates) or working class. One contributor self-identified as a person with a disability, and another self-identified as a single mother. With regard to the diversity of academic roles occupied by the volume participants, approximately two-thirds are traditional "podium" or "doctrinal" professors, just over a tenth are business school professors, and a fifth teach experiential legal education as legal writing or clinical faculty members (including a volume co-editor). Two volume participants also hold or have held senior administrative roles within the legal academy as deans. This diversity contributed to a fruitful virtual workshop convened by the volume co-editors, at which the volume contributors engaged with one another during the process of drafting their rewritten judgments and commentaries.

The authors' process for writing the judgments was to explore the history and context of the case or contract; study the law at the time of the original decision; and apply feminist theories, methods, and modes of feminist legal analysis to bring feminist insights to bear and reach a new interpretation of the legal problem presented. The rewritten cases and contract in the volume represent the multitude of ways in which a judgment can be feminist.[14] The volume and series editors conceive of feminism as a broad movement, and we welcomed proposals that brought into focus intersectional concerns beyond gender, such as race, class, disability, gender identity, age, sexual orientation, national origin, and immigration status.

In recognition of the diversity of feminist theories that exist, as well as the overlaps, divisions, and other interactions among them, we do not emphasize the "affix[ed] definitions to categories of feminisms," as do some other volumes in the Feminist Judgments Series.[15] This is not to say that thinking about the judgments in this volume through the lens of feminism's "waves" is unhelpful. Indeed, especially where the same legal issue – such as board diversity – is taken up by several volume contributors,[16] analyzing the feminist theories employed by this volume's judgments can reveal otherwise subtle merits and disadvantages of the approach associated with a particular wave. Using board diversity as an example, arguments characteristic of the second-wave relational feminism (also known as cultural feminism) may, on the one hand, resonate with corporate law's imperative to find a "business case" for the

[14] Feminist legal theory and methodology continue to evolve as feminism evolves. Indeed, some have argued that feminist epistemologies and feminist methodologies are starting to merge into "feminist research." Andrea Doucet & Natasha Mauthner, *Feminist Methodologies and Epistemology*, *in* Handbook of 21st Century Sociology 36, 36–42 (Clifton D. Bryant & Dennis L. Peck eds., 2006).

[15] Rachel Rebouché, Introduction, *in* Feminist Judgments: Family Law Opinions Rewritten (Rachel Rebouché ed., 2020).

[16] *Infra* Chapters 12, 9, 6, and 10 of this volume on *Disney*, *Smith v. Van Gorkom*, *Revlon*, and *White v. Panic*, respectively.

inclusion of women on boards.[17] On the other hand, a proponent of first-wave liberal feminism's rights-based approach might argue that such a stance instrumentalizes women in a way that is repugnant to women's equal right to serve on boards.[18] Meanwhile, a third-wave radical (also known as "dominance") feminist approach sees board diversity as a way to dismantle a patriarchal system that benefits from women's oppression.[19] Yet another theory would build upon the values and techniques of feminism, using gender and identity as the starting point but not the focus, and critique the imbalanced power dynamic in the socially constructed principal–agent relationship.[20]

For readers interested in engaging more deeply with these feminist and feminism-inspired theories as applied to corporate law, the last chapter provides a foundation for doing so. In Chapter 17, "The Importance of Incorporating Feminist Perspectives in Corporate Law: Analyzing the Foundations and Future Directions of Feminist and Feminist-Inspired Corporate Law Scholarship," Professors Martha Albertson Fineman and Cheryl Wade, together with one of the volume's co-editors, Professor Anne Choike, address four questions about what feminism can offer corporate law. In particular, Chapter 17 considers what feminism offers to corporate law and policy as a response to inequality and discrimination; as a source of values and as an ethical framework for understanding and enhancing the role and purpose of the corporation; as a critique of corporate power; and as inspiration for an institutional analysis of corporate law. The co-authors of Chapter 17 argue that, by showing how corporate law has sometimes been shaped by the false assumptions, blind spots, and missed opportunities of conventional frameworks, feminist and feminist-inspired analysis offers avenues for corporate law to promote prospects for fuller, freer lives among the persons who control or are affected by corporations.

In addition to developing and using feminist theory, feminist scholars also employ techniques of legal analysis that are different from most other forms of legal scholarship. In the remainder of this chapter, we describe the feminist legal methods used most often by the volume contributors: (1) storytelling, (2) contextualizing, (3) deconstruction, and (4) the "feminist reasoning process" or "critical analysis of the law."[21] The fourth method (feminist reasoning process) is a method of legal analysis

[17] *Infra* Chapters 12, 9, and 6 of this volume on *Disney*, *Smith v. Van Gorkom*, and *Revlon*, respectively.

[18] While no chapters in this volume make such an argument, some contributors to this volume have done so in other works. *See, e.g.*, Terry Morehead Dworkin, Aarti Ramaswami & Cindy Schipani, *A Half-Century Post-Title VII: Still Seeking Pathways for Women to Organizational Leadership*, 23 UCLA Women's L.J. 29 (2016).

[19] *Infra* Chapter 10 of this volume on *White v. Panic*.

[20] While no cases in the volume made such an argument, some contributors to this volume have examined vulnerability in the employment relationship, which is a type of principal–agent relationship. *See generally* Vulnerability and the Legal Organization of Work (Martha A. Fineman & Jonathan W. Fineman eds., 2017).

[21] Berta Esperanza Hernández-Truyol, *Talking Back: From Feminist History and Theory to Feminist Legal Methods and Judgments*, *in* Feminist Judgments: Rewritten Opinions of

that can be further broken down into six "moves."[22] The six moves of critical feminist legal analysis identified by feminist scholar Professor Martha Chamallas are: (1) recognizing women's experiences, (2) being aware of intersectionality and complex identities, (3) unearthing implicit bias and male norms, (4) recognizing double binds and dilemmas of difference, (5) reproducing patterns of dominance, and (6) unpacking choice.[23] As we situate the rewritten opinions and commentaries within the six moves, we show how they advance a critical feminist legal analysis of corporate law. The feminist methods and six moves provide novel insights into cases and stories at the forefront of corporate law.

Understanding the feminist contributions of the rewritten opinions and commentaries in feminist terms is crucial to realizing the theoretical innovations of the volume. Therefore, we focus on the six moves and offer an organization of the rewritten opinions according to these moves to highlight the feminist themes in each case. For ease of organization, we also briefly describe the corresponding commentary together with the rewritten opinion it accompanies, even if the commentary uses feminist legal methods that differ from those used in the rewritten opinion.

1. *Storytelling (Narrative), Contextualist, and Deconstructionist Feminist Methods*

Feminism presents modes of analysis that are particularly sensitive to the lived experiences of individuals and the emotional consequences of law. Individuals live their lives within frameworks provided by law. Personal relationships inform both how individuals interact with the world and how they experience it. A single mother navigating the labor market must also find childcare and provide her children with an education. The law affects every aspect of her life, and her personal circumstances will define her experience of the law and how she abides by or challenges it. Feminist theory evaluates the personal impacts of law as it tries to evaluate the societal impacts of legal rules. Contributions to this volume use some of these more personal feminist methods in evaluating corporate law. In particular, they employ the feminist methods of storytelling, contextualizing, and deconstruction.

All legal opinions begin with the facts, stories about the lives of the litigants, how they crossed paths and ended up in conflict with one another, how they hope their conflict will be resolved, and what their conflict tells us about how others may interact in the future. In this volume, our contributors who use the feminist method

THE UNITED STATES SUPREME COURT 28, 36–38 (Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford eds., 2016) (these methods draw from Professor Hernandez-Truyol's identification of feminist legal methods generally).

[22] *See id.* at 38 (Professor Hernandez-Truyol summarizes Professor Martha Chamallas's six "moves" for feminist "critical analysis of the law").

[23] MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 4–15 (3rd ed. 2013).