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Feminizing Capital: A Corporate Imperative

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Feminizing Capital: A Corporate Imperative

Darren Rosenblum[†]

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Recent economic events have turned the relationship between the public sector and the corporate world upside-down. The as-yet-unnamed financial crisis led governments to intervene in the private sector at levels not seen since the Great Depression.¹ This crisis has exposed the need for new leadership in the corporate world and a new influx of public ideas in the private sector. Gendered understandings of economic relations have surfaced, with some arguing that testosterone encourages excessive greed in boom cycles and fear in bust cycles and that “the meltdown’s a guy thing.”² Beyond allegations of causing the crisis, men have received the brunt of the trauma from the shrinking economy. From March 2008 through February 2009, unemployment for men in the United States outpaced that of women, irrespective of education.³ Some estimates suggest that men have suffered 82% of the job losses in the U.S. during this economic crisis.⁴ Indeed, women appear poised to become the majority of the work force for the first time in our nation’s history.⁵ However, they still lag far behind men in corporate boardrooms. Not surprisingly, in the wake of financial disaster, some have called for fresh management with female faces, “mistresses of the universe,” to take charge of the situation.⁶ Iceland, for example, named two women to “clean up [the] male mess,” along with the world’s first openly lesbian prime minister to institute a recovery plan after its unprecedented economic slide.⁷ These events confirm the role gender equality can play in the renewed interchange between the public and private sectors.

Norway’s Corporate Board Quota Law (“CBQ”) exposes the opportunities and complexities in rethinking the public/private relationship through gender.

1. Jon Meacham & Evan Thomas, *We Are All Socialists Now*, NEWSWEEK, Feb. 7, 2009, available at <http://www.newsweek.com/id/183663>.

2. Judith H. Dobrzynski, *Maybe the Meltdown’s a Guy Thing*, N.Y. TIMES, Nov. 16, 2008, at WK5; John Coates, *Traders Should Track Their Hormones*, FINANCIAL TIMES, Apr. 14, 2008, available at http://www.ft.com/cms/s/0/9973fb0a-0a1d-11dd-b5b1-0000779fd2ac.html?nclick_check=1. Marianne J. Legato, a specialist in gender-specific medicine, has argued that in all previous ages, from caves up until the Second World War, men excelled by taking risks, having short attention spans, and being driven by ego. E. Kinney Zalesne, *Guys Left Behind (GLBs)*, WALL ST. J., June 2, 2009, available at <http://online.wsj.com/article/SB124386767941072379.html>. In the Information Age, these skills can actually be counterproductive.

3. Floyd Norris, *In This Recession, Men Are Using Jobs*, N.Y. TIMES, Mar. 13, 2009, available at http://www.nytimes.com/2009/03/14/business/economy/14charts.html?_r=3.

4. *Id.*

5. *Id.*

6. Nicholas D. Kristof, *Mistresses of the Universe*, N.Y. TIMES, Feb. 7, 2009 available at <http://www.nytimes.com/2009/02/08/opinion/08kristof.html>.

7. Sarah O’Connor, *Icelandic Women to Clean Up “Male Mess”*, FINANCIAL TIMES, Oct. 13, 2008, available at <http://www.ft.com/cms/s/0/c347a766-994b-11dd-9d48-000077b07658.html>. See John F. Burns, *Iceland Names New Prime Minister*, N.Y. TIMES, Feb. 1, 2009, available at <http://www.nytimes.com/2009/02/02/world/europe/02iceland.html> (noting Iceland’s naming of first female, openly gay prime minister).

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The CBQ mandated that all publicly-listed corporations in Norway repopulate their boards to include at least forty percent women by January 1, 2008.⁸ Norway's dramatic intervention sought to feminize corporate leadership in one fell swoop, and it succeeded in doing so.⁹ Noncompliance would result in dissolution of the corporation. This draconian penalty induced all covered corporations to comply. Over twenty years ago, Scandinavian countries adopted quotas to remedy electoral inequality.¹⁰ At the time, they were radical outliers, but now most of the world's countries have followed.¹¹ As the world's first law to mandate the percentage of female representation on the boards of publicly-traded corporations, the CBQ may again foretell the wider adoption of what is now labeled a radical remedy.

Over the past few decades, the political state, particularly in Anglophone countries, has adopted private sector values and methods. U.S. policies emphasized reducing the size of government, leaving increasingly substantive

8. See *infra* Part I.B. Public Limited Companies Act 1997.

9. Siri Linstad, *A Story of Success*, <http://eng.kilden.forskingsradet.no/c52778/nyhet/vis.html?tid=57242> (last visited Nov. 5, 2009).

10. In 1972, the Swedish Liberal Party was the first Swedish party to require a minimum level of women's representation of forty percent. During the 1980s and 1990s the rest of the Swedish parties represented in the parliament also set numerical goals for women's participation. International Institute for Democracy and Electoral Assistance (IDEA), *Sweden: Women's Representation in Parliament*, http://www.idea.int/news/upload/sweden_women.pdf (last visited Nov. 5, 2009). Norway's other political parties (Socialist Left, Centre, Christian People's, and Liberal) also have forty percent quotas for electoral candidates of either gender. THE INTERNATIONAL IDEA AND STOCKHOLM UNIVERSITY GLOBAL DATABASE OF QUOTAS FOR WOMEN (2007), <http://www.quotaproject.org/displayCountry.cfm?CountryCode=NO> (last visited Nov. 5, 2009). In Denmark, the Socialist People's Party was the first party to introduce a forty percent quota in 1977; candidate quotas for the European Parliament were adopted in 1983 (of forty percent for both sexes); the Social Democratic Party adopted party quotas of forty percent for women in 1983; and candidate quotas for local and regional elections in 1988 of forty percent for both sexes. *Id.*

11. Now over half of the signatories to the Convention for the Elimination of All Forms of Discrimination against Women ("CEDAW"), one of the most-widely subscribed international treaties, maintain some type of quota to remedy political inequality. Women's political representation is a theme I have explored in previous work. See generally Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759 (2007) [hereinafter Rosenblum, *Internalizing Gender*]; Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119 (2006) [hereinafter Rosenblum, *Parity/Disparity*]. CEDAW, adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and thirty articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including: to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises. Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations. Division for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination against Women, <http://www.un.org/womenwatch/daw/cedaw> (last visited Nov. 5, 2007). As of November 2, 2008, 185 countries are part of the Convention. The United States is the largest non-member.

levels of regulation and execution to the private sector.¹² Outsourcing became commonplace in every aspect of government, from the Department of Defense's use of private security contractors in Iraq to the Internal Revenue Service's use of collection agencies.

Equality efforts evolved in the wake of this privatization wave. U.S. equality jurisprudence's emphasis on antidiscrimination law and theory reflects the primacy of the private sector. The context of a privatized world forces gender justice efforts to play defense. Antidiscrimination work seeks to punish and prevent discriminatory conduct, rather than shift underlying inequities in favor of broader balance. These efforts fail to rectify gender-based power disparities. Although U.S. jurisprudence eschews quotas,¹³ the economic crisis has begun to diminish free-market proponents' fear of government intervention.¹⁴ The CBQ's novel interaction between the public and private sectors heralds the end of the artificially impermeable divide between the state and the corporation.¹⁵

12. See, e.g., Rene Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/12/04/AR2006120401311.html> (exemplifying the Department of Defense's outsourcing security in Iraq and elsewhere); Internal Revenue Service Home Page—Private Debt Collection Program, <http://www.irs.gov/businesses/small/article/0,,id=155136,00.html> (last visited Nov. 5, 2009) (noting the Internal Revenue Service may hire private collection agencies to go after negligent taxpayers); Alan Cooperman & Elizabeth Williamson, *FEMA Plans to Reimburse Faith Groups for Aid*, WASH. POST, Sept. 27, 2005, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/09/26/AR2005092601799.html> (noting the Federal Emergency Management Agency reimburses churches that provide shelter and food in crises, such as the aftermath of Hurricane Katrina).

13. Challenges properly raise questions of their efficacy and dangerous identitarian effect in reifying stereotypical identities. Rejection of quotas unites the right, with its pretense of colorblindness and the unbiased meritocracy myth, and the left, with its rigid anti-essentialism (which presumes group identity cannot determine individual traits). "Feminist debate has raged over essentialism and antiessentialism, whether women inherently differ from men. Some feminists, many of them French, argue that the sexes are fundamentally different. This fixed idea of womanhood fosters cohesion at the cost of reducing the gender identity's fluidity. Anti-essentialist feminism holds that no essential notion of 'womanhood' exists." Rosenblum, *Parity/Disparity*, *supra* note 11, at 1136-37. This theoretical stalemate, along with the rise of the private, has led to an overreliance on antidiscrimination laws and voluntary efforts such as diversity and corporate social responsibility that fail to foster equality. See generally Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Equality Remedies*, 76 FORDHAM L. REV. 101 (2008) [hereinafter Rosenblum, *Loving Gender Balance*].

14. Fear of government intervention in the economy has long been a dominant concern in U.S. laissez faire economic regulation. Laissez-faire is the French expression which, literally translated, means "allow them to do." Political economist Adam Smith believed that humans should be free to govern their own economic affairs without state intrusion. His theory was that the market place would naturally correct and regulate any economic and social inequities and would in turn produce greater output when permitted to operate free of state interference. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), reprinted in TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN BUSINESS ETHICS AND SOCIETY 5-11 (Lisa H. Newton & Maureen M. Ford eds., 9th ed., McGraw-Hill 2003). Although more recent mainstream economists have accepted the need for governmental intervention to avert a worsening of the crisis, resistance still surfaces as 2009's "tea parties" suggest. See Liz Robbins, *Tax Day is Met with Tea Parties*, N.Y. TIMES, Apr. 15, 2009, available at <http://www.nytimes.com/2009/04/16/us/politics/16taxday.html>.

15. Although some may argue that existing or historical antidiscrimination laws bridge this divide as well, these laws regulate behavior by employers but do not mandate methods for choosing

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This Article argues that the CBQ fosters a productive symbiosis between the public and private spheres. Recent studies indicate that higher numbers of women in executive positions result in stronger rates of corporate return on equity ("ROE").¹⁶ Countries with higher levels of women's political representation also tend to have higher levels of economic growth. Increasing women's workforce participation outside the home can drive overall economic growth.¹⁷ These factors prompted the CBQ's proponents to argue for the economic imperative of women's corporate leadership. The CBQ will not only ameliorate gender inequality, but will bring new life to corporate leadership. Norway feminized capital by engaging the private sector in the public goal of fostering women's corporate leadership. Such policies, if universalized, would fundamentally shift both corporate governance and gender governance.¹⁸ The resulting feminization of transnational corporations could actually reduce gender inequality.¹⁹

This article proceeds in four parts. Part One examines the Norwegian Corporate Board Quota as a comparative endeavor in three subsections. First, it reviews Norway's extensive gender equality legislation to explain the CBQ's context. Second, it discusses the origins and purpose of the law and assesses its enforcement methods in contrast to political representation quotas. Finally, Part One connects these gender equality efforts to Norway's extensive public role in matters viewed as "private" in the United States. The CBQ serves as a launching point to explore this public/private symbiosis for the remainder of the Article.

Part Two explores the need to blur the public/private distinction in order to support the public/private symbiosis in the corporate context.²⁰ Governmental regulation of a traditionally private business decision, such as a corporate board's composition, evokes feminist debate over the public/private dichotomy.²¹ These critiques interrogated "the line drawn between the 'public' world of government and the 'private' world of the home,"²² arguing for the

management.

16. See *infra* p. 53 and note 234. Mixed-sex boards had an average ROE of almost four percent higher than all-male boards

17. See *infra* Part IV.B.

18. This governance takes place on multiple levels and through a variety of international institutions, including international financial institutions and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").

19. This is about feminization because of the current domination of men and masculinity, reflecting a deeply entrenched norm of men/women, male/female, and masculine/feminine. Although we know from Judith Butler that all gender is performance, and that these binaries are in fact far more complicated, it is clear that the masculine, in whatever form, dominates the feminine. See generally JUDITH BUTLER, *GENDER TROUBLE* (1999); JUDITH BUTLER, *UNDOING GENDER* (2004).

20. See *infra* Parts II.A, II.B, II.C.

21. See *infra* Parts I.C, II.

22. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 382-83 (1999) (internal citations omitted) [hereinafter Charlesworth, *Feminist Methods*]. See also Hilary

elimination of such distinctions because they relegate women to the “private” sphere,²³ in which men controlled the domestic sphere. Despite critical differences between the two non-state spheres, the “private” corporate context and the “private” family context, the state’s role in each is contested. This public/private theory supports thinking of the CBQ as a primary example of the relationships within two public/private dichotomies, government/business and market/family, which simultaneously develop effective inequality remedies.²⁴

Part Three explores how private means of capital foster and define the public goal of gender equality. Bolstering women’s role in economic development benefits gender equality by clarifying their contribution to the public economy.²⁵ The CBQ breaches the much-decried “glass ceiling.”²⁶ While such private efforts may advance gender equality, they may also come to define gender equality, arousing criticism of the commodification and reduction of women’s work.²⁷ Societies in pursuit of greater equality must account for such costs.

Part Four explores how public norms influence private action. Private corporations and international financial institutions (“IFIs”) benefit from promoting and managing gender equality. These institutions derive moral legitimacy from the introduction of gender equality into their policy calculus.²⁸ Corporations attempt to develop similar legitimacy through Corporate Social Responsibility (“CSR”) efforts. Women, men, and capital all benefit from this change, fortifying the corporations and IFIs that steer the world economy.²⁹ A productive public/private symbiosis requires “public” values, such as economic empowerment for women and men, to institute rules and regulations like the CBQ in the “private” sector.

Feminizing capital brings women to corporate governance and

Charlesworth, *Worlds Apart: Public/Private Distinctions in International Law*, in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES 243, 256-59 (Margaret Thornton ed., 1995).

23. See *infra* Parts II.A, II.B.

24. But see Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT’L L. 199, 200 (2004) [hereinafter Rittich, *The Future of Law and Development*].

25. See *infra* Part III. The liberal economic model suggests that when the market assigns a value to women’s work, it reduces the subsidy that women provide to childcare and housework by performing this work without monetary compensation.

26. See *infra* Part III.B.

27. See generally Kerry Rittich, *Engendering Development/Marketing Equality*, 67 ALB. L. REV. 575 (2003).

28. See *infra* Part IV.A. The most well known examples of international financial institutions are the World Bank and the International Monetary Fund (“IMF”). These institutions devote enormous resources to advocating social and economic changes in the various countries to which they lend. These institutions were established under the 1944 Bretton Woods Agreement, which sought to lift post-war Europe out of ruin. See generally Michael D. Bordo, *Is There a Good Case for a New Bretton Woods International Monetary System?*, 85 AMER. ECON. REV. 317 (1995). Now however, the World Bank’s and IMF focus their activities on assisting developing nations and reducing poverty. See generally Rittich, *The Future of Law and Development*, *supra* note 24.

29. See *infra* Part IV.B.

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demasculinizes the corporate world. This article concludes by asserting the value of the public/private symbiosis to policy issues beyond gender, in which a fruitful balance of each would ameliorate a broad range of group inequalities. The rise of this and other innovative economically-efficient and socially-optimal remedies to entrenched inequity point to the rising purchase of this public/private symbiosis.

I. CONTEXTUALIZING NORWAY'S CORPORATE BOARD QUOTA

This Part situates the CBQ in the context of broader gender equality efforts and explores Norway's distinctive engagement in public and private problems.

A. Norway's Gender Equality Efforts

The CBQ is not Norway's only attempt to regulate gender inequality by intervening in the market. Norway's legal system possesses a broad range of gender inequality remedies that address family inequities, domestic violence, and political discrimination. In 1993, Norway reinforced prior legislation regarding parental leave for fathers, thus remedying an enforcement shortcoming.³⁰ Few men had exercised this right previously, but following the revision, eight out of ten men take advantage of their right to parental leave.³¹ This action reflects Norway's focus not on simply improving the status of women, but rather on gender equality in general. In 1998, Norway instituted a cash benefit scheme to permit families greater choice in childcare.³² This plan guaranteed approximately \$420 a month to the families of every child between the ages of one and three, so long as the child did not attend a subsidized day care center.

In April 2002, Norway's Parliament, the Storting, amended the 1978 Gender Equality Act, renamed the Act Relating to Gender Equality ("Act") in 2005, which sought to "promote gender equality."³³ Particular attention centered on "equal opportunities in education, employment, and cultural and professional advancement."³⁴ The 2002 amendments to the Act intended to promote workplace equality by extending already-existing duties of public officials to private employers, such as equal pay for work of equal value, longer pregnancy and maternity leave, affirmative action, and sexual harassment protections.³⁵ The Act requires employers to implement concrete steps towards

30. MINISTRY OF CHILDREN AND EQUALITY, THE ACT RELATING TO GENDER EQUALITY (2007), <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-relating-to-Gender-Equality-the-.html?id=454568> (last visited Nov. 6, 2009).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See Kristine Nergaard, *Gender Equality Act to be Strengthened* (2002),

compliance and to report on their progress in doing so.³⁶

As Norway stated in its Fifth and Sixth Periodic Reports to the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), domestic violence remains the primary source of inequality between Norwegian men and women.³⁷ In response to this disparity, Norway developed measures to prevent violence against women, including providing services, shelter, and support to casualties of gender-related violence.³⁸ Norway also amended its 2004 Criminal Procedure Act to provide leverage to victims of violence and sexual offenses.

Amidst these equality efforts, Norway's level of women's political participation consistently ranks near the highest in the world.³⁹ Norway's political party quota mandates that women and men each hold at least forty percent of party positions.⁴⁰ Female representation in the Storting is higher than it is in municipal councils.⁴¹ This strong representation of political parity reveals the political quota's success. In an effort to extend these results to the private sector, Norway instituted the CBQ.

B. Norway's Corporate Board Quota

The Storting passed the CBQ in November 2003, requiring that the boards of non-privately owned companies⁴² be comprised of at least thirty-three to

<http://eurofound.europa.eu/ciro/2002/04/inbrief/no0204101n.html>; Press Release, Committee on the Elimination of Discrimination against Women [CEDAW], Norway Called 'Haven for Gender Equality,' As Women's Anti-Discrimination Committee Examines Reports on Compliance with Convention, U.N. Doc. WOM/1377, (2003), <http://www.un.org/news/press/docs/2003/wom1377.doc.htm> (last visited Nov. 5, 2009).

36. See Norwegian Ministry for Children and Equality, Measures and Methods in Gender Equality Efforts, <http://www.norway.gov.no/policy/gender/policy/policy.htm> (last visited Nov. 5, 2009).

37. *Id.*

38. *Id.*

39. *Id.*

40. Norwegian Ministry of Children and Equality, Representation of Both Sexes on Company Boards, <http://www.regjeringen.no/en/dep/bld/Topics/Equality/rules-on-gender-representation-on-compan.html?id=416864> (last visited Nov. 5, 2009).

41. Norwegian Ministry for Children and Equality, Measures and Methods in Gender Equality Efforts, *supra* note 36.

42. The law covers state-owned limited liability companies, state-owned enterprises, companies incorporated by special litigation, inter-municipal companies, and privately owned public limited companies, of which there are about five hundred on the Norwegian stock exchange. Norwegian Ministry of Children and Equality, Representation of Both Sexes on Company Boards, *supra* note 40. With regard to public limited companies in the private sector, an agreement was signed with the business sector stipulating that these regulations would not come into effect if the desired gender balance was achieved voluntarily during the course of 2005. *Id.* "According to figures from Statistics Norway, there were 519 public limited companies in Norway as of July 1st, 2005. Of these, 68 (13.1%) satisfied the legal provisions relating to gender representation. The average women's representation in the permanent board appointments (owner and employed elected) in Norwegian public limited companies was 15.5%. In light of this, the Stoltenberg Government decided to implement the regulations as from [sic] 1 January 2006." Norwegian Ministry of Children and Equality, Women in Norwegian Politics, <http://www.regjeringen.no/en/dep/bld/Topics/equality/women-in-politics.html?id=437166> (last visited Nov. 5, 2009). The law does not apply to privately-owned, non-

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fifty percent of each gender.⁴³ The exact percentage of gender representation required for each company varies proportionally to the size of the board, but boards with over ten members must maintain a forty percent ratio for each gender.⁴⁴ The forty percent requirement does not apply to boards of nine or fewer members because it would practically result in a representational requirement of fifty percent. If the board is between two and nine members, the law proscribes that individuals of both genders must hold positions: "If the board has two or three members, both sexes must be represented."⁴⁵

Interestingly, Norway enacted the CBQ under its business law (the Public Limited Companies Act) rather than as anti discrimination legislation (like the Act Relating to Gender Equality).⁴⁶ The forty percent requirement creates and maintains gender balance, preventing either sex from sinking far below a level proportionate to population. As of January 1, 2006, every newly listed company that seeks to register on the Oslo Stock Exchange (OSE) must satisfy the CBQ's requirements upon the formation of its initial board.⁴⁷ The CBQ provided a two-year transitional period; existing companies were not required to comply until January 2008.⁴⁸ However, for any company formed after January 1, 2006, the punishment for noncompliance is company dissolution.⁴⁹

listed companies, which comprise the majority of Norwegian companies. European Professional Women's Network, *Women on Boards: the Inside Story on Norway's 40% Target*, http://www.europeanpwn.net/index.php?article_id=150 (last visited Nov. 5, 2007). "No gender representation rules have been proposed for private limited liability companies. Most private limited liability companies in Norway are small family companies where the owners are physical person who personally attends the board. The legislation on gender representation does not fit very well for this kind of companies. In public limited companies, on the other hand, the shares are generally more widely spread, and the company's management has a less personal feature." Norwegian Ministry of Children and Equality, *Balanced Gender Representation on Company Boards*, <http://www.regjeringen.no/en/dep/bld/Topics/andre/Balanced-gender-representation-on-compan.html?id=1250> (last visited Nov. 5, 2009).

43. See Norwegian Ministry of Children and Equality, *Representation of Both Sexes on Company Boards*, *supra* note 40.

44. *Id.*

45. In other words, if there are only two board members, one must be male and one must be female. If there are three board members, two must be of one gender and the third member must be of the other gender. The ratio may be 2:1 female or 2:1 male. *Id.* "If the board has four or five members, each sex shall be represented by at least two representatives. If the board has six to eight members, each sex shall be represented by at least three representatives. If the board has nine members, each sex shall be represented by at least four representatives. . . ." *Id.* These statistics require categorizing individuals in one or the other sex, raising deeper problems with the gender binarism essential to the operation of the Corporate Board Quota (CBQ). The challenge of how to count transgender people in the evaluation of adherence to the CBQ reflects the problem of underlying gender binarism.

46. *Id.*

47. Norwegian Ministry of Children and Equality, *Balanced Gender Representation on Company Boards*, *supra* note 42; Norwegian Ministry of Children and Equality, *Representation of Both Sexes on Company Boards*, *supra* note 40 (stating that "[c]ompanies that were not registered by 1 January 2006, had to fulfil [sic] the demands to be registered.").

48. Norwegian Ministry of Children and Equality, *Representation of Both Sexes on Company Boards*, *supra* note 40.

49. *Id.* Experience shows that most companies where discrepancies are pointed out correct these in due time. Therefore, it is unlikely that any companies will be dissolved by the court on account of the

Although every corporation falling under the CBQ's mandate met the January 1, 2008 deadline, the compliance process proved challenging. As of July 2006, only 29.6% (151 out of 510) of OSE companies achieved compliance, nearly 33% of public companies lacked any women on their corporate boards.⁵⁰ Further, out of the 562 women who serve as board members in Norway, only eleven served as chair, suggesting the exclusion of women board members from leadership positions.⁵¹ As of December, 2007, the overall percentage of "women board members at listed companies" had risen from "6% in 2001 to 37%."⁵² The "scramble for talent" to achieve compliance with the CBQ led "to the best qualified women taking up multiple directorships."⁵³ While some companies chose women from this "small cadre

gender representation rule. According to the Public Limited Companies Act, the King (the Ministry) can decide that a forced dissolution shall not be executed because of "substantial public interests." In such cases, the company will have to pay a compulsory fine until the conditions are in accordance with the law. This regulation applies to different situations such as requirements regarding the board of directors, the general manager, the auditor, and the annual accounts. *Id.* Aud Slettemoen, one of the drafters of the legislation at the Ministry of Justice, points out that this dissolution penalty is not as severe as it may appear to non-Norwegians:

About these sanctions, that has been kind of misrepresented in the media, to a large extent, because it is the system of the company laws in Norway, that if you don't fulfill the requirements for the board and the managing director and the accountants, you will be dissolved. So it is not something new, so every year some companies do not give in their accounts and they are dissolved, and that would be companies that are not operating anymore. Anyway, and so it happens every year that some companies are dissolved because they don't submit their accounts to the company registry . . .

Interview with Aud Slettemoen, Senior Counsel, Ministry of Justice, Oslo, Norway (March 19, 2008).

50. Chris Noon, *A Woman's Place is in the Boardroom*, http://www.forbes.com/corporate/governance/2006/09/21/leadership-norway-women-lead-govern-cx_cn_0921norway.html.

51. *Id.* In the summer of 2006, a Swedish governmental advisor on sex equality proposed that companies listed on the Stockholm Stock Exchange whose corporate boards are not at least forty percent female by 2010 should be fined until they comply. *Id.* In order to facilitate the recruitment of women to boards of directors, several ministries have been involved in the development of *Kvinnebasen*, a database where women wishing to become board members may register their interest. See Statistics Norway: Focus on Gender Equality, http://www.ssb.no/likestilling_en (last visited Nov. 5, 2008). As of August 2006, 4,200 women were registered in the database, and it is helping to focus attention on women's competence: sixty-three percent of the women who have registered have board experience and eighty percent have management experience. *Id.* Databases have also been established by the Confederation of Norwegian Business and Industry (NHO), Innovation Norway and the Association of Norwegian Lawyers. See Statistics Norway: Focus on Gender Equality, http://www.ssb.no/likestilling_en (last visited Nov. 5, 2009). The Ministry of Trade and Industry has also worked closely with the NHO in its efforts to draw attention to women candidates for board membership through the Female Future project, and assistance has been provided for the development and implementation of *Styrefaglig møteplass* (a meeting place for candidates for board membership and business leaders). *Id.* In cooperation with the Norwegian School of Management (BI), Innovation Norway has implemented the *Styrekandidater* (Board Candidates) program to improve the competence and raise awareness of both male and female candidates. The Ministry of Trade and Industry has also financed annual surveys to monitor the development of women's representation on the boards of PLCs. *Id.*

52. Gwladys Fouche Oslo, *Quarter of Norway's Firms Face Shutdown as Female Directors Deadline Approaches: Companies must meet 40% Quota By Monday*, THE GUARDIAN, Dec. 27, 2007, at 39, available at <http://www.guardian.co.uk/business/2007/dec/27/norway.female.director>.

53. *Id.*

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of very powerful and influential women,”⁵⁴ others relinquished their public listing to circumvent the CBQ altogether.⁵⁵ Although most firms had hired female members leading up to the January 1, 2008 deadline,⁵⁶ twenty-two percent of firms had not reached the compliance mark.⁵⁷ Despite these difficulties, Norway now leads the world in its percentage of female corporate board members as a result of its unique Corporate Board Quota.⁵⁸

The public policy goal of the CBQ is primarily to increase competitiveness. As one of the drafters stated, “many people also think that the reasoning behind these gender equality rules is gender equality, but in fact it isn’t, it’s a side effect . . . the point is that you need to use all the best people, and the competence, and when you have all these kind of invisible things that keep half of the population out of the board room, something needs to be done, to get the

54. *Id.* International media outlets have been reporting that this select group of highly qualified women has been (unfortunately) dubbed the “golden skirts.” Amir Maki, *Norway’s “Golden Skirts”*, RISK & GOVERNANCE BLOG, Feb. 22, 2008, http://blog.riskmetrics.com/2008/02/norways_golden_skirtssubmitted.html.

55. Vibeke Laroï & Robin Wigglesworth, *Norsk Hydro Orkla Rush to Add Women Directors Under Norway Law*, BLOOMBERG.COM, Dec. 31, 2007, <http://www.bloomberg.com/apps/news?pid=20601085&sid=aS.J0gCborKs&refer=europe>.

56. Stephanie Holmes, *Smashing the Glass Ceiling*, BBC NEWS, Jan. 11, 2008, <http://news.bbc.co.uk/2/hi/business/7176879.stm>.

57. Statistics Norway, *Gender Representation in Public Limited Companies: Four in Five Fulfill Gender Requirements*, (2008), http://www.ssb.no/english/subjects/10/01/ner_en/arkiv/art-2008-01-14-01-en.html.

58. Holmes, *supra* note 56. The issue of low female corporate board representation is widespread. When Norway passed the CBQ, women held only seven percent of Norwegian corporate board and executive positions. “[W]hat actually happened was . . . it’s never more than 40% women in boards” Interview with Siri Sorenson, Ph. D. candidate and Mari Teigen, Director, Norwegian Institute for Social Research, in Oslo Norway (March 18, 2008). By comparison, women constituted twelve percent of United States’ corporate board positions at that time. Carrie Seim Medill, *Closing the Corporation Gender Gap*, (2003), <http://www.norway.org/News/archive/2003/200303gender.htm>. Other countries have considered a corporate board quota. Spain intended to enact a corporate quota in June 2006, requiring that neither gender comprise more than sixty percent of board members. Renwick McLean, *In Spain, the 40% Solution*, INTERNATIONAL HERALD TRIBUNE, May 5, 2006, available at <http://www.iht.com/articles/2006/05/04/news/spain.php>. However, this legislation was delayed by the 2006 elections, and has not yet been passed. The Associated Press, *Spanish Women Struggle to Rise in the Corporate World of Modernizing but Still Macho Society*, INTERNATIONAL HERALD TRIBUNE, Dec. 30, 2006, available at http://www.iht.com/articles/ap/2006/12/31/europe/EU_FEA_GEN_Spains_Glass_Ceiling.php. As of January 2008, the legislation had not passed. ESADE, Second of ESADE - Department of Labour and Women’s Affairs of Madrid Cycle of Conferences, http://www.esade.edu/web/news_events/news?action_page=/p/CMSView/noticias.do&method=viewExecute&elementId=75081. Denmark and France also approved quota requirements, which they have yet to enact. S. Murlidharan, *Reservations about Quotas for Women on Boards*, (2006), <http://www.thehindubusinessline.com/2006/10/12/stories/2006101200091100.htm>. In February 2006, the French government took a similar step to impose a mandatory 20 percent representation by women on corporate boards by 2011. *Id.* However, a recent decision by the Constitutional Court overturned this law. *Id.* Although Sweden considered the idea, it currently has no corporate gender quota. In 2002, the now-former equality minister of Sweden, Margareta Winberg, threatened to introduce legislation requiring quotas if corporate boards did not meet a goal of twenty-five percent women representation by the end of 2004. The Local, *The Great Equality Debate - Whither Swedish Women?*, (2004), <http://www.thelocal.se/230/20040618>. Statistics compiled by the European Professional Women’s Network on June 12, 2006, reveal an overall stagnation of the levels of women’s representation on European corporate boards.

most competent people.”⁵⁹ The CBQ strives to “secure greater gender equality and democracy and . . . strengthen management in the business sector and boost the companies’ competitive ability.”⁶⁰ Those who support the CBQ argue that Norway’s position in the world market could be severely limited by the underrepresentation of women on corporate boards.⁶¹ In a report prepared for Norwegian companies, the Ministry of Children and Equality described the government’s motivation to be the first country in the world to enact a gender-based quota law for corporate boards:

Reaching a balanced participation is a question of democracy. The Government regards the legislation on women in boards as an important step towards equality between the sexes, a fairer society and a more even distribution of power, and as an important factor in the creation of wealth in society. The legislation will secure women’s influence in decision making processes of great importance for the economy in the society. It is important to make use of all the human resources in our country, not just half of it.⁶²

The CBQ reflects Norway’s respect for CEDAW, the primary international convention regarding women’s rights. CEDAW’s strongest rationale for corporate quotas lies in Article 11,⁶³ which states that men and women shall have the right to “the same employment opportunities,”⁶⁴ “promotion,”⁶⁵ and “equal treatment in respect of work of equal value.”⁶⁶ Prior to CBQ’s adoption, Norway’s Sixth Periodic Report recognized the dearth of women in corporate leadership positions.⁶⁷ The more general language of CEDAW Article 3

59. Norwegian Ministry of Children and Equality, *Balanced Gender Representation on Company Boards*, *supra* note 42. According to Aud Slettemoen, a drafter of the CBQ and counsel at the Ministry of Justice, placing the most qualified *people* on corporate boards is the primary motivation for the CBQ:

[An article] actually said that the result has been that the least competent men has disappeared from the corporate boards and the most competent women got in, so it actually did have this affect concerning the competence of the boards, which is the main objective. So that is why it is different from the rules concerning workers because that is about their interests being represented. Women on the boards, it’s not about having the female interests being represented in the boards, its about having the most competent people so its different.

Interview with Aud Slettemoen. This opinion is supported by Siri Sorenson, Ph.D. Candidate and Mari Teigen, Director, Norwegian Institute for Social Research. Interview with Siri Sorenson & Mari Teigen.

60. Norwegian Ministry of Children and Equality, *Representation of Both Sexes on Company Boards*, *supra* note 40.

61. *See generally* Seim Medill, *supra* note 58.

62. Norwegian Ministry of Children and Equality, *Representation of Both Sexes on Company Boards*, *supra* note 40.

63. United Nations Convention on the Elimination of All Forms of Discrimination against Women art. 11(1)(b), Dec. 19, 1979, 1249 U.N.T.S. 13.

64. *Id.*

65. *Id.* art. 11(1)(c).

66. *Id.* art. 11(1)(d).

67. Sixth Periodic Report of Norway on the United Nation’s Convention on the Elimination of All Forms of Discrimination against Women 34-35 (2002), <http://daccessdds.un.org/doc/UNDOC/GEN/N02/426/55/PDF/N0242655.pdf?OpenElement>. Finland also acknowledged this concern. In its Fifth Periodic Report, Finland states that one of the concerns of its CEDAW Committee with respect to Article 11 has been the “low presence of women in high-ranking positions in many areas” (although no quota is specifically discussed). The Fifth Periodic Report of the Government of Finland on the Implementation of the Convention on the Elimination of All Forms of

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recommended appropriate economic measures to ensure the advancement of women,⁶⁸ a goal fostered by the CBQ.

Despite these public goals, the CBQ met with substantial resistance in Norway's business community. Critics argue that the state should not interfere with a corporation's determination of which candidates should hold positions on corporate boards,⁶⁹ that the CBQ is disproportionately severe in relation to its goal,⁷⁰ and that the quota requirements constitute an onerous burden on corporations that actually fails to advance women's interests.⁷¹ Indeed, in January 2006, the European Free Trade Association began an investigation into whether the CBQ violated European Union law on the grounds of positive, or reverse, discrimination.⁷² Some corporations insist that they will maintain female representation on their boards because it is bad business policy to exclude half of the population from their leadership roles, but that it should not be regulated⁷³

C. Norway's Positioning in the Public/Private Spectrum

The CBQ reflects the deeper public/private symbiosis that typifies Scandinavian countries, which, according to the World Economic Forum, rank as some of the most competitive economies.⁷⁴ Strong institutions and competent macroeconomic management, coupled with world-class education and a focus on technology and innovation, explain this consistently high ranking.⁷⁵

Discrimination against Women 54 (2004),
<http://daccessdds.un.org/doc/UNDOC/GEN/N04/257/97/PDF/N0425797.pdf?OpenElement>.

68. In its Sixth Periodic Report, France discusses its Equality Charter, which promotes as one of its goals "[p]arity in the political and social spheres and women's access to positions of responsibility"; "[p]rofessional equality" is another goal mentioned. France: Sixth Periodic Report on Implementation of the Convention on the Elimination of all Forms of Discrimination against Women 14 (2006), <http://daccessdds.un.org/doc/UNDOC/GEN/N06/304/02/PDF/N0630402.pdf?OpenElement>.

69. Interview with Dag Ekelberg, Director, Civita, Oslo, Norway, Mar. 16, 2008. See also Seim Medill, *supra* note 58.

70. Susie Measure, *Norway Shatters the Glass Ceiling – But Will it Promote Women's Cause?*, THE INDEPENDENT, Mar. 8, 2006, available at http://news.independent.co.uk/business/analysis_and_features/article349927.ece.

71. *Oslo Push for Women Directors*, BBC NEWS, June 13, 2003, available at <http://news.bbc.co.uk/2/hi/business/2988992.stm>. However, according to Aud Slettemoen, vocal opposition to the CBQ has dissipated:

[B]ut there has been quite a clear development where the criticism has decreased more and more, and more and more people are positive because, I guess because the experience is a good one, they see that it works and the resources are good for the companies and they get good boards.

Interview with Aud Slettemoen, Senior Counsel, Ministry of Justice, Oslo, Norway (March 20, 2008).

72. *Female Quota Can be Halted*, AFTENPOSTEN, Jan. 4, 2006, available at <http://www.aftenposten.no/english/local/article1190571.ece>.

73. Seim Medill, *supra* note 58.

74. WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2006-2007, Sept. 26, 2006, available at <http://www.gcr.weforum.org>.

75. See Video Interview with Augusto Lopez-Claros, Chief Economist and Director, Global

Scandinavia also embraces a particularly social form of democracy. Due to its economic wealth and high levels of corporate and individual taxation,⁷⁶ its citizens receive substantial state support for every aspect of life such as health, education, unemployment, retirement, and parental responsibilities.⁷⁷ The combination of Scandinavia's competitive economies and socially conscious programs reflect the region's distinctive interrelationship between government, market, and individuals.

The CBQ applies public policy to one of the most private of private sector contexts, the corporate board. This new formulation of the relationship between the public and the private evokes feminist debates concerning the nature of this dichotomy.

II. REVISITING THE PUBLIC/PRIVATE DICHOTOMY

Until recently, public intervention in the market was anathema. Then, suddenly, during the financial crisis that began in 2007, governments throughout the world began taking direct stakes in some of the world's largest banks. Nationalization is on the lips of even relatively conservative economists. This shift creates an opening for new thinking about the relationship between the public and private sectors. Norway's CBQ blurs the public/private distinction and highlights the transformative potential of this temporal moment.

In the early 1960's, women's role in family life became a subject for examination and critique.⁷⁸ The "private" family context exposed women to forced labor, violence, and other ills. Many social justice projects developed in

Competitiveness Network, <http://www.weforum.org/en/fp/gcr2006-07interviews/index.htm>.

76. As I noted in *Internalizing Gender*, the establishment of a social system depends largely on development, and may have broad impacts on the construction of gender itself. See generally Rosenblum, *Internalizing Gender*, *supra* note 11.

77. See, e.g., Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399, 411, n.15 (2006) (remarking that Norway and other Scandinavian countries are known for their social welfare programs and systems). See also Jedediah Purdy, *The New Biopolitics: Autonomy, Demography and Nationhood*, 2006 BYU L. REV. 889, 947 (2006) (describing examples of social welfare programs in Norway such as extensive maternity and paternity leave). "The Nordic countries, Denmark, Finland, Iceland, Norway, and Sweden, are the most gender-equal in the world. The Nordic countries are also the most advanced social welfare states in the world, but Nordic advances in social welfare and gender equality are under threat." Maria Grahm-Farley, *A Ghost is Haunting Europe*, 24 MICH. J. INT'L L. 169, 170 (2002) (reviewing KEVÄ NOUSIAINEN ET AL., RESPONSIBLE SELVES: WOMEN IN THE NORDIC LEGAL CULTURES (1990)).

78. Feminism's Second Wave began in the post-World War II era and lasted through the 1980s. Betty Friedan's book, *THE FEMININE MYSTIQUE* (1963), fast became a symbol of the early second wave. Friedan, a housewife and "former labor union journalist" conducted interviews with women who had attended her alma mater, Smith College. RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 4 (2000). Her investigation exposed the misery of educated housewives that was due to their exclusion from work outside the home and individual fulfillment in the "public" domain. *Id.* It must be noted that Friedan, like years of media coverage, scholarship, and the women's liberation movement itself, ignored the fact that women of color and lower class women had always worked outside of the home (out of necessity). Friedan's foundational critique effectively targeted the devaluation of housework and childrearing, as well as of the general lack of opportunity for success outside of traditionally female occupations.

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reaction to this situation, including the endeavor to criminalize marital rape.⁷⁹ Despite these efforts, the law viewed “private” spaces as beyond its protection, forcing women to frame their privately-suffered and sexist oppression as matters for “public” regulation. The feminist slogan “the personal is political” reflected the importance of exposing the private world to the scrutiny previously reserved for public concerns.⁸⁰

Following the early Second Wave public/private distinction arguments, legal scholars elucidated crucial components of the dichotomy between the public and private spheres.⁸¹ Beyond tropes of good and bad, the public/private dichotomy merits deconstruction, both in the market and in the family. The public/private dichotomy applies both to the market and to the family. Frances Olsen’s landmark work articulates a parallel between the two public/private dichotomies most relevant to feminist analyses: the state/civil society division and the market/family division.⁸² The former “distinguishes ‘the state’ from the rest of society-public, including individuals and nongovernmental groups,”⁸³ while the latter separates the public world of the market, work, and commerce from the private world of the family and home.⁸⁴ The use of “public/private” suggests the dichotomy between state and non-state actors, as well as the market and the family. The CBQ crosses each dichotomy. For state/civil society, it applies both to publicly-owned corporations, as state actors, and to

79. Before Diana Russell published her “pioneering book” *THE POLITICS OF RAPE* (1984), the concept of “marital rape” was virtually unknown to Americans. *Id.* at 183. “[T]he law, as well as conventional wisdom” held that a man could not rape his wife. *Id.* At a 1979 meeting of the National Council of Jewish Women, Bob Wilson, the chair of the Judiciary Committee of the California Senate “joked,” “If you can’t rape your wife, then who can you rape?” *Id.* Rosen notes that “by ‘naming’ such hidden crimes, (second wave) feminists generated the kind of debate that could turn a ‘custom’ into a crime.” *Id.* at 184.

80. Much debate surrounds the origin of this widely-used phrase. Many commentators refer to Carol Hanisch’s essay titled “The Personal is Political” that appeared in a radical feminist document called *The Redstocking Manifesto*, published in 1969, but the origin of the phrase remains undetermined. Carol Hanisch, “*The Personal is Political*,” *Attacking Women, Carnival of Feminists 17, and What the Heck*, WOMEN’S SPACE, Jun. 22, 2006, <http://womensspace.wordpress.com/2006/06/22/carol-hanisch-the-personal-is-political-attacking-women-carnival-of-feminists-17-and-what-the-heck>.

81. See *supra* note 71 and accompanying text.

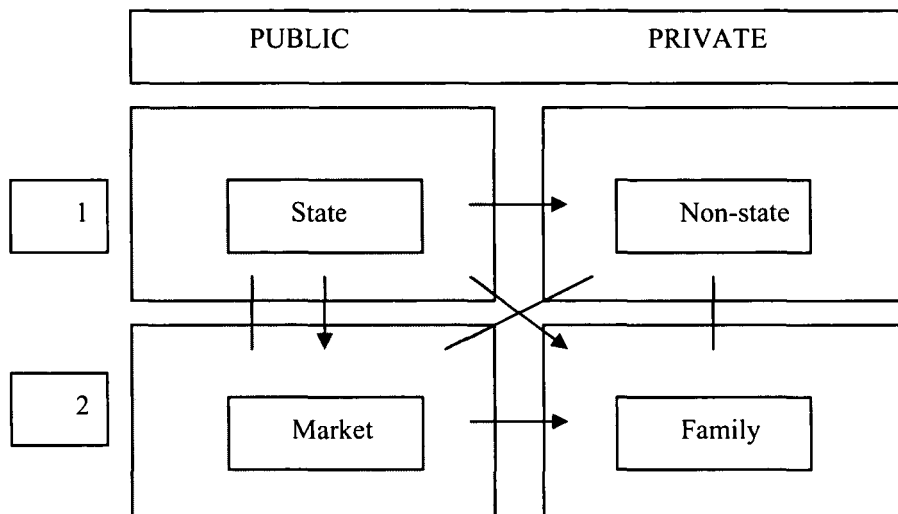
82. Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 157 (Dorinda G. Dallmeyer ed., 1993).

83. *Id.* at 157. Olsen draws a parallel between the state/civil society dichotomy domestically and that between international/national law on a global scale. *Id.* at 157-58. She argues that the state/civil society division is gendered on two levels: attacks on this dichotomy are attacks on the status quo (and for women’s position in society to improve, a change in the status quo is required) and this dichotomy can be seen as a male/female division (men dominate the state and women are relegated to civil society). *Id.* at 158.

84. *Id.* This distinction is clearly gendered, because women have long been associated with the private sphere of the home, both ideologically and practically, as they do most of the work which takes place in the home. *Id.* at 159. The distinction is also gendered internationally. Domestic abuse and violence toward women are “immunized from international scrutiny” on two levels: international law governs the dealings between nation states and international law can be used to prevent abuse of individuals only when committed by a nation state. *Id.* Since neither women nor their domestic abusers are nation states, international human rights law offers insufficient protection to women. *Id.*

publicly-traded corporations, as non-state actors. The CBQ also applies to the market and families, transferring the benefits of each to the other, as non-market actors become integrated into the market.

The public/private dichotomy requires more clarity. Olsen's dichotomy formulation, as depicted below, situates the market on both sides, (1) as in opposition to the public in the state/non-state dichotomy and (2) as part of the public in the market/family dichotomy.



In this graphic, the market and the family figure as elements of the non-state, hence the line linking non-state to both market and family. The chart's arrows depict the power held by the state over the non-state, market, and family actors, and power of the market over the family. While the market views itself as external from the state, it actually exists as a construction of the state, a point Ruth Gavison has argued.⁸⁵ "Nothing is really private," she asserts, addressing three formulations: "private as self-regarding; private institutions based on norms of contract and property (the more voluntary parts of which are called 'private law'); and private as free."⁸⁶ Of these all are public—even contract and

85. Ruth Gavison focuses on the external challenge to the distinction and the many "senses" of the public/private distinction in *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 6 (1992). In particular, she discusses (1) the private, unobservable and the public, observable; (2) the private freedom to act and the public state action; and (3) individual versus group activity. *Id.* She asserts that it is helpful to use these distinctions for discussion purposes but that often they cluster together to define a more complex meaning for public versus private. *Id.* at 7. Gavison continues her analysis through a normative/descriptive approach and seeks to determine the extent of distinctiveness or sameness in the terms. *Id.* at 7-10.

86. She asserts that false beliefs result when society invokes these three privacy formulations. *Id.*

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property rights, including those within the family, exist under state regulation,⁸⁷ so that the state influences “personal” decisions.⁸⁸ State laws govern corporate formation and market investment structure, hence the line linking state and market. Conversely, the market is starting to exert power over the state in developing countries.

Olsen articulates the parallels between the classic arguments against intervention in the private sphere by the public sphere, which are:

- 1) Intervention would be wrong because the intervening agency would be exceeding its proper authority;
- 2) Intervention would be futile, with no lasting effect; and/or
- 3) Intervention would be counterproductive, creating a dramatic or unexpected negative result.⁸⁹

Olsen divides the available responses to these anti-interventionist arguments into “moderate” and “radical” categories. The CBQ is an example of a radical response, the type that Olsen endorses.⁹⁰ A moderate, “soft” response would be state intervention to protect weak citizens from isolated incidents of domestic violence. A moderate, “hard” response would be continuous, systematic state intervention to protect victims of naturally oppressive families.⁹¹ One could extend this moderate, “hard” remedy to the international level and argue that the international human rights regime should act to prevent isolated or common violations of women’s rights, even those committed by non-state actors.⁹² Civil

Gavison bases her definition of self-regarding on John Stuart Mills’ theory from *On Liberty* that there is a distinction between self- and other-regarding activities. *Id.*

87. *See id.* at 16.

88. *Id.* at 14, 19, 43. Feminists suggest collapsing the dichotomy between personal and political because the overlap between the two is often great. Gavison also presents several claims that the distinction results in too much of a difference between the public and private spheres. *Id.* at 21-29. Some of these criticisms include: the privatization of women leads to their marginalization; that the differences between the public and private spheres have been exaggerated, resulting in the further oppression of women; the myth that decisions made in the private sphere do not affect the public sphere; that the value of the public and private spheres are often assessed differently; and the myth that the division into public and private is inevitable. *Id.* Gavison directly addresses the role of language in the distinction, her basic argument being that the public/private dichotomy is not gender-neutral: “the distinction ‘keeps the private beyond public redress and depoliticizes women’s subjection within it.’” *Id.* at 29-30. Here, the public is both a “source of power” as well as a “fundamental structuring concept that affects beliefs and expectations.” *Id.* at 30. This critique complains that using public/private language leads to undesirable consequences because those who use this language are misstating the problems and devise solutions which “systematically disadvantage women.” *Id.* Gavison develops this hypothesis with regard to abortion, domestic violence, and pornography. *See id.* at 30-41.

89. Olsen, *supra* note 82, at 161.

90. *Id.* at 161-62.

91. *Id.* Olsen also points out that Karen Engle’s articulation of the argument that the public/private dichotomy should be abolished because it oppresses women is an example of the hard version of a moderate critique. *Id.* at 163-65.

92. *Id.* at 162. The radical response to that same argument is that because state policies define the family and sometimes empower certain family members over others, “[t]he ground rules set up by the state inevitably affect the power between individuals.” *Id.* at 162-63. Olsen then looks at whether the international community sets ground rules and has an influence on the relationships between the state and individuals (or between individuals) to the extent that “non-intervention” is a “meaningless

and political human rights are viewed as residing in the public sphere, leading to a failure to protect women in their familial relationships.⁹³ The state's role is "gendered because in all societies men dominate the public sphere of politics and government and women are associated with the private sphere of home and family."⁹⁴ Other theorists resist this characterization and warn of the risks of demonizing the private.⁹⁵

The CBQ crosses so many of the lines of this re-envisioned relationship between the public and private sectors. The resistance arising from the state mandate of gender proportion on corporate boards reflects widely-used tropes against public intervention into the private sphere. CBQ critics contend that the state is exceeding its authority and that the private sector should be left to its

concept," although she primarily summarizes her fellow authors in the collection on this topic. *Id.* at 163. Ultimately, Olsen argues that there is a distinction between a "mushy-liberal approach and a realistic-radical approach to social change and gender relations." *Id.* at 163. While the former views the exclusion of women as mere neglect and the lack of women's rights an "oversight to be corrected," the latter recognizes that there is a "power imbalance between men and women and believe that changing this power imbalance involves an important political struggle." *Id.*

93. A leading feminist analysis of international law is Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). See also Charlesworth, *Feminist Methods*, *supra* note 22 (arguing both generally that the public/private distinction acts to silence international law from fully addressing the repression and abuse of women, an issue which is generally treated as a private matter). Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87(1993). *Id.* at 97. Romany addresses these issues by looking at the state action requirement and how a feminist approach through the state action requirement can improve the protection of women's human rights. "State responsibility . . . is central to an expansive interpretation of human rights law which seeks to encompass women's rights." *Id.* at 106. Romany argues that women are aliens within their own states and within the international law community. *Id.* Thus, Romany goes on to argue that, "[s]tate responsibility norms for the protection of aliens provide fertile ground for expanding state responsibility in human rights law." *Id.* Romany argues that a feminist analysis to human rights law is important because "it will focus on building a corpus of international customary law that recognizes violence against women as a violation of traditional human rights as well as a violation of state responsibility." *Id.* at 108. See also Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85, 99 (Rebecca J. Cook ed., 1994) (distinguishing between public protection of gender equality and the enforcement of such equality in the private home. Focusing solely on the public realm [e.g., employment equality, public violence, and equal opportunities] denounces domestic inequality and relegates it to a category of harm that is within family, but not criminal, law). Some argue that domestic violence should constitute a human rights violation, moving human rights beyond the requirement for direct state involvement. Charlesworth, *Feminist Methods*, *supra* note 22, at 382-83.

94. *Id.* at 383.

95. Karen Engle warns that an excessive focus on the public/private distinction overlooks the extent to which women's lives fall within the public sphere, and erroneously assumes that the private sphere somehow necessarily harms women. The automatic demonization of the private sphere risks undermining a source of liberation for women in sexual and reproductive agency. See generally Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 146 (Dorinda G. Dallmeyer ed., 1993). Engle argues that while feminist scholars criticize international law for excluding the private sphere (when they really mean that women are excluded), they are often the very people who "attach the label 'private' to women's activity," that they perceive to be omitted. *Id.* While women do not necessarily live their lives entirely in the private sphere, the private sphere itself can be seen to offer women protection that the public cannot. *Id.* at 148. Engle argues that the idea of a private sphere can be liberating in the areas of abortion, battery, prostitution, or "alternative" sexual lifestyles. *Id.* at 148-49.

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own devices and self-regulate.⁹⁶ Public institutions should only regulate state actors and other public entities, such as state-owned corporations. The market supports the private sector, maintaining that corporations themselves should determine who sits on corporate boards and that such decisions are not the proper subject of public regulation.⁹⁷ Certainly, critics within the United States would make a similar argument.⁹⁸

Despite this call for strict separation, public institutions directly impact private institutions. The law constructs the corporation and the family, as shown in the chart. As the CBQ's enforcement mechanism emphasizes, the corporation is an artificial person created by the force of law. Should a corporation fail to comply with the CBQ mandate, it will be dissolved by the law. The relationship between the public and the private is hotly contested in feminist circles. Despite this conflict, the dichotomy provides fertile terrain for envisioning and applying future remedies to group inequality.

III. GENDER EQUALITY—PRIVATE MEANS TO A PUBLIC END

This Part explores how the public influences the private, perhaps the more obvious impact of the CBQ. First, it demonstrates the several ways that the exclusion of “women’s work” from the public market harms women. Second, it explains how requiring women’s inclusion on corporate boards not only creates opportunities for individual women, but provides broader societal and economic effects beyond the symbolic role played by those leadership positions. Finally, this Part articulates how the CBQ reflects the goals of gender equality present in international women’s rights law.

Women’s corporate leadership serves the role as the public norm that finds life in private implementation. However, clarification of the meaning of gender balance is necessary.⁹⁹ A simplified version centers on the “enjoyment of equal choices and opportunities.”¹⁰⁰ This definition moves beyond the Second Wave

96. Interview with Dag Ekelberg, Director, Civita, Oslo, Norway (Mar. 7, 2009).

97. Economists may argue that a regulated market simply inspires evasion of the rules. *Id.*

98. “Critical thinkers such as Lani Guinier question quotas for an emphasis on descriptive representation; liberal thinkers such as Bruce Ackerman attack quotas as undermining the neutrality of the liberal state.” Rosenblum, *Parity/Disparity*, *supra* note 11, at 1127 n.28. “Critical (and critical race) theorists question quotas because they encourage tokenism and preserve essentialist understandings of identity. Whereas liberals view quotas as violating neutrality, critical theorists believe neutrality serves to maintain the inequality of the status quo.” *Id.* at 1135.

99. “‘Gender equity’, ‘gender equality’, ‘sexual equality’, or gender egalitarianism is the belief in the equality of the genders or the sexes. Many followers of this philosophy would like to see this term come to replace feminism or masculinism, when used to describe a belief in basic equal rights and opportunities for members of both sexes within legal, social, or corporate establishments. They strive for ultimate fairness, and seek cooperative solutions so as to make things better for both males, females, and everything in between. They are opposed both to misogyny and misandry, pointing to a gender transformative perspective and the need for a rejection of all forms of gender oppression and stereotypes.” Gender Equality, http://en.wikipedia.org/wiki/Gender_equality (last visited Nov. 6, 2009).

100. CHRISTINE CHINKIN, GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS: A

fixation on women's empowerment to include a broader vision of gender balance.¹⁰¹ The CBQ aims to enforce greater levels of gender equality in the fields of family life, private work, public work, and politics to enforce gender balance in economic stewardship.

A. Market-Centered Efforts May Make Women's Economic Contributions More Transparent

Inclusion of women in market-related and other developmental activities furthers the effort to increase gender equality. The CBQ reflects a radical departure in this regard, but it builds on extensive efforts by feminist economists to quantify and promote women's work in the private and "unaccounted" economy. The CBQ's effort to crack the glass ceiling connects to work that valorizes the labor of the millions of women at the bottom of class hierarchies.

1. Effects of the Informal Nature of "Women's Work"

Women's work often consists of labor in the informal economy and therefore lacks a clear monetary value or an effective estimation.¹⁰² Many women still do not contribute to the "formal" economy where wages are exchanged for labor.¹⁰³ Women's work in the informal economy falls into four categories: 1) subsistence work involving production related directly to a family's survival needs;¹⁰⁴ 2) unpaid household work;¹⁰⁵ 3) informal work

REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS 7 (2001).

101. The word "gender" possesses a utility beyond serving as a substitute for the word "sex." Gender not only refers to one's social identity as male or female, but also incorporates masculinity and femininity as personal traits. *See generally* Darren Rosenblum, "Trapped" in *Sing-Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000). Such a broad definition of gender should be the subject of a deeper evaluation of CEDAW and other international law institutions. This critique is the subject of a forthcoming article, entitled *Unsex CEDAW: What's Wrong with Women's Rights*.

102. The informal economy consists of activities, such as street vending and housecleaning, which evade efforts of economic data collection due to its underground, unstable, precarious, and unregulated nature. *See* LOURDES BENERIA, GENDER, DEVELOPMENT AND GLOBALIZATION 136 (2003).

103. *Id.* at 136-38. Beneria distinguishes between women's roles as household managers and consumers and women as producers. She combines subsistence and informal work, as well as regular labor, when using the expression "women as producers," which therefore provides a different estimation of the overall value of women's work. *Id.*

104. One effect of the exclusion of subsistence labor from national economic statistics is that poor countries appear to be poorer. *Id.* at 135 (citing ESTER BOSERUP, WOMEN'S ROLE IN ECONOMIC DEVELOPMENT 163 (1970)).

105. Beneria, *supra* note 102, at 137-38. Domestic work includes maintaining family functioning, from washing and cleaning to preparing food and childcare. *Id.* It is important to note that the value of unpaid housework is substantial in relation to GDP. Non-market household production is an important component of household income, consumption, and welfare. *Id.* *See also* Ann Chadeau, *What Is Household's Non-Market Production Worth?*, 18 ECON. STUD. 86, 86-103 (1992), available at <http://www.oecd.org/dataoecd/31/44/34252981.pdf>.

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serving the market;¹⁰⁶ and 4) volunteer work.¹⁰⁷ These four areas expose the reality that much of “women’s work” escapes both public economic calculation and familial financial decision making.¹⁰⁸ Global cultural differences also affect the relationship between women and men and their respective work.¹⁰⁹

Traditional theory of supply and demand holds that where the supply of a service has no price, consumption increases without regard to efficiency, consuming greater time and effort than necessary for the same output.¹¹⁰ In this sense it functions as a distorting subsidy. Women often perform women’s work for family members or people of close personal relation and, as a result, much is informally compensated or not compensated at all.¹¹¹ Because such work is not directly remunerated and difficult to value, economists label it as “non-market” labor.¹¹² Since economists ignore non-market women’s work, it is not factored into gross domestic product calculations.¹¹³ This is particularly true in societies where a woman’s only work falls in one of the four categories described above. Deprived of this economic measure, familial cost-benefit calculations become nearly impossible, leaving household choices at best uninformed and at worst counterproductive. Without any quantification of the value of women’s work, the woman and her family cannot analyze the best use of often-limited resources. As a result, intuitive, rather than rational, decision-

106. Beneria, *supra* note 102, at 136.

107. *Id.* at 138-40. Volunteer work presents different issues because the beneficiary is not the family of the worker. One question that arises is whether to count collective food kitchens (common in some Sikh communities, for instance) as volunteer work or housework. *Id.*

108. It is also important to note that proportions of these categories may change considerably if characteristics of investment trade sectors change, especially in countries that depend on foreign investment to a greater extent. This may further change women’s roles because, depending on which trade sectors will become emphasized. The employment structure may also change, which would also affect women’s opportunities and exact roles. In a wider perspective, such changes may have an impact on human development, transformation of traditional family models, and birth and death rates as well. See generally Aasha Kapur Mehta, *Globalization and Women*, in GLOBALIZATION, CULTURE AND WOMEN’S DEVELOPMENT 55 (Raj Mohini Sethi ed., 1999).

109. One of the most obvious differences between male and female labor is that women’s traditional role is in the home (running the household, caring for children) while men’s work is outside (earning money to support the family). At the same time, this traditional distribution of roles can cause conflict between cultural backgrounds and stunt economic development. In those countries with traditional discrimination against women, cultural (and sometimes legal) restrictions limit female participation in labor and public governance. It is interesting to note that cultural traditions which negatively impact women’s labor exist not only in developing countries. In Japan, for example, women traditionally manage the household while men are sole breadwinners. If women work at all, they are mostly employed subject to strict and often unreasonable discriminative rules, mainly in subordinate or auxiliary positions. See generally Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN’S L.J. 83 (1995). In a country like Japan, if globalization were to provide more involvement for woman in labor and increase participation in areas which were previously dominated by men, the effect could be both the easing of cultural burdens on men, as well as the overall equalization of gender roles. See generally *id.*

110. NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* ix (2001).

111. *Id.*

112. *Id.*

113. *Id.*

making that harms the interests of the woman, her family, and society becomes the norm.¹¹⁴

Women's "free" labor creates a vast distortion of economic potential. When a good is provided without cost, the marginal social costs shoot up as the benefits plummet. The cost of a good or service is equal to the benefit that good or service provides. This equilibrium assumes an appropriate balance of supply and demand. However, when exposed to free services the market changes drastically. Supply and Demand theory asserts that when the supply of a good or service is high, or the price is low, the demand for it will go up. As the demand increases, the marginal social cost of the good increases and concurrently reduces the marginal social benefit, making it less efficient to seek that free good or service.

The fact that much of women's work lacks monetary value distorts the demand for such work. It has no price; therefore, women can work far longer hours than men. The social costs and benefits of free services thus fall out of balance. The fact that women's work falls within the informal economy deprives it of a clear price. The free price of work at home, such as childcare or housekeeping, especially skews the cost/benefit balance. The more time a woman spends on this work, the higher the marginal social cost and the lower the marginal social benefit received. Since there is no "cost" to the family for excessive women's work, the family demands it, thereby driving down the benefit per hour spent. At some point, the hours spent reach a marginal benefit of zero.¹¹⁵

Because of the destructive effects of women's exclusion from the formal economy, many economists have tried to assess the value of such work to rationalize its utility.

2. *Moving Beyond Informality: Efforts to Calculate Women's Work*

Given the above economic challenges, many countries simply omit women's work from their reported economic activity.¹¹⁶ Thus, reported labor participation rates for women fail to accurately demonstrate the hours actually worked by women. For this reason, economists resort to estimating such uncompensated work.¹¹⁷ Economists have spent decades trying to ascertain the

114. For example, in the formal manufacturing sector, women can often take material home and work on it, thereby combining formal work with unpaid household work. While the value of women's work in this scenario might increase (due to the flexible time schedule), Mehta argues that UNIDO data demonstrates that the manufacturer benefits from lower overhead, less organized labor intervention, and lower wages. Ultimately, women's work does not represent a higher value or produce more income in this scenario. *See generally* Mehta, *supra* note 108.

115. *See* Beneria, *supra* note 102, at 137-83. *See also* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 79 (2004).

116. *See* Beneria, *supra* note 102, at 136-37.

117. *Id.*

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most effective method to properly assign a value to “women’s work,” employing various methods, each possessing drawbacks. The two primary methods, input and output, use different techniques to assess women’s contribution to the economy. Overall, these estimates reveal that women work far more hours than men on average.¹¹⁸

Input methods attempt to measure the value of women’s labor by the work they perform. The focus is the effort expended and the time spent by women in their production.¹¹⁹ Input models measure by general substitutes,¹²⁰ specialized substitutes,¹²¹ or opportunity cost.¹²² While input-based methods account for women’s time and effort, they do not necessarily provide an accurate portrait of social and familial welfare.

Output-based estimates require imputing the value of domestic production and then deducing the value of the production efforts. However, it is nearly impossible to estimate the appropriate value of women’s work because its end products have different quality or utility values. More significantly, a feminist critique posits that certain kinds of work have a value beyond assessment.¹²³ For example, what is the value of childcare for one hour? Is one-on-one childcare valued the same as group childcare? These are examples of substantive limitations to output-based work estimates.¹²⁴

118. See *A Guide to Womenomics: Women and the World Economy*, THE ECONOMIST, Apr. 15, 2006, at Finance & Economics Section. See also *The Importance of Sex: Women in the Workforce*, THE ECONOMIST, Apr. 15, 2006, at Leader Section.

119. See Beneria, *supra* note 102, at 143-44. Based on an OECD research elaborating the categories detailed below. See also A. Sylvester Young, *Income from Households non-SNA production: A Review*, <http://www.ilo.org/public/english/bureau/stat/download/articles/2000-22.pdf> (last visited Nov. 6, 2009).

120. The Global Substitute method uses the cost of a hired domestic worker assumed to be paid to carry out all types of household tasks. This method underestimates the value of the work since the wages assigned to domestic help are so low. See Beneria, *supra* note 102, at 143-44. Chadeau states that it is unlikely that all housework tasks could be performed by an unqualified housekeeper because some activities require specific skills and are not performed equally in all households. See Chadeau, *supra* note 105, at 93.

121. The Specialized Substitute method uses the average wage of a specialist with skills for each household task. This method generally is considered to account for a more accurate level of activity, although it may overestimate the value of such work. See Beneria, *supra* note 102, at 143-44. In addition, Chadeau states that it is unlikely that households would in fact hire such a wide range of specialized personnel. See Chadeau, *supra* note 105, at 93.

122. The Opportunity Cost method, based on the wage that the person performing domestic work could receive in the market, yields the broadest range of estimates. Educated people engaged in menial labor will have their time accounted for based on the value of the labor produced by employment that utilizes that education. See Beneria, *supra* note 102, at 143-44. Chadeau criticizes this method because the work resulting in the production of a good or service in the home is estimated at the value of work producing a completely different good or service on the market. See Chadeau, *supra* note 105, at 93. Another criticism of the method is the assumption that individuals are able to work on the labor market for as many hours as they wish in jobs suiting their professional qualifications, when in reality many individuals will be unemployed or working for minimum wage. See *id.*

123. See generally NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2001).

124. The UN International Research and Training Institute for the Advancement of Women (INSTRAW) argues that there have been very few attempts to estimate the value of household output.

3. *The Benefits of Estimating*

Because of its inherent complexity and ambiguity, the value of women's work is difficult to estimate.¹²⁵ Despite this obstacle, estimating the value of women's work favors women in several ways. According to a liberal economic model, when the market assigns a value to women's work, it reduces the subsidy that women provide to childcare and housework.¹²⁶ As Jagdish Bhagwati argues, one benefit of the growing global "care chain" is the monetization of women's work.¹²⁷ Bhagwati reasons that women entering the "formal" workforce discard their subsidy of housework and childcare with real effects.¹²⁸ "[O]ne can argue that this traditional subsidy now must be replaced by an explicit subsidy to child care. . . . [C]hild care's importance, its social value, is now visible, not hidden by the submerged and subsidized provision of it by women confined to the home."¹²⁹ Thus, one key advantage of women's entering the formal economy is that it exposes the value of childcare and home management, requiring families to make economic decisions.

Social position often depends largely on wealth or potential wealth, the ability to generate income. At both the family and national levels, valuing women's work would shift women's social position. Much abuse women suffer is tied to the presumption that they fail to significantly contribute to a country's economy. If women's work were compensated, the shift in resources toward women would improve their social position. Women in certain countries would utilize their familial position to sell their labor and provide additional family

THE INTERNATIONAL RESEARCH AND TRAINING INSTITUTE FOR THE ADVANCEMENT OF WOMEN [INSTRAW], MEASUREMENT AND VALUATION OF UNPAID CONTRIBUTION: ACCOUNTING THROUGH TIME AND OUTPUT 6 (1995). Output-based methods include value added and gross output method. See Memorandum GA 511 from Trevor Cobbold on A Comparison of Gross Output and Value-Added Methods of Productivity Estimation to Australian Government Productivity Commission, (Nov. 2003), available at http://www.pc.gov.au/_data/assets/pdf_file/0010/72289/cgovam.pdf. Value added output excludes intermediate inputs (materials, energy, and services used up in the process of production), while the gross output measure includes these factors. See *id.* The value-added output measure is related to capital and labor as inputs, while gross output is related to capital, labor, and intermediate inputs. See *id.* The difference between the two concepts of productivity growth is less pronounced at the aggregate (or national) level than it is at the sectoral or industry level. See *id.*

125. Feminist economists have criticized the opportunity cost, global substitute, and specialized substitute methods currently used to assess the value of household work as perpetuating the problem of low-paid women's labor. See Posting of Hilka Pietilä to femecon-l, <http://www.listproc.bucknell.edu/archives/femecon-l/199906/msg00015.html> (June 2, 1999). The output-based evaluation method suggested by INSTRAW avoids the problem posed by these methods, although it obviously gives different values in different countries related to the level of each country's market prices and salaries. See *id.* For a related, country-by-country analysis, see Luisella Goldschmidt-Clermont & Elisabetta Pagnossin-Aligisakis, *Measures for Unrecorded Economic Activities in Fourteen Countries*, HUMAN DEV. REPORTS, http://hdr.undp.org/en/reports/global/hdr1995/papers/luisella_goldschmidt-clermont.pdf.

126. Bhagwati, *supra* note 115, at 78.

127. *Id.*

128. *Id.*

129. *Id.*

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income, leading to increased household wealth.¹³⁰

Feminist detractors of globalization argue that monetizing women's work would make it seem unimportant, leading to its devaluation.¹³¹ Although increased women's trade and participation in the labor force provides women with direct financial compensation, for many women, formal and public work seems more like an obligation rather than a choice. As anti-globalization feminists assert, such work victimizes women more than traditional economic structures where work is solely private and therefore non-monetized.¹³² To the contrary, proponents argue that assigning some monetary value to women's labor, where none previously existed, increases women's social status and decreases abuse against women.¹³³ These benefits enable more effective intra-

130. Another important aspect of globalization is the social impact on women. Women's multiple burdens hamper participation in the "public" labor force. See THE WORLD BANK, GENDER AND DEVELOPMENT IN THE MIDDLE EAST AND NORTH AFRICA: WOMEN AND THE PUBLIC SPHERE, (2003), available at [http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/GenderReport-overview/\\$File/GENDER-REPORTOverview.pdf](http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/GenderReport-overview/$File/GENDER-REPORTOverview.pdf). This is particularly true for women in working class households. In MENA countries, for example, in spite of the fact that sixty three percent of the university students were women in 2000, they represented only twenty eight percent of the workforce, meaning that the MENA region is not capturing a large part of the return on investment and that women's presence in political and public policy areas is still very low. See *id.* However, in spite of the latter, women's participation in labor has increased by fifty percent since the 1960s, which is a clear improvement. See *id.* This is a general notion relating not only to MENA countries, but to any other country as well. Utilizing benefits of work by well-educated women has a positive impact to the economy in general, relates to resolving social crises, and counterbalances the eventual negative effects of globalization as well. Dau-Schmidt suggests that government programs promoting female education in all fields are required in order to make use of valuable labor resources of women. See generally Kenneth G. Dau-Schmidt, *Dividing the Surplus: Will Globalization Give Women a Larger or Smaller Share of the Benefits of Cooperative Production?*, 4 IND. J. GLOBAL LEGAL STUD. 51 (1996).

131. See Beneria, *supra* note 102.

132. Bhagwati, *supra* note 115, at 78.

133. Globalization is a feminist issue because "women often bear a disproportionate burden of the costs of globalization." Uche U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights and the 'New' International Trade Regime*, 20 BERKELEY J. GENDER L. & JUST. 75, 80 (2005). "[F]eminists seek to 'resist the practices of exploitation and division of people against each other that are inherent in notions of competition, comparative advantage, free trade, and the international division of labor.'" *Id.* And with respect to economics, globalization is a "means of imagining the world that is premised upon denigrating that which is understood as 'feminine.'" *Id.* Ewelukwa states, in contrast with those who believe globalization is a beneficial phenomenon, that vulnerability of the agricultural sector in the global economy, shrinking market share for developing countries' exports, crisis in the commodity markets, and the market dominance of transnational corporations are some of the factors that currently account for the gap between theory and practice. *Id.* at 83. Penelope Andrews states that globalization "has merely cemented women's unequal economic status" through the "structural adjustment" imperatives imposed by the financial regulatory agents of globalization, the World Bank and the International Monetary Fund, merely reinforcing women's subordinate status. See Penelope A. Andrews, *Globalization, Human Rights and Critical Race Feminism: Voices from the Margins*, 3 J. GENDER RACE & JUST. 373, 390 (2000). Saskia Sassen argues for a historically evident tendency that still exists in modern times, i.e. that women are often forced to take up low-paid positions and occupations. See generally Saskia Sassen, *Towards a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7 (1996). Dau-Schmidt adds that employers in global export industries decidedly prefer female employees, and provided that such jobs provide opportunities and skills previously unavailable to women, this is a benefit for women because it improves their bargaining position with respect to traditional economic and social relationships. However, a negative impact of globalization may be destruction of some traditional cultural norms protecting women and meeting their needs. Dau-Schmidt, *supra* note 130, at 56-57.

familial financial decisions, increasing women's status within the family and providing them with the agency needed to prevent abuse.

The goals of the studies to determine women's role in the economy include establishing a more even distribution of power amongst men and women and increasing the generation of wealth in society. The CBQ's effort to take advantage of the resources offered by Norway's women, in combination with its men, is an important step in realizing these goals.¹³⁴ Despite the possible contrary inference of this statement, the actual level of women's participation in the Norwegian workforce is quite high.¹³⁵ However, women's role in corporate decision making is well below this level.¹³⁶ One potential reason for this disparity is the historical connection between Scandinavian feminist efforts and socialist movements.¹³⁷ This connection causes many women to resist contributing to capitalism when their feminism suggests anti-capitalist sentiments.¹³⁸

B. Cracking the Glass Ceiling and Trickle-Down Effects

As Hillary Clinton's presidential bid helped crack the political "glass ceiling," the CBQ will achieve this effect in the corporate sector.¹³⁹ Breaching this glass ceiling, which prevents women from attaining board or executive positions, has several effects. For women pressed against this ceiling, obtaining such elevated corporate positions would realize their professional dreams. Aside from satisfying this small group of women, shattering the glass ceiling would have greater effects on corporate operations, national economy, and international economy.¹⁴⁰

Bringing women into corporate decision making positions will lead to

134. Ministry of Children and Family Affairs, *Rules on Gender Representation on Norwegian Company Boards*, <http://odin.dep.no/bld/english/topics/gendereq/004071-990149/dok-bn.html> (last visited Nov. 6, 2009).

135. "According to the 2004 figures, seventy-five percent of all women aged 25-66 are on the workforce" Norway-Caribbean.org, Education and Workforce, http://www.norway-caribbean.org/About_Norway/policy/Equal-Opportunities/gender/workforce/ (last visited Nov. 6, 2009).

136. *See id.*

137. Thanks to Ulrika Dahl for this thought. One leader in the CBQ effort agreed that this link between feminism and socialism may be a cause of the low numbers of women in corporate governance. Interview with Siri Sorenson, Research Associate, and Mari Teigen, Research Director, Institute for Social Research, Oslo, Norway (Mar. 17, 2008).

138. Mari Teigen also posits, perhaps foreseeably, that "[i]n Norway the main reason is that not enough women come forth to take this kind of positions, they have too much caring responsibilities." *Id.*

139. *See generally* LINDA R. HIRSHMAN, *GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD* (2006).

140. Feminist analysis often relies on a "bottom-up" analysis to understand how class and gender interact, with a focus on the impoverishment of women. Understanding the full implications of a class analysis requires attention to inequalities at the top of society as well. The emphasis on corporate board members clearly looks directly at women who benefit from class differentials. *See, e.g.,* Martha McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115 (2000).

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different corporate management styles and decision making, as Lisa Nicholson and others argue.¹⁴¹ Changing the makeup of those who govern corporations will strengthen gender equality efforts as well as improve the career prospects for educated women. Moreover, homogenous group members often “avoid asking those tough questions likely to spark dissension,”¹⁴² and frequently “arrive at faulty judgments due to procedural defects in their decision-making processes.”¹⁴³ These homogenous groups tend to have similar experiences and opinions and “the opportunity to generate new ideas, insights, and better solutions is lost.”¹⁴⁴ Beyond breaching the masculine homogeneity of the board, significant differences exist between groups of men and women. Gender-based differences in communication and teamwork will create new ways of solving problems, as feminists have argued for many years.¹⁴⁵ Some feminists suggest that women use different standards and approaches than men

141. Lisa Nicholson, *Women and the “New” Corporate Governance: Making In-Roads to Corporate General Counsel Positions: It’s Only a Matter of Time?*, 65 MD. L. REV. 625, 634 (2006).

142. *Id.* at 636. See also Marleen O’Conner, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003) (arguing that the Enron debacle was due at least in part to “groupthink,” which results when a cohesive and homogenous group’s desire for unanimity impedes the group’s ability to realistically evaluate other alternatives, causing them to make faulty judgments); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN’S L. REV. 837, 844-45 (2003) (arguing that corporate diversity improves the corporate board’s overall functions and decision making, as well as enhancing the “independent thinking that could serve as a check on management prerogatives,” and preventing corporate corruption before it happens); Lynne L. Dallas, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1391 (2002) (arguing that diverse groups have a tendency to make “higher quality decisions in matters involving creative and judgmental decision making,” thus improving the quality of discussion in creative or judgmental decision making; Dallas cites “cognitive conflict” to explain this phenomena: diverse groups have “conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences.”).

143. Nicholson, *supra* note 141, at 637. Nicholson argues that homogenous groups “stake out extreme positions,” and often “limit [their] discussions to a small number of alternative courses of action without surveying the full range of alternatives.” *Id.* See also O’Conner, *supra* note 142, at 1240 (discussing polarization [where like-minded individuals in homogenous groups tend toward extreme decisions] and cascades [where an entire group quickly accepts a certain view because some group members appear to accept that perspective]; O’Conner ultimately argues that “groupthink” reflected the specific situation of Enron rather than polarization or cascades). Nicholson also cites (as do many of the sources she relies on) the originator of the “groupthink” idea. See, e.g., IRVING L. JANIS, VICTIMS OF GROUPTHINK (1972); IRVING L. JANIS, GROUPTHINK (1983). The problem with cohesive, homogenous groups, according to Janis, is that “the greater a group’s cohesiveness[,] the more power it has to bring about conformity to its norms and to gain acceptance of its goals and assignment to tasks and roles.” *Id.* at 4-5.

144. Nicholson, *supra* note 141, at 638; accord O’Conner, *supra* note 143; Janis, *supra* note 144. See also Steven Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1587 (2004) (“Diversity in the boardroom enhances corporate profitability, according to the consensus of scholars of business management, finance, and economics. In addition, diversity seems to add a dimension of abrasion that can serve to mitigate groupthink and thereby heighten the cognitive functioning of the corporate boards”).

145. Nicholson, *supra* note 141, at 638-39. On the ability of gender diversity to “analyze and improve our world,” see Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 835 (1990).

to solve moral dilemmas,¹⁴⁶ while others argue that women are more effective negotiators.¹⁴⁷ Feminists further argue that women's experiences lead to more productive relationships in the work setting.¹⁴⁸ Finally, women in positions of power likely understand more about women's household subsidies and their effects on the economy.¹⁴⁹ Most women understand the burden and cost of household work, and can factor this into establishing corporate policies to produce more efficient uses of labor.¹⁵⁰

Douglas Branson's recent book *No Seat at the Table: How Corporate Governance and Law Keep Women Out of the Boardroom* addresses some key concerns about women's role on corporate boards, especially tokenism.¹⁵¹ Branson's analysis concerns the behavior of the majority when confronted with

146. Nicholson, *supra* note 141, at 639. Nicholson mentions for example, the "Jake and Amy" case studies of Carol Gilligan, where children are asked to solve moral problems, boys tended to balance "individual rights" while girls "used the 'ethic of care' to demand more information about the persons involved in the scenario, rather than making abstract decisions based on universal principles." *Id.* See also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 25-29 (1982); Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L. J. 617, 618-19 (suggesting that biological differences significantly impact temperament and cognitive thinking); Bartlett, *supra* note 145, at 835.

147. In India, for example, corporations have offered existing employees bonuses of as much as 25 percent for referring a female employee. *Corporate India Lures Women Employees*, EXPRESS INDIA, Apr. 7, 2008, available at <http://www.expressindia.com/latest-news/Corporate-India-lures-women-employees/293583/>. Indian companies are eager to apply female perspectives to their business model, and generally see women as better professionals than men. See *id.* For one study which contradicts the stereotypical belief that men outperform women in competitive settings, see Charles Craver & David Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 302 (1999).

148. Nicholson, *supra* note 141, at 639-40. See also Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 43-45 (1983) (arguing that women gain a unique perspective from exclusion and should use their perceived differences [like Carol Gilligan's "ethic of care" idea] to explore new ways of contributing to the legal profession [specifically mentioning "less adversarial methods" of dispute resolution]). For similar arguments on the tendency of women in the legal profession to display less competitive and more negotiation-oriented leadership styles, see Carrie Mendel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 639-40 (1994); Deborah Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1550-51 (1993); Cynthia Grant Bowman, *Bibliographical Essay: Women and the Legal Profession*, 7 AM. U. J. GENDER SOC. POL'Y & L. 149, 172 (1999). Finally, for a discussion of the different approaches of women in corporate leadership positions in the popular press, see Rochelle Sharpe, *As Leaders Women Rule*, BUSINESS WEEK, Nov. 20, 2000, available at http://www.businessweek.com/2000/00_47/b3708145.htm (arguing that the people- and communication-oriented, non-adversarial approaches of women make them invaluable in the business world today).

149. DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* 109 (2007).

150. However, according to Siri Sorenson, many women do not identify with this "women's perspective": "[B]ut women within the corporate sector they have argued that they don't feel that they fit into this gender image that's made or formed thorough these debates and they're quite uncomfortable that they are expected to be more focused on ethics or whatever they're expected to be because they are women." Interview with Siri Sorenson & Mari Teigen, *supra* note 58.

151. Branson's description of women's token role on overwhelmingly male corporate boards parallels Lani Guinier's discussion of Black political representatives in overwhelmingly white legislatures. See generally Lani Guinier, *The Triumph of Tokenism*, 89 MICH. L. REV. 1077 (1991).

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a single member of a minority group.¹⁵² The member is treated as a token and becomes the focus of jokes and criticism.¹⁵³ Ridicule increases as additional minority members join, increasing the perceived threat to the majority.¹⁵⁴ For this reason, fewer women are promoted to senior management positions. Corporations draw board positions from a pool largely composed of senior management. Since few eligible women are available for board positions,¹⁵⁵ few women attain board positions. This treatment of women negatively impacts their mental and physical health, resulting in job turnover, the use of sick leave, and losses to individual and workgroup productivity.¹⁵⁶ When there is a lack of productivity, those women are least likely to advance in the company.

Branson analyzes the nature of a “token” and the fact that tokenism creates heightened visibility within an organization.¹⁵⁷ The dominant group tends to circle together, focusing on its commonalities, while subjecting the minority group to increased scrutiny.¹⁵⁸ A female token faces various performance pressures, such as being asked to speak for all women instead of herself, or being noticed more for her “female status” rather than her achievements in the workplace.¹⁵⁹ The token must balance drawing attention to real achievements with the risk of showing up her male peers.¹⁶⁰ As a result, the token will do anything from becoming socially invisible or outwardly reveling in her token status.¹⁶¹ Women in leadership positions risk being on a “glass cliff” in which women are placed in these positions in desperate situations, when the risk of failure is greatest.¹⁶²

The token’s presence not only causes unwanted focus on her actions, but tends to strengthen the bonds and commonality among the dominant male group.¹⁶³ To garner men’s approval, women may actually turn against other women.¹⁶⁴ Tokens may accept nonthreatening stereotypes to attain

152. See BRANSON, *supra* note 149, at 109.

153. *Id.*

154. *Id.*

155. *Id.*

156. See National Women’s Law Center, *Sexual Harassment in the Workplace*, Aug. 2000, <http://www.nwlc.org/details.cfm?id=459§ion=employment> (last visited Nov. 6, 2009).

157. See BRANSON, *supra* note 149, at 111-12.

158. See *id.* at 111.

159. *Id.* at 113-14.

160. See *id.* at 114.

161. *Id.* at 115.

162. Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Evidence that Women are Over-Represented in Precarious Leadership Positions*, 16 BRIT. J. OF MANAGEMENT 81 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=734677#. Clive Thompson, *Women in Power are Set Up to Fail*, N.Y. TIMES MAGAZINE 80, Dec. 14, 2008, available at <http://www.nytimes.com/2008/12/14/magazine/14Ideas-section4B-t-006.html?scp=2&sq=glass%20cliff&st=cse>.

163. See *id.* at 117.

164. *Id.*

acceptance,¹⁶⁵ or may cope with her status by becoming invisible.¹⁶⁶ When women's numbers increase, it can significantly increase the majority's fear of that minority.¹⁶⁷ Many of these characteristics described by Branson have parallels in the work of Devon Carbado and Mitu Gulati with regard to minorities in management positions.¹⁶⁸

Corporations may seek to reduce the presence of tokenism by increasing the critical mass of women.¹⁶⁹ Quotas are the most direct solution to this problem. Tokenism reflects a political as well as a social problem, which affects efforts to increase women's representation in the governmental sphere. Without increasing women's numbers beyond a token level, it is difficult to conclude that progress has been made in improving gender diversity. Change will come if all corporations adopt provisions that conform to a high level of gender balance. Without it, corporate boards will continue to struggle with inclusion issues.

Yet Branson's analysis of the role of women on corporate boards does not address the key component of the CBQ, the regular and substantial presence of each gender. His analysis centers on the identity group women, rather than the gender diversity, which is the focus of the CBQ.¹⁷⁰ When gender diversity is a factor in group decisions there will be more positive effects on decision making. Of course, individual women in such leadership positions may have no greater comprehension of such questions than men do. However, having women who understand the full nature of public, private, formal, and informal work all participate in the decision making process would ameliorate both the process and the results that ensue.

Men also benefit from the CBQ because it requires that 40% of board positions be held by each gender.¹⁷¹ Given the rising majority percentage of women in higher education, and presuming that those who are educated will assume elite positions in corporations and government, more and more women will gradually occupy positions of power.¹⁷² As women form a majority in

165. *Id.* at 119. When the token allows herself to be encapsulated in a role she may feel comfort in filling a specific role, but the stereotype may delay or limit her ability to achieve promotions and recognition. *Id.* See also ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

166. BRANSON, *supra* note 149, at 119.

167. *See id.*

168. Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1647 1652-54 (2004). The impact of these theories in the gender context surface in greater detail in Rosenblum, *Loving Gender Balance*, *supra* note 13.

169. *Id.* at 123.

170. *See generally id.*

171. See Norwegian Ministry of Children and Equality, *Balanced Gender Representation on Corporate Boards*, *supra* note 42.

172. Podcast: *Women Are Winners*, N.Y. TIMES, July 20, 2007, <http://cityroom.blogs.nytimes.com/2007/07/20/podcast-women-are-winners/?scp=3-b&sq=women%27s+men%27s+salary&st=nyt>.

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higher education and executive positions, men will benefit from and be protected by the CBQ. Although the constituency denies any interest in such protection, the emphasis on gender balance with the CBQ is no accident.¹⁷³ Gender equality is not simply a device for women's empowerment; it is an effort to achieve and maintain balance, both now when men play a disproportionate role and in the future when women may find themselves in that position.

C. Private Efforts Define Gender Equality

While efforts such as the CBQ foster gender equality, they also further a particular vision of gender equality that emphasizes capital as the principal measure of worth. The basic objection to this ideal is that lives matter more than capital. Detractors of economic models assert that the models fail to reflect human cooperation, empathy, and collective well-being.¹⁷⁴ Feminist economists that follow this logic believe it is impossible to set a price on "women's work," such as care-giving.¹⁷⁵ Although this calculation occurs informally within the family all the time, these critics expose the risks of simple cost-benefit analyses applied to women's work.¹⁷⁶

Feminist economists posit a broader methodological critique that undermines a key principle of economics—the neoclassical assumption that humans behave rationally. In reality, humans respond to "a complex set of often contradictory tendencies."¹⁷⁷ One result of women working more is that women take on both market-based responsibilities and responsibilities at home, effectively doubling their workload. Within this economic structure, women work more for far less than equal pay, and their work at home remains uncompensated.¹⁷⁸ Indeed, as *The Economist* reported, women work far more

173. See, Norwegian Ministry of Children and Equality, *Balanced Gender Representation on Corporate Boards*, *supra* note 42; Norwegian Ministry of Children and Equality, *Representation of Both Sexes on Company Boards*, *supra* note 40.

174. See generally Ewelukwa, *supra* note 133.

175. See generally McCluskey, *supra* note 140.

176. See, e.g., Linda Bosniak, *Citizenship, Noncitizenship, and the Transnationalization of Domestic Work*, in CITIZENSHIP, BORDERS AND GENDER: MOBILITY AND IMMOBILITY (Seyla Benhabib et al. eds., forthcoming). See also LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2008).

177. Gerald Marwell & Ruth Ames, *Economists Free Ride, Does Anyone Else?: Experiments on the Provision of Public Goods IV*, 15 J. PUB. ECON. 295 (1981).

178. Multiple duties place multiple burdens on women, devaluing the actual, overall value of their work for a salary and work at home. Difficult working conditions and lower wages lead married women to work in the informal sector due to their limited options. See Beneria, *supra* note 102, at 116-17. Women tend to be tied to informal work, which creates a "vicious circle." *Id.* This pattern limits their choices, opportunities, and has an adverse impact on performing household and childcare work in addition to their paid and informal work. *Id.* The result is a tension between traditional cultural background and changed social and economic circumstance. *Id.* Privatization and restructuring the economy also impacts women's work. *Id.* While this has long term benefits, traditional communities and women whose lives are largely integrated with natural resources subject to these newly concluded

hours on average than men when one includes housework and child-rearing in that calculation.¹⁷⁹ In addition to these arguments, other critics target the gender equality efforts of international financial institutions (“IFI”). Kerry Rittich addresses one example of the promotion of private growth as beneficial to gender equality, a World Bank policy report entitled *Engendering Development: Through Gender Equality in Rights, Resources, and Voice*.¹⁸⁰ Rittich argues that the report “simultaneously challenges the mainstream international gender equality paradigm, incorporates some of its arguments and strategies, and reflects back its blind spots and omissions.”¹⁸¹ In addition to constructing a vision of gender equality, the report proposes a strategy that rests on the use of market incentives to discourage gender discrimination, rather than the international law approach of holding the state responsible for gender equality.¹⁸² In conclusion, the report suggests that the state enables rather than directly institutes gender equality, and therefore puts much faith in market incentives to meet that end. “The net result is a significantly ‘privatized’ model of gender justice, one in which furthering gender equality becomes co-extensive with, and in some way subordinated to, the demands of growth and efficiency.”¹⁸³

Private efforts to foster gender equality also serve to define it. As Rittich states, the World Bank focuses on educational levels and other factors rather than substantive economic equality measured by wages, income, and wealth.¹⁸⁴ The outcome is that gender equality benefits from efforts by institutions such as the World Bank. However, these efforts also serve to define the meaning of gender equality itself, reflecting the normative values of the authors rather than those of women in developing countries or feminist movements. These

concession contracts will have a hard time. *Id.* In many South East Asian countries, for example, women’s wages have increased; yet, others say that low female wages are practically incentives for investment, making multi-national corporations interested in keeping women’s wages low. *See id.* at 126. The adoption of codes of conduct and implementing minimum working standards may reduce investment from developing countries; however, a lack of such minimum standards or rules will not improve the general working conditions for women or the economies of developing countries. *Id.* The issue is how developing countries where outsourced or subcontracted work is done could participate in some of the benefits gained by multi-national corporations, including economic growth and gender-specific development, if that is possible at all. *See id.* at 126; *see also* Andrews, *supra* note 133.

179. *See A Guide to Womenomics: Women and the World Economy*, *supra* note 118. Alan B. Krueger and Andreas Mueller, economists, recently analyzed data from the U.S. government’s American Time Use Survey and found that, on average, employed women spend more time on child care and housework than employed men do. *See* Catherine Rampell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES, Feb. 5, 2009, available at http://www.nytimes.com/2009/02/06/business/06women.html?_r=1.

180. Rittich, *Engendering Development*, *supra* note 27, at 576.

181. *Id.*

182. *Id.* at 582-84. Rittich proposes that the list of essential rights the report lists is “curious”: “with the exception of political rights, they do not relate to the three axes used to measure progress in gender equality—education, mortality, and political participation—in any obvious way.” *Id.* at 584.

183. *Id.* at 577.

184. *Id.* at 582.

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concerns raise appropriate questions that require deeper analysis of private efforts for gender equality.

While Rittich argues that the World Bank's gender equality efforts are not substantive, the CBQ constitutes a substantive move, because it requires a significant element of the market adopt gender equality. Arguments made in favor of the CBQ reflect some of the gender equality efforts facilitated by free markets as conveyed by the World Bank. Norway not only sought gender equality, but it also sought to "strengthen management in the business sector and boost the companies' competitive ability."¹⁸⁵ Those in favor of the CBQ argued that the under-representation of women on corporate boards would hamper Norway's position in the world economy.¹⁸⁶

Norway's vision of gender balance moves beyond the World Bank's limited gender equality goals. Norway's specific target of corporate inclusion of women in their power structure is a broader, more effective solution. One particular comment by Rittich connects to the other side of the symbiosis. As the public benefits from the private and gender equality from the market, the market also benefits from gender equality. As Rittich notes, the World Bank's Report relies on two "mutually reinforcing" theses: that "gender equality is good for growth,"¹⁸⁷ and that "growth is good for gender equality."¹⁸⁸ Market-directed efforts like the CBQ will further Norway's broader vision of gender equality and economic development.

IV. EQUALITY AS A MEANS TO FORTIFY PRIVATE ENDS

As gender equality benefits from the private sector's incorporation of such public norms, so does the private sector benefit from adopting these public norms. In the recent financial crisis, women, as actors largely excluded from corporate management, have been singled out for their potential to save the financial system. Indeed, economies and corporations benefit from greater participation of women in management. This Part describes the extent to which the private influences the public by focusing on how corporations and IFIs derive legitimacy and economic power by incorporating gender equality norms into their policy considerations. This private sector-driven policy focus

185. Norwegian Ministry of Children and Family Affairs, *Balanced Gender Representation on Company Boards*, *supra* note 42.

186. Seim Medill, *supra* note 58, at 8.

187. Rittich, *Engendering Development*, *supra* note 27, at 580. This is because "'investing in women,' especially in the areas of health and education, is likely to generate payoffs or 'positive externalities' for the well-being of children, the household, and the economy as a whole." *Id.*

188. *Id.* The basic argument here is that since economic development may introduce opportunities and incentives that have the result of breaking down entrenched economic gender roles, growth will support gender equality by generating jobs (from which women benefit more than men), providing incentive to invest in greater training and education of women, and leading to the breakdown of the gendered labor division within the household (thus resulting in the substitution of paid for unpaid work). *Id.* at 580-81.

transforms women's corporate leadership into an economic imperative. Across the political spectrum, it is commonly assumed that globalization victimizes women through trafficking, prostitution,¹⁸⁹ sex tourism,¹⁹⁰ mail-order brides, and sweatshop labor.¹⁹¹ As international trade expands, so do these phenomena.¹⁹²

Gender in international economic growth is not solely about victimizing women. IFIs, corporate think-tanks, and others have marshaled evidence connecting gender equality to growth, asserting that the more economic power women have, the more an economy will grow. This Part addresses the economic growth arguments behind the CBQ. As corporations legitimize business practices through Corporate Social Responsibility ("CSR") efforts, IFIs appear more well-intentioned when enforcing gender equality norms. The corporations and IFIs driving the world economy can draw on gender equality to fortify their profit and development goals. As market-directed efforts benefit gender equality, so may gender equality fortify the market.

189. Prostitution has swelled because of increased travel and disparities in currency values that permit tourists to obtain sexual services for far less than possible in their home countries. *See* Beneria, *supra* note 102, at 80-81.

190. *See, e.g., The Children in Gucci Shoes*, THE ECONOMIST, Nov. 22 2003. After police raided brothels in the capital of Phnom Penh, after complaints concerning sex trafficking, pimps moved their businesses to the smaller town of Krong Koh Kong, which is said to be at the lower end of the sex trade. *Id.* Krong Koh Kong, whose respectable business is fishing, is practically unpoliced, and the porous Thai and Vietnamese borders make things even worse. *Id.* The town attracts many sex tourists from a wide area because sex there is cheaper than in Phnom Penh, and far cheaper than in neighboring Thailand. *Id.* "The girls, some of them children aged only 14 but looking older in their heavy make-up and fake Gucci sandals, charge the equivalent of \$2 or \$3, half of which goes to their boss. A girl can make about \$25 a week, a relatively big sum in an area of widespread poverty and unemployment." *Id.* These traffickers seem to have no trouble finding their young victims, who are often offered as debt repayment. *Id.*

191. *See* Hussein Sadrudin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 382 (2005). *See generally* JENNIFER GORDON, *SUBURBAN SWEATSHOPS* (2005).

192. *See* Sadrudin, *supra* note 191, at 382. On the right, Francis Fukuyama argues that women's increased participation in the labor force gives men the message that because women now work, men can leave their families, causing increased numbers of women-headed households. *See* FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER* 101-11 (1999). On the left, a wide range of women's activists oppose globalization, asserting that its primary effect is to worsen the aforementioned problems. *See generally* AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003). Now, women who leave their home country and extended families to support their own families constitute a broad sector of migrants. SUSAN FORBES MARTIN, *WOMEN AND MIGRATION*, UNITED NATIONS DIVISION FOR THE ADVANCEMENT OF WOMEN (DAW), CONSULTATIVE MEETING ON "MIGRATION AND MOBILITY AND HOW THIS MOVEMENT AFFECTS WOMEN" (2003), <http://www.un.org/womenwatch/daw/meetings/consult/CM-Dec03-WP1.pdf>. Linda Bosniak describes the cost to women who engage in transnational childcare work as providing a form of citizenship to the women who employ them by depriving the workers of their own citizenship. *See* BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 176. Women who hire childcare workers acquire their "citizenship" (meaning economic and thus political status) through hiring women of lower economic status who, at least temporarily, give up their national identity to come to the United States for this work. *Id.*

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A. The Legitimization of Private Sector Goals through Gender Equality

International Financial Institutions and multinational corporations pursue gender equality out of self-interest. Gender equality efforts legitimize IFIs by linking them to a widely-accepted social purpose. Although IFIs' support for gender equality policies may play a role, such norms may be weak if set against market forces.¹⁹³ Rittich examined IFIs' role in managing the "incorporation of social justice and greater participation in the development agenda," as well as the ways in which governmental agendas as a whole affect the process of pursuing social objectives.¹⁹⁴

International economic reforms developed in two generations. The first generation focused on neo-liberal reforms to open markets and protect investments for multinational corporations and IFIs.¹⁹⁵ The second-generation reforms moved beyond those efforts to achieve social objectives.¹⁹⁶ Non-state actors receive a newly-important role in generating norms with respect to a broad range of social issues beyond just gender.¹⁹⁷ To emphasize market-centered types of social equality and inclusion, social justice is framed in market terms,¹⁹⁸ with a focus on those changes that yield economic results.¹⁹⁹ "[B]y articulating their relationship to economic growth and managing the processes by which they are incorporated, the IFIs are effectively ranking and ordering the importance of different social objectives and alternatively legitimizing and de-legitimizing the means and strategies by which they can be pursued."²⁰⁰

IFIs and multinational corporations benefit from the incorporation of gender equality norms from the public sector into their purpose of maintaining the status quo. France's Parity Law demonstrates a parallel effort in the context of political representation. An all male legislature enacted the Parity Law, which requires half of all candidates for public office in France to be women.²⁰¹ Economists studying this law found that the male legislators acted

193. Rittich, *Engendering Development*, *supra* note 28, at 586-87.

194. Rittich, *The Future of Law and Development*, *supra* note 24, at 200. The World Bank's Comprehensive Development Framework, for example, identifies two different sides to the "development agenda": the "macroeconomic and financial aspects of economic growth," and the "social, structural, and human" dimensions"; the latter can include issues like education, health, gender equality, good governance, human rights, and the rule of law. *Id.* The CDF also suggests that the development process should be maintained by the people; to impose a "one size fits all agenda that is orchestrated and imposed from above, second generation reforms propose greater country-ownership of the reform process and a development agenda that is generated in a more inclusive and participatory way." *Id.*

195. *Id.* at 201.

196. *Id.* at 205.

197. *Id.*

198. Rittich, *The Future of Law and Development*, *supra* note 24, at 243.

199. *Id.*

200. *Id.*

201. Guillaume R. Fréchette, Francois Maniquet & Massimo Morelli, *Incumbents' Interests and*

in order to preserve their own incumbency.²⁰² Since female candidates prove less popular than male candidates, a higher percentage of female competitors increases the likelihood of men maintaining their political hegemony.²⁰³

Legislation requiring women's participation in managing corporations could function in a similar fashion.²⁰⁴ In the near term, men on a corporate board would benefit from having other board members with less experience. Board members with more experience could manipulate those with less experience to achieve their vision of management. In addition, a broader vision of self-interest supports the idea that men benefit from a quota that protects their role in the management of corporations, albeit at a lower level. Corporations follow this reasoning, by integrating gender issues into Corporate Social Responsibility programs.²⁰⁵ Finally, because much of women's work is volunteer work or work in the home, for the public economy women constitute an untapped potential resource.

B. Efficiency and Cost Benefit Analysis—Why Gender Equality is “Good for Growth”

The rhetoric of the connection between gender equality and economic growth figures prominently in the evaluation of the role of women on corporate boards and in the economy. The language used by Norway's Ministry of Children and Family Affairs to promote the CBQ references this connection, stating that the legislation will not only lead to “equality between the sexes,” but also to “the creation of wealth in society.”²⁰⁶ As discussed in greater detail

Gender Quotas, 4 AM. J. POL. SCI. 891 (2008), available at http://homepages.nyu.edu/~gf35/print/Frechette_2008b.pdf.

202. *Id.*

203. *Id.* Additional comparison between the CBQ and Parity appears in Rosenblum, *Loving Gender Balance*, *supra* note 13.

204. It is worth noting that the Parity Law regulates candidates for political office whereas the CBQ legislates corporate board positions themselves, stepping to another level of intervention.

205. Kate Grosser & Jeremy Moon, *Gender Mainstreaming and Corporate Social Responsibility*, 62 J. OF BUS. ETHICS 4 (2005) (investigating the contribution of CSR to gender equality and analyzing whether gender mainstreaming is compatible with the CSR agenda). *See also* Robert J. Williams, *Women on Corporate Boards of Directors and Their Influence on Corporate Philanthropy*, 42 J. BUS. ETHICS 1 (2003) (analyzing a study finding that those Fortune 500 companies with women on their boards engaged in more charitable giving); Craig A. Peterson & James Philpot, *Women's Roles on U.S. Fortune 500 Boards, Director Expertise & Committee Memberships*, 72 J. BUS. ETHICS 2 (2006) (examining the trends in committee appointments for female and male directors and finding that men are more likely to serve on executive committees while women are more likely to serve on public affairs committees); Zena Burgess & Phyllis Tharenou, *Women Board Directors: Characteristics of the Few*, 37 J. BUS. ETHICS 1 (Apr. 2002) (general discussion of gender diversity on corporate boards); John R. Boatright, *The Future of Corporate Social Responsibility*, 20 BUS. & PROF. ETHICS J. Nos. 3 & 4 (2001) (discussing the future of corporate social responsibility and the appointment of women to corporate boards); Janis Sarra, *Class Act: Considering Race and Gender in the Corporate Boardroom*, 79 ST. JOHN'S L. REV. 1121, 1160 (2005) (discussing shareholder actions to correct lack of board diversity); Ronnie Cohen, *Feminist Thought & Corporate Law: It's Time to Find our Way up From the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1 (1994).

206. Norwegian Ministry of Children and Equality, *Representation of Both Sexes on Company*

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below, several sources have produced data supporting this understanding. This data bolsters a reconfigured international economic architecture that uses gender equality to promote the fair treatment of women and to further a vision of capital as having a human face.²⁰⁷

Profits, the goal of the corporate sector, benefit from including women in corporate boards and senior corporate management.²⁰⁸ Gender diversity's offering of new ideas and a more responsive corporate culture will generate greater profits.²⁰⁹ Several studies have compared the financial success of corporations with mixed-sex boards to corporations with all-male boards. The Female FTSE Report 2004 analyzed the gender diversity of British corporate boards and found a correlation with positive business results.²¹⁰ The corporations with women on their boards yielded higher profits than those without.²¹¹ To measure the corporations' financial success, the Report examined each corporation's ROE.²¹² Corporations with mixed-sex boards had an average ROE almost four percent higher than those with all-male boards (13.8% versus 9.9%).²¹³ Although the study does not prove that gender diversity causes higher ROEs, it demonstrates a correlation.

Beyond the board, gender diversity in management also correlates with higher ROEs. An American Management Association study found that firms reporting a diverse management team had better overall financial performance.²¹⁴ Similarly, a Covenant Investment Management survey of the Standard and Poor's 500 corporations confirmed this finding, reporting that corporations with diverse management had over ten percent higher ROEs than

Boards, *supra* note 40.

207. See, e.g., Lisa M. Fairfax, *Women and the "New" Corporate Governance: Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579 (2006) (discussing a Fortune 100 study on women directors and finding that there are still significant barriers to women achieving these positions and the positive impact that women have on the board's conduct). See also Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003); Lynne L. Dallas, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1403-05 (2002) (noting that diversity counters isolated focus on stock price); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 109-10 (2000) (discussing rationales for diversity on boards); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 494 (2002) (discussing that diversity enhances corporate governance).

208. Nicholson, *supra* note 141, at 642-45.

209. *Id.*

210. SUSAN VINNICOMBE ET AL., *THE FEMALE FTSE REPORT 2004*, CENTER FOR DEVELOPING WOMEN BUSINESS LEADERS, CRANFIELD SCHOOL OF MANAGEMENT 1 (2004), available at <http://www.som.cranfield.ac.uk/som/research/centres/cdwbl/downloads/FT2004FinalReport.pdf>.

211. *Id.* The Report used thirteen indicators to measure the level of corporate governance that each corporation possessed. *Id.* The report assigned one point for successful compliance with each indicator, so a score of thirteen was the highest. *Id.* The average score for companies with women directors was a 10.8, whereas companies with all-male directors had an average score of 9.1. *Id.*

212. *Id.*

213. *Id.* Sixty-nine boards had women on their boards; thirty-one did not. *Id.*

214. *Id.*

firms that lack diversity (18.3% versus 7.9%).²¹⁵ The Female FTSE Report 2004 also confirms these findings, reporting that companies with women on the board had an average three-year ROE of 13.8%, compared to all-male boards, which had an average ROE of 9.9% for the same period.²¹⁶ The evidence shows that women's participation in corporate boards leads to a greater return for both the company and its investors.²¹⁷ These statistics reflect a correlation, but not necessarily any causality. In many cases, it might be a coincidence that higher ROE exists when more women sit on the board. Certain industries may be more diverse and have a higher ROEs because of their nature.²¹⁸

A more recent study confirms these findings. Using data from top French publicly-traded corporations, Michel shows that 2008 stock market performance correlates to the number of women in corporate management. Corporations with fewer women experienced a greater drop in share price than corporations with more women in management. He concludes that "feminization of management seems to be a protection against financial crisis. Currently, financial markets value firms that took less risk and are doing more stable business."²¹⁹

At the national level, studies show that countries with higher levels of women's representation have higher GDP growth rates.²²⁰ In addition to the direct economic benefits, diversity improves profits in an indirect fashion as well.²²¹ Corporations lacking gender diversity can lose new recruits to

215. *Id.*

216. *Id.*

217. It is worth noting that women board members may obtain their position through relationships with powerful men. For example, the only woman on the board of LVMH, the French conglomerate, is the daughter of the Chief Executive Officer, Bernard Arnault. See *Ten Women to Watch in Europe, the Middle East and Africa*, WALL ST. J., Nov. 10, 2008, available at <http://online.wsj.com/article/SB122629166790613063.html>. This reflects a commonplace phenomenon in the empowerment of women in previously male sectors of society. In India, for instance, women taking on leadership roles in village councils often are relatives of men who previously held such positions. Raghavendra Chattopadhyay & Esther Duflo, *Women as Policy Makers: Evidence From a Randomized Policy Experiment in India*, 72 *ECONOMETRICA* 1409 (2004), available at http://econ-www.mit.edu/faculty/download_pdf.php?id=437.

218. For example, LVMH has an ROE of 18.73%, a relatively high ROE, and has one woman on the Board, but it is in a more creative sector of the economy than other corporations. Michel Ferrary, *Why Women Managers Shine in a Downturn*, FINANCIAL TIMES, Mar. 2, 2009.

219. Of French banks, BNP-Paribas has best resisted the crisis. Since January, its stock only decreased by 20%; 38.7% of its managers are women. By comparison, Credit Agricole's stock decreased by 50% and only 16% of its managers are women. Firms with a highly feminized management like LVMH (56% female managers), Sanofi (44.8%) have gone down less than the CAC40. While stocks of more male-managed firms like Alcatel-Lucent (8.68% women), Renault (21.77% women) have fallen more than the CAC40. "Several gender studies have pointed out that women behave and manage in a different way than men. They tend to avoid risk and to focus more on a long term perspective. A larger proportion of female managers balances the risk taking behaviour of their male colleagues." CERAM School of Business, *Global Financial Crisis: Are Women the Antidote?* CERAM Research, <http://www.ceram.edu/index.php/Latest-News/Latest/Financail-Crisis-Are-Women-the-Antidote-CERAM-Research.html> (last visited Nov. 6, 2009). See also Ferrary, *supra* note 218.

220. See Ronald Inglehart et al., *Gender Equality and Democracy*, 1 *COMP. SOC.* 321 (2002).

221. Nicholson also addresses the corporation's costs associated with the failure to retain the

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competitors.²²² Perceptions of a lack of diversity could result in difficulties in recruiting or could even give rise to litigation for unfair hiring practices.²²³ Conversely, the presence of diversity programs can have a positive impact.²²⁴ Extensive law and economics analyses have examined the benefits of these policies. These arguments, centering on statistical analyses of corporate profits and management theories, reflect the important role that gender equality presently plays in legitimizing capital.

V. CONCLUSION—GENDER BALANCE AND THE PUBLIC-PRIVATE SYMBIOSIS

What happened to the dreams of a girl president?

She's dancing in the video next to 50 Cent

- Pink, "Stupid Girls"

People, women included, are less comfortable with women in leadership positions. We reflexively see women as more likely to play backup dancer than President or Chief Executive Officer. The rarity of women's political and economic leadership has substantial costs. It fosters an environment in which women's leadership is not only rare, but a source of derision and sexist humor. It arises out of a presumption that leadership must be gendered masculine, excluding those whose gender expression is not male. Indeed, recent studies indicate that the wage gap between men and women is really a gap between non-egalitarian minded men and everyone else, in which men who believe in traditional roles for women made \$8549 more than men who believed in a more egalitarian role for women, and that women who believed in a more egalitarian role made more than women who believe in traditional gender roles. This study suggests that gendered constructions of power carry more weight than biological sex.²²⁵ Such attitudes proliferate by virtue of the liberal presumption that individuals make leadership choices in a vacuum free of discriminatory

diverse workforce. Nicholson, *supra* note 141, at 644. When an in-house lawyer leaves, or an associate at the corporation's outside firm leaves, the corporation will bear significant expenses to find a replacement. *Id.* In addition to the costs of recruiting a new attorney, the loss causes a lack of productivity in the remaining attorneys and an information vacuum because the departing attorney takes with her some information and knowledge that cannot be translated to the firm. *Id.* Nicholson argues that the economic losses continue even when a new attorney is hired because of her lack of experience, different learning curve, and the risk that some knowledge can be lost forever because one person is not a complete replacement for another. *Id.*

222. *Id.* at 643.

223. *Id.*

224. *Id.* at 645. Nicholson argues that the presence of diversity programs conveys a perception to the public that the corporation sees value in its employees. *Id.* Nicholson sees this attitude manifested in a corporation's desire to achieve accolades such as "Fortune's 100 Best Companies to Work For." *Id.* Institutional investors then begin to demand that their target investment corporations achieve those listings, thus driving the corporation to pursue diversity to boost their attractiveness to investors. *Id.*

225. Timothy A. Judge & Beth A. Livingston, *Is the Gap More Than Gender: A Longitudinal Analysis of Gender, Gender Role Orientation, and Earnings*, 93 J. APPLIED PSYCH. 994 (2008), available at <http://www.apa.org/journals/releases/apl935994.pdf>.

attitudes.

They do not. Entrenched gender hierarchies continue to reduce half our population to a small minority of leaders in both government and industry. Countries, like international financial institutions, benefit from fostering and managing gender equality. Sonia Alvarez argues that the global gender agenda both “disciplines and enables” feminist goals.²²⁶ Similarly, private-oriented efforts enable gender equality, as discussed in Part Three, and they discipline them by steering gender equality movements toward market-oriented goals.

Many countries have attempted to rectify this inequity by adopting quotas for political representation. Until the current economic crisis, the “public” world has been shrinking. Despite recent reversals, the world in which policy-makers, activists and scholars pursue remedies for gender and race inequities is a vastly different one from that which greeted the incipient civil rights and feminist movements decades ago. Public functions have been increasingly privatized and transnational corporations have come to wield more power than most nation-states.

Here, Norway’s adoption of the CBQ reflects the symbiosis between the public and the private. Norway acknowledges the private’s critical and increasingly central role in society. In adopting the CBQ, it pursues the integration of the public norm of gender balance into private goals of capital accumulation. Exclusively public attempts to repair gender inequity will not succeed in transforming society. Brenda Cossman and Judy Fudge have argued that through the process of privatization, the State “lost its privileged status as the central unit of political, economic, and cultural analysis.”²²⁷ This reduced role played by the state has hampered gender equality efforts. “Privatization presents a formidable challenge to feminist theory and practice.”²²⁸ Outsourcing equality from the state to the market leaves weaker parties at the mercy of forces that will forsake fairness for profits.

The current financial crisis has aroused a renewed interest in partnerships between the public and private sectors. Private enterprise recognizes the need for legal regimes to organize economic structures. Norway’s CBQ presaged this blurring of the public/private dichotomy. The CBQ reflects a symbiotic relationship between the public and private, in which public norms acquire their force through the private sector, at the same time that private goals inform public norms. Gender equality benefits the private, as corporations with greater levels of women’s representation show higher returns. Feminizing capital does not require its emasculation. Rather, capital will gain power from feminization.

226. See generally Sonia Alvarez, *The Global Gender Agenda* (2007) (manuscript on file with author).

227. PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM 403-20 (Brenda Cossman & Judy Fudge eds., 2002).

228. *Id.* at 404.

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Feminizing capital teaches a broader lesson: a public/private symbiosis offers more effective solutions to problems of inequality, allowing public norms to inform the private. The growing concern over corporate gender quality reveals the increased normative role of “public values” in informing “private actions.” This fluidity of ideas from the public to the private demonstrates the tenuousness of the lines that divide these arenas. The public/private symbiosis goes beyond gender. Merging the strengths of the public and private sectors only serves to bolster gender, race, and class equality endeavors within each sphere. The CBQ marks a new direction in realizing this symbiosis.