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New Strategies for Justice: Linking Corporate Law with Progressive Social Movements

An Introduction

Dana L. Gold¹

The large corporation has become the dominant institution of our time. Increasingly, academics, lawyers, and activists dedicated to preventing injustice in its many forms—race discrimination, gender inequality, environmental degradation, health and safety risks, extreme wealth disparities, and threats to political and workplace democracy—are recognizing that expanding corporate power is frequently the common denominator that cuts across these seemingly distinct public interest concerns.

The strategies that progressive advocates have been applying for the past several decades generally have not, however, focused on corporations, corporate law or corporate structure. Rather, they have focused largely on addressing specific problems, such as workplace discrimination, water pollution, or unsafe consumer goods, which are generally enforced through a model of regulatory protection, and then only after harm has occurred. Too frequently, the overwhelming number of interests needing dedicated and constant advocacy has splintered progressives as they attempt to stem erosion of fundamental principles of justice.

With the economic, political and legal landscape becoming more and more influenced by corporations, those thinking about and working towards a more just vision of society need new tools and strategies that are grounded in an understanding of corporate law and structure. To that end, on April 7–9, 2005, the Center on Corporations, Law & Society² and the Equal Justice Society,³ in collaboration with the Critical Race Studies concentration at University of California at Los Angeles, School of Law, sponsored a

conference entitled *New Strategies for Justice: Linking Corporate Law with Progressive Social Movements*.⁴

This conference successfully brought together experts across a range of sectors and issues to learn about how the evolution of corporate law jurisprudence has contributed to many forms of injustice and to engage in creative dialogue about new strategies that address not just the symptoms of corporate conduct, but the roots of corporate law and structure itself. Corporate law and critical race theory scholars exchanged ideas with consumer protection, human rights, environmental and civil rights activists; law students, private practitioners, and policy reform advocates engaged in discussions about the intersection between corporations and government, and the benefits and limitations of traditional methods of seeking justice, such as litigation, media outreach and legislative advocacy, in an age of corporate influence in all three of these arenas.⁵

The articles included in this symposium section capture the principal themes explored in the *New Strategies for Justice* conference. The opening panel invited experts from the racial, environmental, worker, and political rights communities to offer a progressive critique of the dominant socio-legal landscape in order to highlight the relationship between corporations and diverse forms of injustice. The thoughts of three of these presenters—Julie Su,⁶ John Bonifaz,⁷ and Professor Cheryl Harris⁸—are included here, and together they powerfully frame both the direct and more subtle power corporations have on not only the lives of people but on the very systems we depend on to protect them.

Julie Su, in *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Economic Justice*, puts in high-relief the landscape of economic injustice and the ever-widening wealth gap caused by corporations. After describing the plight of immigrant workers who, as the backbone of the garment and agricultural industries dominated by large corporations, endure often slave-like working conditions with less than living wages, long hours, no health care, and no job security, Su outlines

how current jurisprudence, exacerbated by globalization, supports corporate structures that allow such conditions to exist. First, she explains that the retail clothing and food industries have largely been able to shield themselves from direct liability by subcontracting with factories that actually employ the workers who produce the goods for sale. Thus, millions of workers, predominantly poor people of color, work as contractors under abusive conditions without the protection of employment laws.⁹ Second, she points out that the controversial Supreme Court ruling in *Hoffman Plastic Compounds v. NLRB*, holding that undocumented workers are not entitled to back pay relief even if they are fired for engaging in protected union activities, demonstrates an increased commitment to protect corporate interests over human interests by refusing to apply existing law originally intended to protect workers from corporate exploitation.¹⁰

Although Su describes important, hard-fought legal and legislative victories that have created opportunities for workers to seek relief from inhumane working conditions—undeniably important components of highlighting corporate misconduct to pressure industry to make changes to their practices¹¹—she ultimately argues that progressives need new legal theories and strategies that directly confront the jurisprudence that allows corporations to externalize the cost of corporate conduct in the form of injustice to workers and harm to communities by overvaluing concepts of efficiency and “economic growth.”¹² Until corporations are, as a matter of law, compelled to pursue profit without harming the public interest, progressives will need to continue using up-hill, band-aid approaches in a world that increasingly protects the interests of the powerful over the powerless.

John Bonifaz in *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Political Injustice* explains the roots of Su’s insight that corporate interests are eroding the willingness of the government—either through judicial interpretation or expanded legislation—to enforce laws and regulations that are currently the only form

of legal recourse against social, economic and environmental injustice caused by corporate conduct. As Bonifaz describes, corporations, and thus their interests, have disproportionate power in the political process because of the current campaign finance system that all but eclipses the voices of individual citizens.¹³ By exposing the fact that the dominant process of elections is the primary system, and that in order for a candidate to win at the primary level, massive amounts of money are needed and will, generally, statistically control the outcome of the election, Bonifaz explains how corporations are able to dominate the “wealth primary” process by funneling enormous amounts of money to candidates.¹⁴ Bonifaz describes how these unparalleled amounts of corporate contributions at the federal level translate directly into policy results that favor corporate interests, using examples of the recent bankruptcy bill, efforts to open the Arctic National Wildlife Refuge for drilling, and decisions related to the war in Iraq.¹⁵

Painting a graphic picture of corporate control of federal politics, Bonifaz describes some efforts to put democracy back in the hands of citizens, including state-based efforts to institute public funding of state elections and current legal challenges to the dominant jurisprudence that equates money with speech (a holding which fuels the system of campaign contributions).¹⁶ He ultimately drives home the point that the unprecedented levels of corporate influence, supported by current law, erode the very democratic structures that protect the interests of people. Thus, the current system that progressives depend on—regulatory protection and enforcement of public interests against corporate misconduct—is fatally compromised by the current campaign finance system. Until citizens and not corporations control government, we can continue to expect a landscape of social, economic, environmental and political injustice.

The theme of the relationship between private, corporate interests and the public interests theoretically protected by government is echoed by

Professor Cheryl Harris in *The Progressive Critique of the Current Socio-legal landscape: Corporations and Racial Justice*.¹⁷ Harris, a scholar deeply conversant in the issues of civil rights and critical race theory, acknowledges how her own work has primarily focused on race and not corporations, but in reflecting on the relationship between corporations and racial justice, she highlights how legal jurisprudence in the area of race consistently protects private, corporate interests over public and human interests. She notes that legal jurisprudence promoting diversity and affirmative action has often been shaped by corporate arguments that these programs are good for business because they promoting cross-culture competence that will maximize wealth.¹⁸ She then contrasts this with the jurisprudence of employment discrimination law, where corporate defendants engage in pervasive racial discrimination with plaintiffs facing difficult legal standards and hostility by courts to proving anti-discrimination and harassment claims.¹⁹

The contrasts are striking—where racial justice is perceived as “good for business,” the law generally supports it; when racial justice challenges corporate conduct, the law generally denies it. Harris concludes that the very structure of how racial justice is conceived in our jurisprudence is not through the lens of valuing equality, but rather through the private interests of the corporate sector. She underlines this point by noting that the Fourteenth Amendment—enacted to protect African Americans from pervasive, historic discrimination—not only limits acts of unlawful discrimination to states (exempting the private sector), but in later jurisprudence, extends the protection of the Fourteenth Amendment to corporations by deeming them “persons” entitled to constitutional rights.²⁰ Harris concludes that in order to change the paradigm that grants rights but not responsibilities to private interests, and defines the scope of public interests in deference to private interests, we necessarily must rethink the relationship between public and private power.

This need to distinguish between the public and private interests is echoed in the other articles included here. Professor Daniel Greenwood²¹ in *Introduction to the Metaphors of Corporate Law* exposes as erroneous the metaphors used to characterize corporations as private, powerless, passive entities—metaphors that have nonetheless become embedded in and drive the jurisprudence applied to corporations.²² Greenwood argues that these privatizing metaphors serve to conceal the true nature of corporations as powerful economic institutions from which citizens need protection from abuse of power. Specifically, these metaphors include the ideas that a corporation, like property, is something that can be “owned” (in the corporation’s case, by shareholders);²³ that a corporation is merely an arena in the market for contractual arrangements where all parties enter into agreements based on consent and equal standing;²⁴ that corporate structure is an “agent” for the interests of shareholders;²⁵ and that corporations are “legal persons” independent of those involved with the firm that accordingly deserve constitutional rights.²⁶ However, unlike public institutions that have democratic mechanisms for ensuring that citizen interests are protected, corporations are not “elected” democratically and are overtly designed to maximize profit rather than promote the public interest.

The danger, Greenwood asserts, of characterizing corporations as private rather than public-like entities is that as corporations acquire, like citizens, rights to protect their “private” interests, these same rights intensify the institutional nature of corporations to make decisions with limited responsibility to consider the consequences of their actions on societal interests and to further aggregate their power by participating in the political process originally designed to control power. Greenwood concludes that as long as corporations are treated as private entities deserving rights but requiring minimal oversight, the power and wealth of corporations will not only continue to grow but external restraints in the form of regulation will be weakened by corporations’ exercise of their power, wealth and rights on the political process. He ultimately calls for us to discard the obfuscating

metaphors of the corporation as a private entity to create a legal paradigm shift that would subvert corporate interests to human interests.

Charlie Cray and Lee Drutman²⁷ neatly expand on Professor Greenwood's argument in *Corporations and the Public Purpose: Restoring the Balance*.²⁸ Cray and Drutman explain how the concept of the corporation as a private entity beyond the scope of citizen control is wholly inconsistent with the origins of the corporation in American history, which took the form of an entity highly controlled by individual states through corporate charters that limited the purpose of corporations to supporting public needs such as infrastructure development, banking and insurance.²⁹ After outlining the economic and legal evolution that increasingly loosened state regulation of corporations, supported the corporate acquisition of private rights, and ultimately created a system where internal control of corporate conduct through state charters was replaced by external regulation of corporate conduct, the authors consider what the proper role of the corporation is in relationship to societal interests. By examining industrial sectors, including national security, accounting, the broadcast news media, and utilities, Cray and Drutman assert that such functions are inherently public in nature, and accordingly, a public rather than private theory of the corporation that protects public interests through exercising citizen authority over corporations is crucial. Significantly, Cray and Drutman's argument is not limited to those sectors that provide goods or services that fulfill public needs. Rather, they suggest that viewing the corporation as a public and not private entity in all sectors—with rights that to this day derive from the grant of a state charter—is necessary to reinstate citizen control over corporate power and restore a functioning democracy.³⁰

The final article, offered by noted journalist and public intellectual William Greider,³¹ takes one step back from the preceding articles to ask not how corporate law and theory has evolved to support corporate interests at the expense of public interests, but how corporate structure and the system of capitalism itself creates injustice and needs to undergo radical

transformation.³² Echoing Greenwood's observation that a corporation is not a stand-alone, private entity "owned" by shareholders, Greider observes that corporations are in fact human institutions dependent on and affected by people—community members, investors, workers, consumers—that have also become the primary social organizations in this country around which the majority of citizens organize their time, incomes, social relationships, and self-fulfillment.³³ At the same time, corporations have grown in unprecedented size and power despite efforts throughout the last century to regulate corporate conduct as a way of protecting the interests of the less powerful, such as children, workers, the environment, women and minorities.³⁴ Greider suggests that we must reformulate the notion of the corporation and its role in society given on the one hand its nature as a social organizing institution and its current unaccountable focus on profits at the expense of current and future generations on the other.

Specifically, Greider argues that a new model of ownership should organize corporate structure that would not derive from the false control of shareholders, but rather from the people who are deeply committed to the long-term success of the firm—the employees.³⁵ His proposal is rooted in the arguments that (1) a worker, from a human rights perspective, should "own" his or her work; (2) workers who have ownership stakes in the corporation will be committed to fair wealth-distribution so they can benefit from their labor; and (3) employee ownership creates more effective business enterprise because they have a stake in the outcome.³⁶

Greider's advocacy of a corporate structure that is defined by employee ownership is only one of many possible reforms that would change corporate purpose from one focused exclusively on profit-maximization to one focused on being a powerful vehicle to maximize social interests in real wealth creation, civilized society, and long-term sustainability. He articulates six principles, important enough to summarize here, that should define the new "social corporation:"

- Corporations must create new wealth characterized by enduring value necessary to sustain a civil society
- Corporations must create value in harmony with nature, restoring the natural assets it uses in its production
- Corporate governance should be democratic, characterized by the participation of and return to all of those responsible for the success of corporate activity
- Corporations must create covenants with communities that allow citizens to enforce promises of behavior
- Corporations must promote the full potential for self-realization of every individual within the firm
- Corporations must commit to defending society's bedrock institutions, from family life to the integrity of democracy³⁷

Greider's principles should serve as guides for progressives truly interested in controlling corporations' power to subvert public interests in fairness, equality, environmental sustainability, and a functioning democracy. Together, progressive attorneys can, and must, devise new legal theories and strategies—many of which are suggested by the authors here and by others who participated in the *New Strategies for Justice* conference—that do not merely set limits on corporate behavior, but that actually harness the power of corporations to benefit public interests. Scholars, lawyers and activists working together towards a vision of society where human interests are valued above corporate interests can pursue ideas such as reform of corporate governance structures to ensure the active involvement of employees and citizens in corporate decision making. They can change the definition of a corporation's fiduciary duty away from maximizing profit for shareholders to active consideration of societal interests, and they can change the legal status of corporations to those of public, and thus accountable, entities from private entities with rights that eclipse those of individuals.

The injustices that flow from corporate power and abuse will always need direct attention and unique strategies that involve dispute resolution, public education, legislative reform and scholarship. However, as traditional remedies to address specific forms of injustice become increasingly weak in a system dominated by corporate influence, progressives must supplement these efforts with long-term strategies that address the root causes of injustice found in corporate law and structure. When progressives combine their voices and energies towards efforts that support a vision where public interest values instead of profit are the inalienable principles that limit the behavior of corporations, perhaps we will be able to move away from the band-aid approach of seeking remedies for corporate harm as we create a world where the power of corporations is harnessed for social good. The *New Strategies for Justice* conference and its related scholarship captured here is an important step towards achieving this vision.

¹ Dana L. Gold is the Director of the Center on Corporations, Law & Society at Seattle University School of Law. She was also one of the primary organizers and Chair of the conference *New Strategies for Justice: Linking Corporate Law with Progressive Social Movements*.

² The Center on Corporations, Law & Society is an academic center at Seattle University School of Law that promotes interdisciplinary dialogue and scholarship on the role law plays in maximizing the positive contributions of corporations while protecting the interests of employees, shareholders, the environment, consumers, communities, and other fundamental public interest values. See <http://www.law.seattleu.edu/ccls>.

³ The Equal Justice Society is a national organization of scholars, advocates and concerned individuals advancing innovative legal strategies and public policy for enduring social change. See <http://www.equaljusticesociety.org>.

⁴ The title of the conference derives from Kellye Y. Testy's article *Linking Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002), in which she argues that a "progressive corporate law project" that changes corporate law structures and values is necessary to dismantle the dominant corporate law model of shareholder primacy in favor of a model that fosters social, economic and environmental justice. She further argues that such an effort will only be effected by developing strategic linkages with progressive social movements that will in turn create both solidarity and power. *Id.* at 1230. Kellye Testy is currently the Dean of Seattle University School of Law and a founder of the Center on Corporations, Law & Society, a co-sponsor of the *New Strategies for Justice* conference.

⁵ See <http://conf2005.equaljusticesociety.net/> for the full conference program (last visited December 15, 2005).

⁶ Julie Su is the Litigation Director of the Asian Pacific American Legal Center of Southern California (APALC), where she works with and represents garment workers to call for corporate accountability and an end to sweatshop conditions.

⁷ John Bonifaz is the founder and General Counsel for the National Voting Rights Institute, a non-profit organization dedicated to protecting the right of all citizens to vote and to participate in the electoral process on an equal and meaningful basis.

⁸ Cheryl Harris is a professor at UCLA School of Law and the director of its Critical Race Studies Concentration.

⁹ Julie Su, *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Economic Justice*, 4 SEATTLE J. SOC. JUST. 239 (2005).

¹⁰ *Id.* at 241.

¹¹ *Id.* at 243.

¹² *Id.*

¹³ John Bonifaz, *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Political Injustice*, 4 SEATTLE J. SOC. JUST. 251 (2005).

¹⁴ *Id.* at 254.

¹⁵ *Id.* at 255, 256.

¹⁶ *Id.* at 257, citing *Buckley v. Valeo*, 424 US 1 (1976).

¹⁷ Cheryl Harris, *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Racial Justice*, 4 SEATTLE J. SOC. JUST. 263 (2005).

¹⁸ See Cheryl Harris, *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Racial Justice*, 4 SEATTLE J. SOC. JUST. 266 (2005) (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003))

¹⁹ *Id.* at 267.

²⁰ *Id.* at 270; see also, *Santa Clara County v. Southern Pacific R. R.*, 118 U.S. 394 (1886) (holding, without analysis, that corporations are persons for purposes of protection from state-based discrimination under the Fourteenth Amendment); Daniel J.H. Greenwood, *Introduction to the Metaphors of Corporate Law*, 4 SEATTLE J. SOC. JUST. 275, 292 (2005); Charlie Cray and Lee Drutman, *Corporations and the Public Purpose: Restoring the Balance*, 4 Seattle J. Soc. Just. 314-15 (2005).

²¹ Professor Greenwood is the S.J. Quinney Professor of Law at the University of Utah S.J. Quinney College of Law.

²² Greenwood, *supra* note 20 at 275.

²³ *Id.* at 282-86.

²⁴ *Id.* at 286-90.

²⁵ *Id.* at 290-92.

²⁶ *Id.* at 292-95; see also Harris, *supra* note 17 at 270.

²⁷ Charlie Cray is the Director of the Center for Corporate Policy, non-profit, non-partisan public interest organization working to curb corporate abuses and make corporations publicly accountable. Lee Drutman is the communications director of Citizen Works, a non-profit, non-partisan organization founded by Ralph Nader to advance justice by strengthening citizen participation in power.

²⁸ Charlie Cray and Lee Drutman, *Corporations and the Public Purpose: Restoring the Balance*, 4 SEATTLE J. SOC. JUST. 307 (2005).

²⁹ *Id.* at 309-11.

³⁰ *Id.* at 332-33.

³¹ William Greider is national affairs correspondent for *The Nation* and the author of *The Soul of Capitalism: Opening Paths to a Moral Economy* (2003).

³² William Greider, *Reinventing the Corporation*, 4 SEATTLE J. SOC. JUST. 365 (2005).

³³ *Id.* at 365-66

³⁴ *Id.* at 366. (Not surprisingly, the increasing corporate capture of government outlined by John Bonifaz, Daniel Greenwood, Charlie Cray and Lee Drutman tracks the trend towards industry deregulation. Because public interest advocates have not focused on reforming corporate structure itself to prevent injustice in the first place, the tools available to protect less powerful interests—legislation, litigation, and even media outreach—have been weakened substantially by corporate influence in all branches of our democratic system of checks and balances.)

³⁵ *Id.* at 370-75.

³⁶ *Id.* at 371-73.

³⁷ *Id.* at 374-75.