

# In Her Own Words: What Corporate Women May—and May Not—Teach Us About Law and Legal Theory

Theresa A. Gabaldon\*

## ABSTRACT

*Cheryl Bachelder, Carly Fiorina, Sheryl Sandberg, and Meg Whitman all are women who have served in the “C-Suite” of a publicly traded company. In addition, each has written a semi-autobiographical advice book on leadership. The titles, in alphabetical order of authorship, are Dare to Serve: How to Drive Superior Results by Serving Others (2015), Tough Choices: A Memoir (2007), Lean In: Women, Work, and the Will to Lead (2013), and The Power of Many: Values for Success in Business and in Life (2010). This Article attempts to contextualize the experiences described in these books with the methods and conclusions of three schools of legal theory—contractarianism, team production theory, and progressive corporate law—that purport to describe and, in some cases, structure corporate law. The Article also attempts to posit tentative conclusions on three specific questions. One is whether high-achieving women believe that the vaunted glass ceiling has been cracked and that women might now have the same opportunities for upward career mobility as men. Another is whether high-achieving women believe that gender may affect performance and, if so, that women may actually bring about “better” results in terms of financial bottom lines. A third is whether high-achieving women evidence interest in attaining better results in terms of softer social metrics, such as considering the interests of more constituents or providing better environmental stewardship. Finally, the Article addresses the limitations of its own methodology and discusses some of the questions it leaves unanswered.*

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\* Lyle T. Alverson Professor of Law, The George Washington University Law School. The author thanks the organizers of, and participants in, the 2018 George Washington University Law Review Symposium on Women and Corporate Governance—particularly Professor Lisa Fairfax and Senior Projects Editor Kelsey Stein. She also thanks Articles Editor Chelsea Getz for an outstanding edit. This Article occasionally draws, without indication, on some of the author’s former work. See generally THERESA A. GABALDON, IN LOCO PARENTIS: DIRECTORIAL DUTIES TO CONSUMERS, in RESEARCH HANDBOOK ON DIRECTORS’ DUTIES (Adolfo Paolini ed., 2014); Theresa A. Gabaldon, *Half-a-Cup Better than None: A Pragmatic Approach to Preventing the Abuse of Financial Consumers*, 81 GEO. WASH. L. REV. 929 (2013); Theresa A. Gabaldon, *Joe Camel Explains It to the Board: Corporate Law, Women in the Workforce, and the Exploitation of Children* [hereinafter Gabaldon, *Joe Camel Explains It to the Board*], 13 DUKE J. GENDER L. & POL’Y 203 (2006); Theresa A. Gabaldon, *Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders*, 65 MD. L. REV. 538 (2006) [hereinafter Gabaldon, *Like a Fish Needs a Bicycle*]; Theresa A. Gabaldon, *The Story of Pinocchio: Now I’m a Real Boy*, 45 B.C. L. REV. 829 (2004). Unattributed biographical details relating to the authors of the books reviewed are drawn from various locations in their respectively authored works.

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## INTRODUCTION: A SMALL CLUB

There are a few things that Cheryl Bachelder, Carly Fiorina, Sheryl Sandberg, and Meg Whitman obviously have in common. First, they are all women who have served in the “C-Suite.” Sandberg is the Chief Operating Officer (“COO”) for Facebook; each of the others has held the position of chief executive officer (“CEO”) for at least one publicly traded company. Bachelder served as Popeyes’ CEO, Fiorina ran Hewlett Packard, and Whitman held the CEO position at each of FTD, eBay, and Hewlett Packard. This means that they are members of a small—some would say painfully small—club. To put this in perspective, as of August 2018, the well-known Fortune 500 companies boasted only 24 female CEOs, down from 32 in 2017.<sup>1</sup> As Fiorina notes, “there are fewer women than men . . . named James.”<sup>2</sup>

A second commonality is that each of the four women has a name you have probably heard, perhaps because each has written a semi-autobiographical advice book on leadership.<sup>3</sup> The titles are *Dare to*

<sup>1</sup> Betsy Atkins, *Where Did All the Female CEOs Go?*, FORBES (Aug. 7, 2018, 12:26 PM), <https://www.forbes.com/sites/betsyatkins/2018/08/07/where-did-all-the-female-ceos-go/#2005b279d1ec> [https://perma.cc/6492-RRS4].

<sup>2</sup> Carly Fiorina, *Trump Has Disparaged Women’s Looks—including Mine. But We Have Bigger Problems.*, WASH. POST (Oct. 18, 2018), [https://www.washingtonpost.com/opinions/trump-has-disparaged-womens-looks—including-mine-but-we-have-bigger-problems/2018/10/18/22e54342-d305-11e8-b2d2-f397227b43f0\\_story.html?utm\\_term=.2c1c6f6a3f8e](https://www.washingtonpost.com/opinions/trump-has-disparaged-womens-looks—including-mine-but-we-have-bigger-problems/2018/10/18/22e54342-d305-11e8-b2d2-f397227b43f0_story.html?utm_term=.2c1c6f6a3f8e) [https://perma.cc/G9M9-S7FU].

<sup>3</sup> Whitman also is a political figure, having run for governor of California. Fiorina, too, is

*Serve: How to Drive Superior Results by Serving Others* (Bachelder),<sup>4</sup> *Tough Choices: A Memoir* (Fiorina),<sup>5</sup> *Lean In: Women, Work, and the Will to Lead* (Sandberg),<sup>6</sup> and *The Power of Many: Values for Success in Business and in Life* (Whitman).<sup>7</sup> There are, of course, other evident similarities: all are well educated (with a total of nine degrees among them, including four Master of Business Administration degrees),<sup>8</sup> all have at least partially raised two or more children,<sup>9</sup> all are or have been married (by their own accounts, quite contentedly),<sup>10</sup> and all are white.

Still, this Introduction thus far has begged the question just why we care about who these four women are and what they have written. With respect to the “who,” why should it matter whether an executive officer is male or female? With respect to the content of their volumes, do we have any reason to believe the stories of “corporate women” will be palpably different from those of “corporate men”?<sup>11</sup>

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notable for her forays into politics, including runs for the United States Senate and Presidency, and a brief period as Ted Cruz’s running mate during the 2016 presidential election.

4 CHERYL BACHELDER, *DARE TO SERVE: HOW TO DRIVE SUPERIOR RESULTS BY SERVING OTHERS* (1st ed. 2015).

5 CARLY FIORINA, *TOUGH CHOICES: A MEMOIR* (2007).

6 SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013).

7 MEG WHITMAN & JOAN O’C. HAMILTON, *THE POWER OF MANY: VALUES FOR SUCCESS IN BUSINESS AND IN LIFE* (2010).

8 Bachelder received both an undergraduate degree and an MBA from Indiana University. *About*, Serving Platforms with Cheryl Bachelder, <https://cherylbachelder.com/about/> [<https://perma.cc/9UAG-GNZY>]. Fiorina has an undergraduate degree from Stanford, an MBA from the University of Maryland, and a Master of Science in Management from the MIT Sloan School of Management. *Carly Fiorina Fast Facts*, CNN (last updated Sept. 9, 2019), <https://www.cnn.com/2015/05/28/us/carly-fiorina-fast-facts/index.html> [<https://perma.cc/7ZC8-K4BZ>]. Sandberg has an undergraduate degree and an MBA from Harvard. *See* SANDBERG, *supra* note 6, at 42, 54. Whitman’s undergraduate degree is from Princeton University, and she earned her MBA at Harvard. *See* WHITMAN & HAMILTON, *supra* note 7, at 24.

9 Bachelder has three children. *See* BACHELDER, *supra* note 4 (acknowledgment). One of Fiorina’s two stepdaughters (both of whom lived primarily with their birth mother) died in 2009. *See* Michael Kruse, ‘*I Have Buried a Child*,’ *POLITICO MAG.* (Nov. 1, 2015), <https://www.politico.com/magazine/story/2015/10/gop-debate-carly-fiorina-2016-i-buried-a-child-213306> [<https://perma.cc/L9ES-F2S8>].

10 Sandberg’s husband of 11 years died in 2015. Each of the others has been married to her current spouse for more than 25 years. Sandberg and Fiorina both note brief first marriages.

11 In the words of John Kenneth Galbraith,

[C]onsideration of the life and larger social existence of the modern corporate man—the individual in the reasonably senior ranks of the thousand largest corporations—begins and also largely ends with the effect of one all-embracing force. That is organization—the highly structured assemblage of men (and some women) of which he is a part.

John Kenneth Galbraith, *About Men; Corporate Man*, *N.Y. TIMES* (Jan. 22, 1984), <https://>

Most feminist scholars probably would regard these as issues worthy of investigation. These scholars share a common overlay of focus on the position of women in a patriarchal society and a common goal of expunging the perceived inequalities of that position.<sup>12</sup> As part of the feminist legal studies undertaking, the experience of women is examined, the values of women are explored, and existing legal and social structures are assessed in terms of their arguable congruence with that experience and those values.<sup>13</sup> This type of analysis does not necessarily presuppose that the experiences and values of all or most women are different from those of all or most men,<sup>14</sup> but the possibility that a difference exists dictates the approach.<sup>15</sup>

As an integral part of their analytical process, feminist scholars make use of the concept of “gender,” which is defined as the socially constructed (as opposed to biological) differences between being male and female.<sup>16</sup> The term “gendered” sometimes is used to describe

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[www.nytimes.com/1984/01/22/magazine/about-men-corporate-man.html](http://www.nytimes.com/1984/01/22/magazine/about-men-corporate-man.html) [<https://perma.cc/DA68-YLJT>].

<sup>12</sup> See SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 244 (1986) (“It would be historically premature and delusory for feminism to arrive at a ‘master theory,’ at a ‘normal science’ paradigm with conceptual and methodological assumptions that we all think we accept . . . . We need to learn how to see our goal for the present moment as a kind of illuminating ‘riffing’ between and over the beats of the various patriarchal theories and our own transformations of them . . . .”); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 *STAN. L. REV.* 751, 753 n.11 (1989) (book review) (“If . . . the need for diversity within feminism . . . is answered simply with uncritical pluralism, nothing has been gained . . . . To the extent that any articulation of feminism is white, it is not only incomplete but also inadequately centered in women’s experience, and therefore inadequately feminist.”); Elaine Marks & Isabelle de Courtivron, *WHY THIS BOOK?*, in *NEW FRENCH FEMINISMS: AN ANTHOLOGY*, at xi (Elaine Marks & Isabelle de Courtivron eds., 1980) (“[American feminists’] style of reasoning, with few exceptions, follows the Anglo-American empirical, inductive, anti-speculative tradition. They are often suspicious of theories and theorizing.”).

<sup>13</sup> See generally Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 *UCLA L. REV.* 1037, 1049–55 (1996).

<sup>14</sup> See generally Ronnie Cohen, *Feminist Thought and Corporate Law: It’s Time to Find Our Way up from the Bottom (Line)*, 2 *AM. U. J. GENDER & L.* 1 (1994).

<sup>15</sup> The probability that values and experience may vary woman to woman is an analytic challenge with which feminists constantly grapple. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585–86 (1990); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 *HARV. WOMEN’S L.J.* 115, 117–18 (1989). Nonetheless, if the values of even some women identifiably and predictably diverge from those underlying a legal regime, it is a matter to be reckoned with.

<sup>16</sup> For a discussion of “gendering,” see generally Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995) (treating “gender” and “sex” separately and discussing the applicability of that distinction to employment discrimination and other areas of law). As an example, for a time “between the Industrial Revolution and the advent of the women’s liberation movement, the popularly ascribed gender role of women was to remain at home, raising

structures, analyses, etc., that are the outcome of gender. It may, for example, be said that corporate law is gendered because it predominantly is the product of men, constructed in (presumably unknowing) reliance on their own experience of being male in society. Reading what the quartet of chosen authors has written may illuminate this possibility. It may also permit us to at least anecdotally contextualize the experience of these women with the methods and conclusions of schools of legal theory that purport to describe and, in some cases, structure corporate law.

Another compelling reason to read and comment on these stories is to reach tentative conclusions about three specific questions. One is whether high-achieving women believe that the vaunted glass ceiling has been cracked and that women might now have the same opportunities for upward career mobility as men. Another is whether high-achieving women believe that gender may affect performance and, if so, that women may actually bring about “better” results in terms of financial bottom lines (a possibility that recently has been much in the news).<sup>17</sup> A third is whether high-achieving women evidence interest in attaining better results in terms of softer social metrics, such as considering the interests of more constituents or providing better environmental stewardship.<sup>18</sup>

This Article comments on what each of the noted volumes seems to indicate about the opportunities for women and the possible relationships between gender and bottom line, and gender and social metrics. Additional length will be devoted to experiencing through others—namely, these four successful business women—what legal academics have not experienced ourselves. The idea, then, is to apply

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children (although, most certainly, some women, either as a matter of aspiration or necessity, did deviate).” Gabaldon, *Joe Camel Explains It to the Board*, *supra* note \*, at 212 n.41.

<sup>17</sup> See generally MEGGIN THWING EASTMAN & PANOS SERETIS, MSCI, WOMEN ON BOARDS AND THE HUMAN CAPITAL CONNECTION 3, 12 (2018), <https://www.msci.com/documents/10199/4bd5f3bb-e5a4-4993-9c2a-4b44423ba4a2> [<https://perma.cc/N7RT-QQKT>] (reporting better financial results for companies with more than three women on the board, but noting that “[c]ompanies with a critical mass of female directors (three or more each year from 2014 to 2016) were substantially more likely than average to also have strong human capital management practices, and vice versa. The inverse also held true: Companies with few or no female directors were more likely to have lagging human capital management practices, and vice versa.”); Maria LaMagna, *Having More Women on Boards Can Boost Your Investment Returns*, MARKETWATCH (Oct. 1, 2018, 4:40 PM), <https://www.marketwatch.com/story/something-amazing-happens-when-you-have-3-or-more-women-on-a-company-board-2018-03-08> [<https://perma.cc/78VX-UEKE>].

<sup>18</sup> Clearly, if we are concerned with results, we also would care about the opportunity of women to be in a position to bring them about.

this experience to briefly factcheck the theories of contractarianism, team production, and progressive corporate law.

In Part I, this Article attempts to describe the four authors' views with respect to desirable leadership, organizational values, and several other topics. These include their opinions on just what it is that top corporate managers should be seeking—and for whom—and just what the role of the law should be in allowing them to do so. Also explicitly addressed are their sentiments on the role of gender and its interaction with the aforementioned topics. Part II then draws on Part I in evaluating the descriptive and normative claims made by the schools of legal analysis listed above. Finally, Part III addresses the limitations of this Article's own methodology and discusses some of the questions it leaves unanswered.

## I. WHO THEY ARE AND AS THEY SEE IT

As an initial matter, it should be acknowledged that the four books have very different purposes. Bachelder's promulgates a particular leadership style for which she does not take credit but to which she attributes her success in turning Popeyes around from near-failure to fast-food powerhouse. Although the chapters are liberally strewn with personal anecdotes (and you can almost smell the chicken), none of them have much to do with gender.<sup>19</sup> Fiorina's account is the most straightforwardly autobiographical, although it is clear that she believes she is teaching lessons—one of which is that women in corporate America very definitely have challenges not faced by men.<sup>20</sup> Sandberg's book specifically addresses empowering women as leaders. It has a very personal tone and uses her life as a frequent example.<sup>21</sup> Whitman's is about running a principle-based organization and has relatively little explicit discussion of gender.<sup>22</sup>

### A. *Biographical Background*

Cheryl Bachelder was born in 1956, the oldest of four children, all of whom became CEOs.<sup>23</sup> After graduating from business school, she worked in a number of managerial positions at three different compa-

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<sup>19</sup> See generally BACHELDER, *supra* note 4.

<sup>20</sup> See generally FIORINA, *supra* note 5.

<sup>21</sup> See generally SANDBERG, *supra* note 6.

<sup>22</sup> See generally WHITMAN & HAMILTON, *supra* note 7.

<sup>23</sup> See Jenna Goudreau, *Popeyes CEO to Women: Don't Waste Time Trying to Fit In*, FORBES (Jan. 7, 2013, 12:44 PM), <https://www.forbes.com/sites/jennagoudreau/2013/01/07/popeyes-ceo-to-women-dont-waste-time-trying-to-fit-in/#55501ecf2584> [https://perma.cc/2JB7-ANAP].

nies before temporarily leaving the workforce to be a full-time homemaker (the only one of the four authors to do so).<sup>24</sup> Upon her return, she obtained a position as senior vice president of marketing and product development for Domino's Pizza.<sup>25</sup> She became the president of KFC in 2001 and held that post for two years, during which she was diagnosed with breast cancer.<sup>26</sup> She was fired in 2003 for lackluster performance, which she attributed to a misfit of her focus on long-term results and the board of directors' expectations of short-term profit.<sup>27</sup> She did not reenter the business world until 2006, when she joined the board of directors of AFC Enterprises (the owner of the Popeyes chain).<sup>28</sup> In 2007, she was elected CEO and, over the next 10 years, presided over its steady growth.<sup>29</sup> Bachelder retired in 2017 when the chain was acquired by Restaurant Brands International Inc.<sup>30</sup> Her advice book, *Dare to Serve: How to Drive Superior Results by Serving Others*, was originally published two years before her retirement.

Born in 1954, Carly Fiorina is arguably the most notorious of the four authors. She dropped out of UCLA Law School in 1976 and worked in real estate and as an Italian tutor before earning an MBA in marketing.<sup>31</sup> She worked her way up the management ladder at AT&T, eventually heading corporate operations for Lucent Technologies, which was successfully spun off by AT&T in 1996.<sup>32</sup> In that ca-

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<sup>24</sup> Cheryl Bachelder, *How Did I Get Here?*, BLOOMBERG (2015), <https://www.bloomberg.com/graphics/2015-how-did-i-get-here/cheryl-bachelder.html> [<https://perma.cc/9PAC-T2PU>].

<sup>25</sup> *Id.*

<sup>26</sup> Shana Lebowitz, *The CEO of Popeyes Says One of Her Biggest Professional Successes 'Would Not Exist' If She Hadn't Been Fired Earlier in Her Career*, BUS. INSIDER (Dec. 11, 2016, 12:20 PM), <https://www.businessinsider.com/cheryl-bachelder-ceo-popeyes-2016-12> [<https://perma.cc/8DPT-F8WR>].

<sup>27</sup> *See id.*

<sup>28</sup> *See* Jonathan Maze, *Cheryl Bachelder to Step Down at Popeyes*, NATION'S RESTAURANT NEWS (Mar. 2, 2017), <https://www.nrn.com/people/cheryl-bachelder-step-down-popeyes> [<https://perma.cc/FHK2-VZ7R>].

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See* Frank Bruni, *Carly Fiorina Means Business*, N.Y. TIMES MAG. (June 2, 2010), <https://www.nytimes.com/2010/06/06/magazine/06Fiorina-t.html> [<https://perma.cc/XP7S-GMSQ>]; Michelle Ye Hee Lee, *Carly Fiorina's 'Secretary to CEO' Career Trajectory (Fact Checker Biography)*, WASH. POST (Sept. 25, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/09/25/carly-fiorinas-bogus-secretary-to-ceo-career-trajectory-fact-checker-biography/?utm\\_term=.201aa4d6f7a8](https://www.washingtonpost.com/news/fact-checker/wp/2015/09/25/carly-fiorinas-bogus-secretary-to-ceo-career-trajectory-fact-checker-biography/?utm_term=.201aa4d6f7a8) [<https://perma.cc/FA92-P495>].

<sup>32</sup> *See* Patricia Sellers, *The 50 Most Powerful Women in American Business*, FORTUNE (Oct. 12, 1998), <http://fortune.com/1998/10/12/carly-fiorina-most-powerful-women/> [<https://perma.cc/Z3GX-QZGG>]; *AT&T; Spinoff Lucent Makes Historic IPO*, L.A. TIMES (Apr. 4,



capacity, she was named “The Most Powerful Woman in American Business” in 1998—edging out Oprah Winfrey in the number two spot.<sup>33</sup> The following year she became the CEO of Hewlett-Packard Company (“HP”), a Fortune 20 company.<sup>34</sup> Of this achievement, it was subsequently said that “Carly Fiorina didn’t just break the glass ceiling, she obliterated it.”<sup>35</sup> Her years at HP were somewhat controversial: she became known as “Chainsaw Carly” for her willingness to engage in widespread employee layoffs,<sup>36</sup> and a merger with Compaq spawned a media-drawing proxy fight that was won by HP management by a slim margin of 1.4%.<sup>37</sup> Although the company’s revenue doubled during Fiorina’s time at HP, its net income did not increase, and its stock price fell by 65%<sup>38</sup> (part of which is surely explained by the burst of the dot-com bubble). She was forced to resign in early 2005.<sup>39</sup> Her autobiography, *Tough Choices: A Memoir*, was published the following year. Fiorina subsequently has been involved in state and national Republican politics and has held positions with various philanthropies, generally detailed in her second book, *Rising to the Challenge: My Leadership Journey*, published in 2015.<sup>40</sup>

Sheryl Sandberg is the youngest of the authors, born in 1969.<sup>41</sup> Following stellar achievements at Harvard College, she worked with

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1996), <https://www.latimes.com/archives/la-xpm-1996-04-04-fi-54949-story.html> [<https://perma.cc/E6P5-GPXY>].

<sup>33</sup> Sellers, *supra* note 32.

<sup>34</sup> Dan Mitchell, *Here’s Why Carly Fiorina Is Such a Controversial Figure*, TIME (May 4, 2015), <http://time.com/3845767/carly-fiorina-hp/> [<https://perma.cc/B2Y7-LNK5>].

<sup>35</sup> Matthew Boyle, *Carly Fiorina Talks Tough*, CNN MONEY (Oct. 24, 2007, 9:12 AM), [https://money.cnn.com/2007/10/23/news/newsmakers/fiorina\\_hp.fortune/index.htm](https://money.cnn.com/2007/10/23/news/newsmakers/fiorina_hp.fortune/index.htm) [<https://perma.cc/X96X-6USB>].

<sup>36</sup> See *infra* notes 158–67 and accompanying text.

<sup>37</sup> David F. Larcker & Brian Tayan, *Leadership Challenges at Hewlett-Packard: Through the Looking Glass*, in STANFORD CLOSER LOOK SERIES 2 (2011), <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-21-hp-leadership-challenges.pdf> [<https://perma.cc/D85M-RXCE>]. The transaction’s announcement led to a 23% decline in HP’s stock price, see *infra* text accompanying note 120, and later was described as “one of the more questionable deals of the time,” Michael J. de la Merced, *Hewlett-Packard’s Rocky Deal History*, N.Y. TIMES: DEALBOOK (Aug. 18, 2011, 4:29 PM), <https://dealbook.nytimes.com/2011/08/18/hewlett-packards-rocky-deal-history/> [<https://perma.cc/73LV-X9V8>].

<sup>38</sup> See Matt Krantz, *President Fiorina? How Carly Did at HP*, USA TODAY: AM. MKTS. (May 4, 2015, 12:51 PM), <http://americasmarkets.usatoday.com/2015/05/04/president-fiorina-how-carly-did-at-hp/> [<https://perma.cc/7XA6-A945>].

<sup>39</sup> FIORINA, *supra* note 5, at 301–03.

<sup>40</sup> See generally CARLY FIORINA, *RISE TO THE CHALLENGE: MY LEADERSHIP JOURNEY* (2015).

<sup>41</sup> See Ken Auletta, *A Woman’s Place: Can Sheryl Sandberg Upend Silicon Valley’s Male-Dominated Culture?*, NEW YORKER (July 4, 2011), <https://www.newyorker.com/magazine/2011/07/11/a-womans-place-ken-auletta> [<https://perma.cc/7H58-HWCT>].



her former professor, Larry Summers, as a research assistant at the World Bank.<sup>42</sup> She says that she rejected his suggestion that she apply for international fellowships “on the grounds that a foreign country was not a likely place to turn a date into a husband.”<sup>43</sup> After business school and one year as a management consultant, she became Summers’ special assistant in his new post as deputy secretary at the Treasury Department and, later, his chief of staff when he served as U.S. Treasury Secretary.<sup>44</sup> She then managed online sales for Google, where the team she supervised grew from 4 to 4,000.<sup>45</sup> In 2008, she joined Facebook as its COO,<sup>46</sup> a job she accepted notwithstanding the availability elsewhere of the higher-ranked position of CEO.<sup>47</sup> She has served in that position ever since,<sup>48</sup> adding a role as the company’s first female board member in 2012.<sup>49</sup> *Lean In: Women, Work, and the Will to Lead* was published the next year. Sandberg’s second book, *Option B: Facing Adversity, Building Resilience, and Finding Joy*, was published in 2017.<sup>50</sup> Written after the unexpected death of her husband, it addresses grief and resilience.<sup>51</sup> She consistently appears in *Fortune*’s list of “Most Powerful Women,” most recently appearing at number six.<sup>52</sup>

Last, but certainly not least, is Meg Whitman, born in 1956.<sup>53</sup> She graduated from Princeton University in 1977<sup>54</sup> and was grateful

42 *Id.*

43 SANDBERG, *supra* note 6, at 17.

44 *Id.* at 56.

45 *Lead, Lead Again*, MASTERS OF SCALE (May 31, 2017), <https://mastersofscale.com/sheryl-sandberg-lead-lead-again/> [<https://perma.cc/W4MC-YUCB>].

46 Shayndi Raice & Joann S. Lublin, *Sheryl Sandberg Joins Facebook Board*, WALL STREET J. (June 25, 2012, 8:15 PM), <https://www.wsj.com/articles/SB10001424052702304782404577489003831226744> [<https://perma.cc/FM9B-J6XQ>].

47 SANDBERG, *supra* note 6, at 60.

48 #12 *Sheryl Sandberg*, FORBES, <https://www.forbes.com/profile/sheryl-sandberg/#17552b7358b6> [<https://perma.cc/S56W-2CHT>].

49 Raice & Lublin, *supra* note 46.

50 *See generally* SHERYL SANDBERG & ADAM GRANT, *OPTION B: FACING ADVERSITY, BUILDING RESILIENCE, AND FINDING JOY* (2017); *see also* Rebecca Mead, *Sheryl Sandberg’s “Option B” and the Facebook Way to Grieve*, NEW YORKER (May 4, 2017), <https://www.newyorker.com/culture/cultural-comment/sheryl-sandbergs-option-b-and-facebooks-way-to-grieve-book-review> [<https://perma.cc/NXZ9-LBV9>].

51 Mead, *supra* note 50.

52 *See Most Powerful Women*, FORTUNE, <http://fortune.com/most-powerful-women/> [<https://perma.cc/R5YF-T6TL>].

53 Mallie Jane Kim, *10 Things You Didn’t Know About Meg Whitman*, U.S. NEWS & WORLD REP. (Oct. 18, 2010, 12: 15 PM), <https://www.usnews.com/news/articles/2010/10/18/10-things-you-didnt-know-about-meg-whitman-author-name> [<https://perma.cc/3NVC-GK9A>].

54 *Id.*

enough to endow it with \$30 million for an eponymous residential college in 2002.<sup>55</sup> After her graduation from business school in 1979,<sup>56</sup> she worked for Procter & Gamble, The Walt Disney Company, Stride Rite Corporation, FTD, and Hasbro.<sup>57</sup> She also served a stint as a management consultant with Bain & Co.<sup>58</sup> Whitman's first job as a CEO was at FTD from 1995 to 1997.<sup>59</sup> Her second was with eBay, which expanded from 30 to approximately 15,000 employees between the day she joined (in 1998) and the time, 10 years later, when she left.<sup>60</sup> Her third, which followed a foray into California politics,<sup>61</sup> commenced at HP in 2011 and ended in 2018.<sup>62</sup> Her most recent ranking (of several) among the "[m]ost [p]owerful [w]omen in [b]usiness" was in 2017 at number seven.<sup>63</sup> She has been heavily involved in Republican state and national politics, but endorsed Democrat Hillary Clinton's 2016 campaign for President.<sup>64</sup> *The Power of Many: Values for Success in Business and in Life* appeared in print in 2010 with an epilogue emphasizing her qualifications to serve in political office.<sup>65</sup>

### B. *As They See It*

The four books clearly are intended to be educational, rather than entertaining. As a result, it is fairly easy to identify the authors' views on a number of matters, such as leadership and organizational

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<sup>55</sup> Joey Gardiner, *eBay CEO Gives \$30M to Princeton*, ZDNET (Feb. 5, 2002, 1:45 PM), <https://www.zdnet.com/article/ebay-ceo-gives-30m-to-princeton/> [<https://perma.cc/FS6E-2GQC>]; see also *Princeton Receives \$30 Million Gift from Trustee Meg Whitman*, CANDID: PHILANTHROPY NEWS DIGEST (Feb. 5, 2002), <https://philanthropynewsdigest.org/news/princeton-receives-30-million-gift-from-trustee-meg-whitman> [<https://perma.cc/ULG4-L3PE>].

<sup>56</sup> Kim, *supra* note 53.

<sup>57</sup> WHITMAN & HAMILTON, *supra* note 7, at 4, 25, 55, and 159.

<sup>58</sup> See *id.* at 201.

<sup>59</sup> *Meg Whitman*, WASH. POST, [https://www.washingtonpost.com/politics/meg-whitman/gIQAWpOu9O\\_print.html](https://www.washingtonpost.com/politics/meg-whitman/gIQAWpOu9O_print.html) [<https://perma.cc/6WPX-HCLJ>].

<sup>60</sup> *Id.*; Brad Stone, *Settlement Was Paid in Whitman Shoving Incident*, N.Y. TIMES (June 14, 2010), <https://www.nytimes.com/2010/06/15/us/politics/15whitman.html?scp=2&sq=whitman&st=cse> [<https://perma.cc/99Q2-J4N9>].

<sup>61</sup> See Jonathan Martin, *Meg Whitman, Calling Donald Trump a 'Demagogue,' Will Support Hillary Clinton for President*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/us/politics/meg-whitman-hillary-clinton.html> [<https://perma.cc/B6UW-VPDF>].

<sup>62</sup> See Jonathan Vanian, *HPE CEO Meg Whitman Reveals Why She's Stepping Down*, FORTUNE (Nov. 22, 2017), <http://fortune.com/2017/11/21/meg-whitman-hewlett-packard-enterprise-ceo/> [<https://perma.cc/55GN-HZR2>].

<sup>63</sup> See *These Are the Top 10 Most Powerful Women in Business*, FORTUNE (Sept. 21, 2017), <http://fortune.com/2017/09/21/top-10-most-powerful-women-in-business/> [<https://perma.cc/N4HL-EQ22>]. She was absent from the list in 2018, presumably owing to her exit from business when she left HP. See *Most Powerful Women*, *supra* note 52.

<sup>64</sup> Martin, *supra* note 61.

<sup>65</sup> See WHITMAN & HAMILTON, *supra* note 7, at 269–74.

values. On some, however, including gender, two of the authors are somewhere between indifferent and circumspect. On others, including the importance of corporate law, the attitudes of each author can, at most, be discerned between the lines.

### 1. *On Leadership and Organizational Values*

*Leadership Values.* Whitman makes the straightforward claim that success as a corporate leader does not require relinquishing decent, commonsense values, nor stepping on people while climbing the corporate ladder in Manolo Blahniks.<sup>66</sup> In fact, she makes it pretty clear that she doesn't wear fancy shoes, referring to herself as "frumpy" and too harried to shop.<sup>67</sup> She specifically recalls watching how "greed is good" played out in the eighties (badly) and how self-dealing and fraud undermined the entire economy in the Enron years.<sup>68</sup>

Certainly, none of the other three give the impression that they would take issue with Whitman on these points, and each makes it clear that honesty is an integral part of her leadership toolkit. For instance, Sandberg has an entire chapter titled "Seek and Speak Your Truth."<sup>69</sup> Sandberg also emphasizes the need to see things from others' perspectives,<sup>70</sup> while Bachelder emphasizes the need to "[t]hink positively about the people you lead" and lead with humility.<sup>71</sup> Bachelder also makes much of the importance of affording dignity to others through application of the golden rule,<sup>72</sup> and she devotes a great deal of discussion to how to discover, and encourage others to discover, "personal purpose."<sup>73</sup> Her own personal purpose, at least in part, is to "[s]teward[] . . . future leaders."<sup>74</sup> She describes "[s]elf-centered leadership" as a "lazy path,"<sup>75</sup> and she disapprovingly notes that "[l]everaging power over others is the primary leadership model celebrated in our culture."<sup>76</sup> Somewhat similarly, for Fiorina

<sup>66</sup> *Id.* at 5.

<sup>67</sup> *Id.* at 183–85.

<sup>68</sup> *Id.* at 5, 130.

<sup>69</sup> See generally SANDBERG, *supra* note 6, at 77–91 (Chapter 6).

<sup>70</sup> See *id.*

<sup>71</sup> BACHELDER, *supra* note 4, at 16, 149.

<sup>72</sup> See *id.* at 143–44.

<sup>73</sup> *Id.* at 67–79. Bachelder further advises aspiring leaders to remain "out of the spotlight" and to focus instead on helping others "pursue [their] dreams and find meaning in [their] work." *Id.* at 5.

<sup>74</sup> *Id.* at 153.

<sup>75</sup> *Id.* at 113 (emphasis omitted).

<sup>76</sup> *Id.* at 109.

“[l]eadership is about making a positive difference for and with others.”<sup>77</sup> “Chainsaw Carly” sobriquet aside, Fiorina also says that she found it important to stand up for subordinates (at least the ones she didn’t fire), to see bosses and employees as people (noting that when she terminated people she tried to do it with dignity), and to make it clear that abusive behavior is not tolerated.<sup>78</sup>

Overall, one comes away from the books firmly impressed with the idea that these are corporate officers who devoutly believe in the value of teamwork. Fiorina at one point describes her job as a leader as letting her team do what works while she figures out some problem to fix. As an example, while heading an engineering group at AT&T, she recognized she could “add no value by telling these people how to do their jobs or getting in their way.”<sup>79</sup> She decided, instead, “to focus [her] time on something no one else was doing” and spent her time discovering billing errors that ultimately saved the company hundreds of millions of dollars.<sup>80</sup> She also narrates multiple stories about groupthink sessions at which ideas were shared and solutions achieved, and she emphasizes the importance of soliciting feedback from all team members.<sup>81</sup> In particular, she recommends designing missions as a team.<sup>82</sup> Of her time at HP she says with pride, “[i]n the boardroom, with the exception of [her] very last Board meeting in February of 2005, every decision [they] made was unanimous.”<sup>83</sup> She nonetheless notes that “a failure to achieve consensus can’t derail progress when a decision has to be made.”<sup>84</sup>

Whitman’s “power of many” envisions the use of technology to create a much larger team—one comprised not just of corporate officers and employees, but one that incorporates the network of eBay users as well.<sup>85</sup> Under her watch, the company grew from a “tiny start-up” to a “revolutionary economic engine that now provides a livelihood for people around the world.”<sup>86</sup> She, like Fiorina, gave the expanded team “tools, structure, and minimal rules” and “tried to stay

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77 FIORINA, *supra* note 5, at 168.

78 *See id.* at 53–54, 236–37.

79 *Id.* at 49.

80 *Id.* at 49–51; *see also* Carly Fiorina, *Making the Best of a Mess*, N.Y. TIMES (Sept. 29, 1999), <https://archive.nytimes.com/www.nytimes.com/library/financial/092999manage-fiorina.html> [<https://perma.cc/DUW6-2BF9>].

81 *See, e.g.*, FIORINA, *supra* note 5, at 233–34.

82 *See id.*

83 *Id.* at 234.

84 *Id.* at 233–34.

85 *See* WHITMAN & HAMILTON, *supra* note 7, at 3–4, 8.

86 *Id.* at 4.

out of the way.”<sup>87</sup> One of her chapters is specifically devoted to teamwork and describes the efforts that she and another woman took at Bain & Co. to increase the enfranchisement of new hires, in part by reducing “the Roman spectacle factor” of (essentially) hazing them.<sup>88</sup>

Bachelder describes at length working with her “leadership team” to turn Popeyes around.<sup>89</sup> One tactic was to rotate senior leaders so someone fresh and more objective could take over when someone became exhausted by a particular task.<sup>90</sup> The team went on teambuilding retreats and learned to find out the strengths of each member in order to assign appropriate roles.<sup>91</sup> If they discovered there was a skill gap, they added to the team.<sup>92</sup>

*Organizational Values.* Two of the authors—Whitman and Fiorina—had quite a bit to say about the importance of organizational values. Fiorina describes fighting for “the core values of the HP brand”: “trust, respect, and integrity.”<sup>93</sup> In another place, she comments appreciatively on a longer list, including “trust, respect, integrity, passion for customers, teamwork and collaboration, innovation, contribution—and one new addition [by reason of a merger with Compaq][:] speed and agility.”<sup>94</sup> She notes, however, that “there’s a difference between falling short of an aspiration for speed and agility and willful violation of bedrock principles like trust, respect and integrity.”<sup>95</sup> She describes ethics as a “leading indicator” of a company’s success and states that “managers, employees, executives, and board members must believe that ethical conduct is always more important than short-term results.”<sup>96</sup> And, of a piece, at one point Bachelder notes that passion, humility, and accountability, presumably on the part of the entire organization, lead to increased stock price.<sup>97</sup>

<sup>87</sup> *Id.* at 8.

<sup>88</sup> *Id.* at 200–02. She describes her involvement in sports as a young girl as valuable training in teamwork—but more importantly, it seems, in competition, saying, “[she doesn’t] believe it is a coincidence that so many successful women executives today were active—and in many cases are still active—in sports.” *Id.* at 238.

<sup>89</sup> See generally BACHELDER, *supra* note 4.

<sup>90</sup> See *id.* at 30.

<sup>91</sup> *Id.* at 48–50.

<sup>92</sup> *Id.* at 50.

<sup>93</sup> FIORINA, *supra* note 5, at 254.

<sup>94</sup> *Id.* at 265.

<sup>95</sup> *Id.* at 266.

<sup>96</sup> *Id.* at 322–23.

<sup>97</sup> BACHELDER, *supra* note 4, at 18–19, 95–97. She also celebrates “democratic capitalism” which “creates conditions for entrepreneurs to invest and grow small businesses.” *Id.* at 23.

Whitman is, if anything, even more interested in the importance of organizational values. She celebrates eBay's (evidently very large) employee name badges, which carry the following statements:

We believe people are basically good.

We recognize and respect everyone as a unique individual.

We believe everyone has something to contribute.

We encourage people to treat others the way they want to be treated.

We believe that an honest, open environment can bring out the best in people.<sup>98</sup>

Whitman does not claim authorship of the list, instead attributing it to the (male) founder of eBay, and notes that others (who happen to be male) have successfully run companies with highly combative styles or mantras like "Only the paranoid survive."<sup>99</sup> She nonetheless found it imperative for eBay to "demonstrate that [they] care about doing the right thing," ultimately becoming "very comfortable with the position that [they] were not going to hide behind the idea of free speech every time [they] faced something [they] knew was just plain wrong"—like the sale of Nazi memorabilia or the refrigerator Jeffrey Dahmer allegedly used to store his murder victim's body parts.<sup>100</sup> She says she has "come to appreciate that the character of a company is one of its most vital assets."<sup>101</sup> Although when she interviewed for the position of CEO she was impressed by eBay's philosophy that people are good and can be trusted, she still admits that "what really got [her] attention were the numbers they shared with [her] . . . [She] had never seen numbers for a young enterprise that could match eBay's."<sup>102</sup>

## 2. *What Corporate Managers Should Be Seeking, and for Whom*

### a. *The Goals of Corporate Life*

*Stock Price and Bottom Lines.* Sandberg's mission (and perhaps her position as something other than CEO or CFO) does not give her much occasion to comment on financial matters, but the other three wax eloquent. Interestingly, although they share great interest in finance, they have distinctive views on the importance of stock price.

Bachelder is relatively the most interested in stock price *per se*. She first got the idea for being a servant-leader from a presentation

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<sup>98</sup> WHITMAN & HAMILTON, *supra* note 7, at 5–6.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 97–99.

<sup>101</sup> *Id.* at 106.

<sup>102</sup> *Id.* at 18–19.

(by a man) suggesting that the servant-leader model of management style delivered superior performance results.<sup>103</sup> She notes that when she joined Popeyes, the stock price had slid, in just a few years, from \$34 per share to \$13.<sup>104</sup> In the next six years, it rose into the \$40 range.<sup>105</sup> She credits the increase to the change in management style that she, with her leadership team, implemented. She says that “[p]rinciples perform” and that (as noted above) passion, humility, and accountability lead to increased stock price.<sup>106</sup>

Whitman is somewhat less impressed with the metric of stock price. She praises eBay’s founders, saying “[t]hey knew that the point of running a business was to provide some kind of product or service for which people paid more money than it cost to provide the service, thus earning the company a profit,”<sup>107</sup> and she notes elsewhere that profit is “the difference between the revenues and [] costs, otherwise known as the point of being in business.”<sup>108</sup> She observes that eBay placed a greater emphasis on financial results compared to other internet-based companies,<sup>109</sup> lamenting that “[d]uring the dot-com explosion, young employees had a tendency to view the company’s stock price, rather than its bottom-line results, as a measure of its value and success.”<sup>110</sup> Whitman recalls lecturing those employees on valuing a company based on fundamentals, rather than market price: “[Y]ou must never confuse our stock price day to day, week to week, or even month to month with the fundamental value of our company.”<sup>111</sup> She describes the appropriate prioritization in the following terms: “If we do the very best job possible in meeting customers’ needs, increasing revenues, and minimizing costs, we will deliver profits, and that will be reflected in the stock price.”<sup>112</sup> She characterizes the idea that rising stock price can reflect increased value in the absence of any change in performance or strategy as “delusional.”<sup>113</sup> Given eBay’s reported revenues of \$430 million in 2000, Whitman announced an annual revenue

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103 BACHELDER, *supra* note 4, at 6.

104 *Id.* at 7.

105 *Id.* at 8.

106 *Id.* at 18–19, 96–97.

107 WHITMAN & HAMILTON, *supra* note 7, at 115–16.

108 *Id.* at 19.

109 *Id.* at 137. She also comments adversely on the costly customer acquisition expenditures of many dot-coms. *See id.* at 116.

110 *Id.* at 141.

111 *Id.*

112 *Id.* at 142.

113 *Id.*



goal of \$3 billion by 2005.<sup>114</sup> In fact, in that year the company's revenues hit \$4.5 billion.<sup>115</sup> She says "[i]f [she] failed to make that number, it could mean [she] would lose [her] job. But the reason [she] was willing to accept that risk was that [she] was not trying to energize the stock; [she] was trying to energize and inspire the *company*."<sup>116</sup>

In Fiorina's somewhat similar view, "a CEO should . . . [not] manage the stock price."<sup>117</sup> She explains that "stock price has become too important" given that it is merely a function of whether quarterly performance meets or exceeds analysts' estimates.<sup>118</sup> She specifically notes that "[t]he role of a CEO is to think about years, not quarters. Quarterly results are a measure of past decisions and actions, and a CEO must always face forward."<sup>119</sup> She says she espoused (albeit denying great enthusiasm for) the infamous merger with Compaq even though bankers "predicted a 20 percent drop in the stock price (it turned out to be 23 percent the day of the announcement)."<sup>120</sup> She worried, though, about the fact that stock price continued to sag after the merger and supported a significant company buy-back program in order to prop it up.<sup>121</sup> She also describes the board as "expressing legitimate concern about the [flaccid] stock price" in a year in which HP "deliver[ed] over 20 percent [earnings per share] growth."<sup>122</sup>

*Other Goals.* In an epilogue, Fiorina writes that financial statements are "lagging indicators" of a company's health.<sup>123</sup> In her view, "future fortunes . . . can be better understood by examining the signposts of leading indicators. The leading indicators of any business are [the following]: customer satisfaction, rate of innovation, the diversity of a management team, and ethics."<sup>124</sup> She quotes Dave Packard, one of HP's founders, in saying, "[p]eople wrongly assume that our proper end is profit. Profit is what makes all the other ends possible."<sup>125</sup> Whitman gives an example of deliberately disregarding the bottom line in order to do the right thing by customers: eBay chose to refund all listing fees paid by sellers whose auctions were disrupted by a system

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114 *Id.* at 225–26.

115 *Id.* at 228.

116 *Id.*

117 FIORINA, *supra* note 5, at 223.

118 *Id.* at 224.

119 *Id.* at 223.

120 *Id.* at 240.

121 *See id.* at 278–79.

122 *Id.* at 286.

123 *Id.* at 320.

124 *Id.* at 321.

125 *Id.* at 213.

crash, even though the company was not contractually required to do so.<sup>126</sup> She says that it “seems to surprise people . . . that these two sets of values—the hard-nosed business values and the ‘softer,’ ethical values—were complementary.”<sup>127</sup> At another point, she notes that “[m]aking eBay a lawful, safe, positive, global marketplace where all people were treated with respect sometimes meant turning away from product categories that could have represented very large revenues for [them].”<sup>128</sup> These categories included tobacco, guns, and alcohol.<sup>129</sup> Bachelder describes with admiration the insistence by Domino’s founder (over his CFO’s objection) that all bills be paid upon arrival because “[h]e didn’t think it was right to use the supplier’s cash to his advantage.”<sup>130</sup>

### *b. Corporate Constituents*

*Shareholders.* Whitman acknowledges the principle of shareholder primacy when she says “[they] vowed to be frugal and treat shareholder resources as something to be conserved for the best possible use.”<sup>131</sup> Even more explicitly, she observes that “[i]t was exciting to change the world, but at the end of the day [they] were a business, and [their] first responsibility was to make a profit for [their] shareholders. That was job one, and [they] delivered those profits.”<sup>132</sup>

Bachelder views shareholders as expecting a “reasonable, preferably good, return” and describes her leadership team as being hired to be the shareholders’ “stewards.”<sup>133</sup> If “not well served, they exit [their] stock—and the stock price falls—reducing [their] access to capital and the value of the enterprise.”<sup>134</sup> Shareholder interests, however, were specifically subordinate to those of franchise owners as far as the management priorities of Bachelder and her leadership team were concerned.<sup>135</sup> In part, this seemed to be because the franchise owners had long-term (typically twenty-year) commitments.<sup>136</sup> To Bachelder, if the franchise owners were not prospering, “there was no chance

<sup>126</sup> WHITMAN & HAMILTON, *supra* note 7, at 2.

<sup>127</sup> *Id.* at 9.

<sup>128</sup> *Id.* at 103.

<sup>129</sup> *Id.*

<sup>130</sup> BACHELDER, *supra* note 4, at 118.

<sup>131</sup> WHITMAN & HAMILTON, *supra* note 7, at 9.

<sup>132</sup> *Id.* at 27.

<sup>133</sup> BACHELDER, *supra* note 4, at 20.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 21.

<sup>136</sup> *See id.*

Popeyes sales would go up ([generating] royalties) or franchise fees would increase ([from] new openings).”<sup>137</sup>

*Consumers.* Notwithstanding shareholder primacy, Whitman definitely sees customers as part of the corporate team: “[B]usinesses will best prosper by inviting customers and partners into their thinking and decision-making processes.”<sup>138</sup> eBay knew that it “needed to show its respect for [its] community [of users] by never being ostentatious or frivolous.”<sup>139</sup> Even though the company went public and still needed to make money for its shareholders, Whitman says that eBay’s management “saw [the] faces [of their users] and heard their voices when [management] made decisions.”<sup>140</sup> She describes mistakes that were made as a result of failing to consult consumers before, e.g., changing eBay’s rating system.<sup>141</sup> Consumers were at the top of Bachelder’s first list of who her Popeyes leadership team would serve, followed by the shareholders.<sup>142</sup> Still, when her team reprioritized the list, it was franchise owners who would come first when management decisions actually were to be made.<sup>143</sup> According to Fiorina, “[s]ome will argue that a company should focus on competitors or stockholders.”<sup>144</sup> She feels that “leading companies must focus on customers.”<sup>145</sup> In accomplishing the controversial merger with Compaq, her team “began with the principle that the customer comes first.”<sup>146</sup> As noted above, this meant accepting the probability of a decline in stock price as a result.<sup>147</sup>

*Employees.* Bachelder evidences genuine concern for employees, talking in her third chapter about the lack of engagement (essentially, lack of interest) of American workers (only 30 percent of American workers are “engaged,” although Popeyes’s workforce is, by its own demanding metrics, 45% engaged, and under less rigorous standards is 78% engaged).<sup>148</sup> She says that, among other responsibilities, the lead-

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<sup>137</sup> *Id.*

<sup>138</sup> WHITMAN & HAMILTON, *supra* note 7, at 11.

<sup>139</sup> *Id.* at 116.

<sup>140</sup> *Id.* at 118.

<sup>141</sup> *See id.* at 145–46.

<sup>142</sup> *See* BACHELDER, *supra* note 4, at 19–20 (remarking that in the restaurant industry, the “ultimate goal” is usually to serve the guests).

<sup>143</sup> *See id.* at 21.

<sup>144</sup> FIORINA, *supra* note 5, at 176.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 262.

<sup>147</sup> *See supra* text accompanying note 120.

<sup>148</sup> BACHELDER, *supra* note 4, at 63, 78.

ers of the company had a duty to “bring purpose and meaning” to the organization’s work.<sup>149</sup>

Whitman is more bloodless, referring at one point to continually looking “at how you can pare back teams,” noting that “[e]fficient organizations run lean.”<sup>150</sup> She says “the real trick is to practice exclusion and be frugal without demotivating employees.”<sup>151</sup> In a later chapter, she discusses her brief tenure as CEO of FTD, commenting that her predecessor had moved too quickly to eliminate unnecessary employees, leaving behind anger and mistrust.<sup>152</sup> She thought “these changes could have been made more gradually and methodically.”<sup>153</sup> She does observe the need to pay to get the best possible employees for the most important jobs,<sup>154</sup> but she comments negatively on the metastasized perks common in dot-com companies.<sup>155</sup> “[Her] feeling is that a company should treat employees like grownups: pay them appropriately and let them make their own decisions.”<sup>156</sup>

According to Fiorina, “[t]he company belongs to [the employees]—not to the Board, or the founders, or the families of the founders.”<sup>157</sup> Nonetheless, she prepared HP to “weather the storm” of the economic downturn in the early 2000s by “lay[ing] off a lot of people,”<sup>158</sup> earning her the nickname “Chainsaw Carly.”<sup>159</sup> Her approach contrasted with the company’s immediately prior method of “everyone [agreeing] to an across-the-board pay cut or fewer hours in the factory.”<sup>160</sup> She was dissatisfied with HP’s employee performance evaluations, in which “[t]he vast majority of employees always ended up in the top two categories,” even when business was struggling.<sup>161</sup> “Everyone had a secure job, but no one questioned whether some shouldn’t.”<sup>162</sup> Although 6,000 employees were laid off in August 2001, Fiorina credits herself for the dignified way in which it was accom-

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149 *Id.* at 62.

150 WHITMAN & HAMILTON, *supra* note 7, at 119–20.

151 *Id.* at 122.

152 *See id.* at 161–63.

153 *Id.* at 163.

154 *See id.* at 120–21.

155 *See id.* at 115.

156 *Id.*

157 FIORINA, *supra* note 5, at 174.

158 *Id.* at 231.

159 *Id.* at 237.

160 *Id.* at 231.

161 *Id.* This comment seems to assume that if business is struggling, there must be employees at fault.

162 *Id.* at 232.

plished.<sup>163</sup> She admits, however, that she “probably should have taken an extra several weeks and allowed managers a little more time to identify the people who would leave the business.”<sup>164</sup> More cuts occurred in each of 2002 through 2005,<sup>165</sup> particularly as HP integrated its operations with those of Compaq, its merger partner.<sup>166</sup> At the end of 2004, when the company reported record profits, it nonetheless was planning the “cutting” of an additional 10,000 to 12,000 “heads.”<sup>167</sup> This plan was for a time undisclosed because management did not want to distract Wall Street from HP’s strong performance.<sup>168</sup>

*Other.* Whitman’s fourth chapter is titled “Be frugal. Conserve resources.”<sup>169</sup> She turns very quickly (in less than a page) from a discussion of concern for the environment to conserving company resources today to invest tomorrow.<sup>170</sup> Fiorina speaks of focusing HP’s philanthropic efforts so they were “not acts of charity, but rather of enlightened self-interest.”<sup>171</sup> Both seem straightforward examples of the idea that one can “do well by doing good” and probably not an indication that either author seriously considered environmental stewardship or philanthropy significant corporate concerns. None of the books otherwise manifested recognition of corporate constituents other than as noted above.

### 3. *The Role of Law in Corporate Life*

The authors generally seem to have targeted their books toward a popular audience, so it is not surprising that there is not much specific rumination about corporate law. For instance, there is no explicit mention of duties of care or loyalty—although there is plenty of caring and loyalty manifest in the combined pages—and not a word about the business judgment rule, constituency statutes, tests for lawful dividends, or anything else that fills the typical corporations casebook.<sup>172</sup>

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163 *See id.* at 235–36.

164 *Id.* at 237.

165 *Id.*

166 *See id.* at 265.

167 *Id.* at 285.

168 *Id.*

169 WHITMAN & HAMILTON, *supra* note 7, at 107.

170 *See id.* at 107–08.

171 FIORINA, *supra* note 5, at 215.

172 *See generally* BACHELDER, *supra* note 4; FIORINA, *supra* note 5; SANDBERG, *supra* note 6; WHITMAN & HAMILTON, *supra* note 7.

*Governance Roles.* Some parts of legally mandated corporate structure nonetheless are in evidence. It is clear, for instance, that the board of directors elects the officers (and fires them, as Fiorina bitterly notes).<sup>173</sup> The fact that shareholders elect directors, however, is completely invisible. Facebook's directors are never mentioned, while Popeye's board is simply a given for Bachelder, who says nothing about how it is constituted. The board is presented by Fiorina as self-perpetuating, selecting those it wishes to join with some amount of input from the CEO.<sup>174</sup> Whitman sees the board as built by the CEO, commenting at one point, "[she] had put together incredibly smart, honest, individuals with integrity."<sup>175</sup>

The role of shareholders in corporate governance is portrayed in only two instances, neither positively. First, Fiorina devotes much of a chapter to an unsuccessful proxy battle spearheaded by the family of one of HP's founders.<sup>176</sup> The battle, which was over HP's merger with Compaq, was followed by an investor lawsuit, the details of which were not fully described, but which Fiorina says exonerated her and restored the "credibility of management" in the proxy process.<sup>177</sup> Second, Whitman was infuriated by a conflict of interest lawsuit brought by investors on the grounds that her personal wealth managers at Goldman Sachs engaged in IPO "spinning" (offering her shares in hot IPOs) in order to garner eBay's investment banking business.<sup>178</sup> She reports settling the suit with her own funds to get past the distraction, but she uses it as a springboard for discussing the need to avoid even the appearance of conflicts of interest.<sup>179</sup>

At one point, Fiorina acknowledges that a formal decisionmaking structure exists (without describing where it might come from) but says that decisions sometimes are made outside that structure and that formal decisions are undermined when they simply are disregarded.<sup>180</sup> She clearly believes that at times corporate governance is dysfunc-

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<sup>173</sup> See FIORINA, *supra* note 5, at 301–03.

<sup>174</sup> See *id.* at 287.

<sup>175</sup> WHITMAN & HAMILTON, *supra* note 7, at 90.

<sup>176</sup> See FIORINA, *supra* note 5, at 247–48, 255–56.

<sup>177</sup> *Id.* at 255–56. Other sources show the suit was based on a claim that management had made misleading statements to influence voting and had coerced a major shareholder (with an offer of additional business) to change its vote. See, e.g., *Judge Dismisses HP Merger Lawsuit*, CNET (June 1, 2002, 1:43 AM), <https://www.cnet.com/news/judge-dismisses-hp-merger-lawsuit/> [<https://perma.cc/5JHA-CRSU>].

<sup>178</sup> WHITMAN & HAMILTON, *supra* note 7, at 147–49. Whitman also served on Goldman's board. *Id.* at 149.

<sup>179</sup> See *id.* at 149–51.

<sup>180</sup> FIORINA, *supra* note 5, at 88.

tional when actors do not perform their assigned roles. For instance, she says that when she began to consider joining HP as CEO, the board had just acquiesced to a reorganization driven by the old CEO, who did not really consult them, simply because the members were “tired of fighting [him].”<sup>181</sup> Several years later, she felt keen loss when she faced a group of directors that in the interim had seen the retirement of men who were CEOs and who had the type of experience Fiorina felt was necessary for effective board performance.<sup>182</sup> She recounts a fight she had with the HP board about the timing of appointing a returning member who she felt would not be qualified to sign the annual report for the previous year (a report for which Fiorina had personal liability).<sup>183</sup> She describes situations in which she had disagreements with the board and felt that the board should “butt out,”<sup>184</sup> and she lingers over a description of investigations by Congress, the SEC, and other agencies into deliberate leaks of confidential board deliberations.<sup>185</sup> Fiorina notes that the role of the board is intrinsically difficult because the members cannot obtain enough details in their few meetings to manage a company.<sup>186</sup> She worked hard to improve information flow to the board, including by fostering interaction with management outside board meetings.<sup>187</sup> She describes in some detail the process the board went through in approving the Compaq merger, pleased that the vote was unanimous and “taken one person at a time”<sup>188</sup>—although at least one board member subsequently and sensationally objected.<sup>189</sup>

The CEO-board interactions pictured by the other authors were less colorful. For instance, Bachelder matter-of-factly recounts seeking board permission (which was granted) for the corporate expenditure of \$6 million for national advertising, counter to Popeyes’ usual practice of requiring all advertising to be funded by franchisees.<sup>190</sup> Whitman describes resigning from what essentially was a rubber stamp board at Goldman Sachs, as well as how she subsequently ran her own

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181 *Id.* at 158.

182 *Id.* at 279.

183 *Id.* at 287–88.

184 *Id.* at 289.

185 *Id.* at 313–15.

186 *Id.* at 210.

187 *Id.* at 211.

188 *Id.* at 238.

189 *See id.* at 247–48.

190 BACHELDER, *supra* note 4, at 44–47.



board meetings at eBay by asking that the board members express their opinions before she gave hers.<sup>191</sup>

*Sarbanes-Oxley.* Whitman characterizes the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley Act”) as the “inevitable and necessary” response to both the excess of the dot-com bubble and the Enron accounting scandal.<sup>192</sup> She describes the new rules as “cumbersome and expensive,” but she acknowledges that they did shift board meetings toward “a more thoughtful and penetrating analysis.”<sup>193</sup> Fiorina describes post-Sarbanes-Oxley recruitment of independent directors as difficult because of perceived conflicts, as well as increased duties and liabilities.<sup>194</sup>

*The Duty of Care and the Business Judgment Rule.* Although neither mentions the subject, Whitman and Fiorina seem to be poster children for the business judgment rule—the doctrine that essentially precludes judicial second-guessing of informed corporate judgments that simply turn out to be wrong.<sup>195</sup> Both argue at length for the importance of corporate leaders who are willing to take risks (presumably knowing no one will review those risks for legal liability). Whitman acknowledges that mistakes will be made, but says that adaptive companies that are not overly cautious will ultimately achieve better success than timid companies that wait for ideal conditions.<sup>196</sup> According to her, “the price of inaction is far greater than the cost of making a mistake,”<sup>197</sup> and “if . . . some of your ideas . . . don’t come up short, you’re probably not the right person to lead the company.”<sup>198</sup> She says that mistakes are made because the goal is progress, not perfection.<sup>199</sup> Fiorina more graphically acknowledges the importance of risk taking, saying HP’s mantra under her leadership might be described as “Ready. Fire. Aim, aim, aim, aim.”<sup>200</sup> It is doubtful that either CEO would have felt quite as daring absent the comfort of the business judgment rule (and, daresay, provisions in the articles of

191 WHITMAN & HAMILTON, *supra* note 7, at 89–90.

192 *Id.* at 130–31.

193 *Id.* at 131.

194 FIORINA, *supra* note 5, at 281.

195 See Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343, 345 (2005). For an explanation of the modern business judgment rule, see *id.* at 345–50.

196 WHITMAN & HAMILTON, *supra* note 7, at 46.

197 *Id.*

198 *Id.* at 68–69.

199 See *id.* at 72.

200 See FIORINA, *supra* note 5, at 200–01.

incorporation eliminating the monetary liability of officers and directors for breach of the duty of care).<sup>201</sup>

*The Relevance of Other Law.* Sandberg makes the point several times that she favors government-mandated paid family leave.<sup>202</sup> She otherwise notes that she is writing about what women can do for themselves rather than about eliminating external barriers.<sup>203</sup> She calls the “specter of legal action” a “real barrier[]” to meaningful conversations about gender in the workplace.<sup>204</sup> She calls federal and state antidiscrimination laws “essential,” even though they “can have a chilling effect on discourse, sometimes even to the detriment of the people they are designed to defend.”<sup>205</sup> She leaves the “solution to this dilemma . . . to public policy and legal experts to solve.”<sup>206</sup>

Fiorina acknowledges that she got her first management job after AT&T entered a consent decree dictating the hiring of more women.<sup>207</sup> She also clearly regards the law as a sometimes helpful tool, devoting one chapter to a successful lawsuit against the federal government for fraud in procurement.<sup>208</sup> On the other hand, another chapter detailing navigation of the process of registration under the Securities Act of 1933 makes it clear that the process was daunting,<sup>209</sup> requiring “virtual all-nighters for weeks.”<sup>210</sup>

Whitman comes across as sometimes puzzled and sometimes frustrated by the American legal system. She describes, in her introduction, reading the fine print of a contract requiring eBay to refund listing fees on disrupted auctions and then deciding to refund more than was legally required, even though it would mean missing the quarterly earnings projection.<sup>211</sup> She also described the difficulty in

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<sup>201</sup> These provisions, known as “raincoat” provisions, have been broadly available since the mid-1980s. See Lawrence A. Hamermesh, *Why I Do Not Teach Van Gorkum*, 34 GA. L. REV. 477, 479, 489–91 (2000) (discussing the advent of modern “raincoat” provisions, which shield a corporate director from financial liability for a breach of the duty of care); see, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (2011) (allowing these provisions in the articles of incorporation of Delaware corporations). See generally James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207 (1988) (exhaustively detailing the director and officer liability limiting statutes of a number of states).

<sup>202</sup> See SANDBERG, *supra* note 6, at 102, 113.

<sup>203</sup> See *id.* at 170–71.

<sup>204</sup> *Id.* at 150.

<sup>205</sup> *Id.* at 151.

<sup>206</sup> *Id.*

<sup>207</sup> FIORINA, *supra* note 5, at 38–39.

<sup>208</sup> See *id.* at 71–79 (Chapter 10, “The Stuff of Triumph”).

<sup>209</sup> See *id.* at 122–30 (Chapter 15, “The Power of Teamwork”).

<sup>210</sup> *Id.* at 126.

<sup>211</sup> WHITMAN & HAMILTON, *supra* note 7, at 2.

preventing the sale on eBay of various illegal products and services, particularly in light of the Digital Millennium Copyright Act of 1998, which protected platform providers from liability for illegal transactions only as long as the company did not selectively police the site.<sup>212</sup> Despite the liability risks, eBay eventually did begin to police with respect to some items.<sup>213</sup> eBay also received “subpoenas by the binful” from such sources as manufacturers pursuing counterfeiters and divorcing spouses trying to trace their partners’ transactions.<sup>214</sup> Whitman discusses (in less than flattering terms) the attempts of various state legislatures “pressured by their local industries to put the brakes on eBay’s growth,” as well as the impact of federal attempts to regulate online commerce.<sup>215</sup> She links this to her political ambitions, which became manifest toward the end of her time with eBay.<sup>216</sup>

Bachelder is largely silent about the role of law in corporate life, although she reflects at one point on unproductive litigation between restaurant franchisees and franchisors.<sup>217</sup>

#### 4. Gender

Three of the books (those by Bachelder, Fiorina, and Sandberg) emphasize the importance of parents who encourage high achievement and who transmit the belief that their daughters are not limited by their gender. For instance, Bachelder describes “Daddy Max[’s]” nightly leadership lessons.<sup>218</sup> Each of she and her three siblings went on to become a CEO or president of a corporation, in four different industries.<sup>219</sup> Fiorina says that “[t]he fact that [she] was a girl made no difference to their level of expectation . . . it was only later in life that [she] realized how rare this was, particularly in the 1950s and 1960s.”<sup>220</sup> Sandberg “was raised to believe that girls could do anything boys could do.”<sup>221</sup> By contrast, Whitman reveals that her mother originally encouraged her and her sister to get teaching certificates so they “would have something to fall back on in case marriage didn’t work out.”<sup>222</sup> That changed, however, in her mother’s later years, when she

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212 *Id.* at 92–99.

213 *Id.* at 99–100.

214 *Id.* at 101.

215 *Id.* at 261–63.

216 *See id.* at 261–64.

217 *See* BACHELDER, *supra* note 4, at 22.

218 *Id.* at 8–9.

219 *Id.* at 9.

220 FIORINA, *supra* note 5, at 4.

221 SANDBERG, *supra* note 6, at 14.

222 WHITMAN & HAMILTON, *supra* note 7, at 75.

began to emphasize that her daughters would have the “opportunity to do anything.”<sup>223</sup> Coverage of parental influence aside, the books differ widely in the attention paid to gender. The following discussion proceeds in ascending level of detail devoted to the subject.

Bachelor is the least interested in the subject of gender. Her few comments that are most relevant—but not necessarily specific—to gender are as follows. She says that her career philosophy for many years was to “[t]hink like a man, act like a lady, and work like a dog.”<sup>224</sup> (After meeting successful servant-leaders in nonprofit organizations, she replaced it with the less colorful but arguably more inspiring “dare-to-serve.”<sup>225</sup>) She admires bosses who are interested in the family lives of their team members, noting one in particular under whom “performance results soared.”<sup>226</sup> She says, “At home, [she] was a wife and mother, juggling the demands of family. Life was complicated, but good.”<sup>227</sup> At another point, she describes her leadership skills as “refined by the joys and trials of life as a parent of three children.”<sup>228</sup> There is no discussion whatsoever of discrimination or other barriers to achievement by women.

Whitman was more forthcoming, but still fairly circumspect. She was a member of the fourth coed class at Princeton (where she remembers general acceptance by faculty and male students) and went immediately on to Harvard Business School.<sup>229</sup> She was “never conscious of any overt discrimination that held [her] back in business” but does remember having a sense of not really belonging to a “club” comprised of “ambitious young men . . . bonded by their families’ expectations for them and by their own expectations of a traditional businessman’s life.”<sup>230</sup> She ultimately decided not to “bend” herself to be “one of the in crowd,” instead opting to be “‘in with’ the in crowd” by being “likeable and fun and very good at what [she] did.”<sup>231</sup> She believes women of her generation were grateful for the opportunities they had and were “determined to prove [themselves].”<sup>232</sup> Many chose to focus on “outperforming those who seemed intent on making

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223 *Id.* at 77.

224 BACHELDER, *supra* note 4, at 101.

225 *Id.* at 103, 106–07.

226 *Id.* at 104–05.

227 *Id.* at 104.

228 *Id.* at 130.

229 WHITMAN & HAMILTON, *supra* note 7, at 79.

230 *Id.* at 80.

231 *Id.* at 80–81.

232 *Id.* at 85.

[their] lives more difficult, rather than talking about sexism or fighting back directly.”<sup>233</sup> It was to her a “natural evolution” for women to “[become] more aggressive about identifying and trying to root out behaviors in the workplace that were inappropriate.”<sup>234</sup>

On the subject of work-life balance, Whitman discusses the need to focus, and she says that “thanks to the pressures and time commitment of [her] job, [she has] tried to spend [her] nonwork hours with [her husband] and the boys,” even though it meant that she and her husband socialized very little and she shopped even less.<sup>235</sup> When asked by a reporter what she thought people thought of her, she responded, “She’s frumpy, but she delivers.”<sup>236</sup> At one point, she muses about “whether trying to be the ‘perfect’ wife, mother, and executive undermines a woman’s ability to be effective in a balanced way in those pursuits.”<sup>237</sup> She also describes trade-offs she and her neurosurgeon husband made for their respective careers,<sup>238</sup> and she devotes several pages to extolling her spouse and their relationship.<sup>239</sup> She jokes that “[b]ehind every successful woman is an astonished man” and indicates that, although her husband was supportive of her success, he also was surprised at its extent.<sup>240</sup>

Fiorina notes the progress of women in the workforce, describing a time at which the leadership team in her division finally became “dominated by women” and representation in the organization’s sales force reached one-half.<sup>241</sup> She still believes, however, that gender can deny women a “presumption of competence,”<sup>242</sup> and she recounts the longest list of clearly discriminatory interactions.<sup>243</sup> By contrast, Bachelder does not mention any, and each Whitman and Sandberg describes only one.<sup>244</sup> Fiorina suggests a need to establish that women can function in the business world as well as men when she shares an

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 184.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 217.

<sup>238</sup> *Id.* at 218.

<sup>239</sup> *See id.* at 255–58.

<sup>240</sup> *Id.* at 255–56.

<sup>241</sup> FIORINA, *supra* note 5, at 141.

<sup>242</sup> *Id.* at 52.

<sup>243</sup> *See id.* at 38–39, 69–70.

<sup>244</sup> Whitman was mistaken at a trade conference for a spouse, WHITMAN & HAMILTON, *supra* note 7, at 86–87, and Sandberg was asked by Speaker of the House Tip O’Neill if she had been a pom-pom girl, SANDBERG, *supra* note 6, at 141.

anecdote about appearing onstage at a conference with artificial testicles clearly visible under her trousers.<sup>245</sup>

Fiorina recounts being belittled by managers as a woman<sup>246</sup> and notes a number of awkward encounters involving business-related social events.<sup>247</sup> She mentions the chagrin of being named the most powerful *woman* in business<sup>248</sup> and being asked, “Does this mean [the glass ceiling] no longer exists?”<sup>249</sup> Evidently, she publicly (and controversially) indicated that the glass ceiling did not exist, by which she now says she meant that there is no “invisible barrier” although there are “obstacles and prejudices.”<sup>250</sup> Because of the resulting furor, she decided she would not thereafter talk about either herself or the glass ceiling (until she wrote her first book).<sup>251</sup> She felt news coverage was different for her than for male CEOs: there was much commentary about her appearance, hair, and shoes, and she constantly was referred to by her first name.<sup>252</sup> She was accused of not having biological children for purposes of career advancement (her two children were stepchildren in the primary custody of her husband’s first wife), and her husband was inaccurately referred to as a “stay-at-home spouse.”<sup>253</sup> She feels she was unfairly portrayed online as either a “bimbo” or a “bitch.”<sup>254</sup> She notes that male CEOs are described as “decisive” when they fire people, while she was characterized as “vindictive.”<sup>255</sup> She describes gender as a “distraction[.]” that “separated [her] from the vast majority of [her] employees.”<sup>256</sup>

With respect to work-life balance, it appears that Fiorina experienced almost none. For instance, she says that in the wake of the HP-Compaq merger “HP had become [her] life. [She] was consumed by the company and its requirements. It is no exaggeration to say [she]

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245 See FIORINA, *supra* note 5, at 142–43.

246 See *id.* at 39, 69–70.

247 See *id.* at 96–97 (describing a visit to Korea, saying “[her] gender was an issue from the moment [she] arrived” and further embellishing).

248 See *id.* at 145.

249 *Id.* at 169.

250 *Id.* at 171.

251 *Id.* at 171–72.

252 See *id.* at 172–73.

253 *Id.* at 173; Stephanie Dube Dwilson, *Frank Fiorina, Carly’s Husband: 5 Fast Facts You Need to Know*, HEAVY (Dec. 23, 2015, 7:51 AM), <https://heavy.com/news/2015/09/frank-fiorina-carly-husband-marriage-children-lori-daughter-dead-bodyguard-patricia-easler-divorce/> [https://perma.cc/Y958-P33B].

254 FIORINA, *supra* note 5, at 173.

255 *Id.* at 222.

256 *Id.* at 171.

routinely worked twelve- or fourteen-hour days, slept little and thought always about HP.”<sup>257</sup>

Although many of Fiorina’s observations about gender go to a perceived lack of fairness, she picks up on research indicating that progress for women is not just progress for themselves:

Today . . . diversity is no longer just about fairness, it’s about winning or maybe even about surviving . . . . For example, while twentieth-century power structures have always been male dominated, there is irrefutable evidence that unless women are actively engaged as peers, problem-solvers, and entrepreneurs within their communities, sufficient progress will not be made toward economic development, disease prevention, or conflict resolution.<sup>258</sup>

Her exploration of this theme, however, is not in-depth.

Sandberg is the author most overtly interested in gender. The title of her book (*Lean In: Women, Work, and the Will to Lead*) broadcasts her central theme. She believes that women are bypassing career opportunities either because they don’t believe they will succeed or because they don’t believe those career opportunities will be compatible with the family life they aspire to have.<sup>259</sup> She notes that women are “trained to care more about the well-being of others.”<sup>260</sup> Family concerns are portrayed as the reason that female managers are less likely to make the intercompany job changes that are helpful in climbing the “jungle gym” (rather than the ladder) that leads to career success.<sup>261</sup>

She devotes a chapter to “The Myth of Doing It All,”<sup>262</sup> which (obviously) is about work-life balance. As an indication of her coping strategy, she fondly quotes a favorite poster that declares, “Done is better than perfect.”<sup>263</sup> She offers sobering statistics, describing the more than 50-hour work week of more than 62% of high-earning corporate professionals and the 80% of employed adults who, in 2012, reported that they kept working even after they left the office.<sup>264</sup> She sadly notes that many who try to cope with the “new normal” skimp on sleep, resulting in mental impairment equivalent to imbibing alco-

<sup>257</sup> *Id.* at 276.

<sup>258</sup> *Id.* at 322.

<sup>259</sup> See SANDBERG, *supra* note 6, at 15, 22.

<sup>260</sup> *Id.* at 48–49.

<sup>261</sup> *Id.* at 52–63 (Chapter 4).

<sup>262</sup> *Id.* at 121–39 (Chapter 9).

<sup>263</sup> *Id.* at 125.

<sup>264</sup> *Id.* at 131.



hol above the legal driving limit.<sup>265</sup> She says that “[e]mployees who make use of flexible work policies are often penalized and seen as less committed than their peers. And those penalties can be greater for mothers in professional jobs.”<sup>266</sup>

Sandberg is particularly concerned with the pressure on women to “have it all.”<sup>267</sup> “Employed mothers and fathers both struggle with multiple responsibilities, but mothers also have to endure the rude questions and accusatory looks that remind [them] that [they’re] shortchanging both [their] jobs *and* [their] children.”<sup>268</sup> She notes that mothers who work outside the home put in the same amount of time on primary child care as full-time homemakers did in 1975<sup>269</sup> and that women feel required to do so even though studies show no difference in the cognitive skills and social competence of children cared for exclusively by their mothers and those who were also cared for by others.<sup>270</sup> She urges women to take a different path, saying that “success is making the best choices we can . . . and accepting them.”<sup>271</sup> She also takes the position that your “most important career decision” is your choice of life partner and that you can “overcome biology with consciousness” in order to “[m]ake [y]our [p]artner a [r]eal [p]artner.”<sup>272</sup> Her eleventh chapter is titled “Working Together Toward Equality.”<sup>273</sup> She believes that neither men nor women currently have real choice in structuring their lives; to remedy this, women must have “partners who share family responsibilities” and men must be “fully respected for contributing inside the home.”<sup>274</sup>

Work-life balance aside, in Sandberg’s view workplace bias is real. She admits her own bias and discusses studies showing “gender-blind evaluations still result in better outcomes for women.”<sup>275</sup> She observes that able women are deemed less likeable by both men and women,<sup>276</sup> noting that “the dearth of female leaders causes one woman to be viewed as representative of her entire gender. And because people often discount and dislike female leaders, these generalizations

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265 *Id.* at 132.

266 *Id.* at 130.

267 *Id.* at 121.

268 *Id.* at 122–23.

269 *Id.* at 134.

270 *Id.* at 135.

271 *Id.* at 139.

272 *Id.* at 104–20 (Chapter 8, “Make Your Partner a Real Partner”).

273 *Id.* at 159.

274 *Id.* at 160.

275 *Id.* at 151–52.

276 *Id.* at 39–40.

are often critical. This . . . reinforces the stigma that successful women are unlikeable.”<sup>277</sup> Sandberg opines that men and women both “do, in fact, demand more time and warmth from women in the workplace . . . and can become angry when they don’t conform to that expectation.”<sup>278</sup>

It is, perhaps, foreseeable that “men in more traditional marriages view[] the presence of women in the workforce less favorably” than men in “modern” marriages and are less likely to promote qualified female employees.<sup>279</sup> At the same time, Sandberg notes that it is difficult for men who might otherwise be supportive to mentor women, given the perception of sexual overtones.<sup>280</sup> More surprising is what Sandberg reports about the attitudes of women themselves. She feels that women fail to be supportive on gender-related issues and sometimes even attack one another. “Everyone loves a fight—and they *really* love a cat-fight. The media will report endlessly about women attacking other women, which distracts from the real issues.”<sup>281</sup> She regretfully describes the experience of Marissa Mayer, who in 2012 and entering her third trimester of pregnancy was named CEO of Yahoo, a Fortune 500 company.<sup>282</sup> Mayer was roundly criticized by feminists for taking a short maternity leave and working throughout it.<sup>283</sup> She was viewed as injuring “the cause by setting up unreasonable expectations.”<sup>284</sup> Sandberg also discusses the “mommy wars, which pit mothers who work outside the home against mothers who work inside the home.”<sup>285</sup>

Sandberg explains that internecine war among women was understandable in earlier generations, when women believed that tokenism would limit advancement to very few and resented one another as a result.<sup>286</sup> She additionally notes that “research suggests that once a woman achieves success, particularly in a gender-biased context, her capacity to see gender discrimination is reduced.”<sup>287</sup> Unfortunately,

<sup>277</sup> *Id.* at 161.

<sup>278</sup> *Id.* at 165.

<sup>279</sup> *Id.* at 152–53.

<sup>280</sup> *Id.* at 72. In general, Sandberg advises that women should never ask for mentorship, but rather excel so that potential mentors will want to invest in their potential (although formal mentorship programs do work). See generally *id.* at 64–76 (Chapter 5, “Are You My Mentor?”).

<sup>281</sup> *Id.* at 162.

<sup>282</sup> *Id.* at 160.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 166.

<sup>286</sup> *Id.* at 163.

<sup>287</sup> *Id.*

“[w]hen women voice gender bias” by speaking negatively about their female coworkers, they “legitimize” the biases held by their male colleagues.<sup>288</sup> On a more positive note, other “[r]esearch already suggests that companies with more women in leadership roles have better work-life policies, smaller gender gaps in executive compensation, and more women in midlevel management.”<sup>289</sup>

## II. THE RELEVANT THEORIES

The foregoing Part alluded to a few legal structures and doctrines without explaining their development and without any intentional characterization of their merits. This Part introduces theories that may be explanatory, critical, or laudatory of those developments and attempts to mine the four reviewed volumes for supporting or contradictory evidence.

*Law and Economics.* Law and economics theory describes the corporation simply as a “nexus of contracts” among managers, employees, shareholders, lenders, and other possible interested parties.<sup>290</sup> It is assumed that each of these groups would bargain in its own rational self-interest—if actual bargaining were required.<sup>291</sup> Corporate law, however, assures that bargaining usually is not required since the best or most efficient corporate law provides the best or most efficient set of default contract rules.<sup>292</sup> The “contractarians” leave the parties free to bargain around the default rules but believe that existing corporate law embodies those rules that would most often be negotiated voluntarily.<sup>293</sup>

According to contractarians, corporate law generally is both descriptively and normatively structured to assure that managers act as

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288 *Id.* at 164.

289 *Id.* at 171.

290 FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991); *see also* Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 *BROOK. L. REV.* 767, 770–71 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305, 310–11 (1976).

291 *See* Butler & Ribstein, *supra* note 290, at 770–71.

292 *See* Jensen & Meckling, *supra* note 290, at 306–08, 310–11 (discussing the corporation as a nexus of principal-agent contracts and noting that “[s]ince the specification of rights is generally effected through contracting . . . individual behavior in organizations, including the behavior of managers, will depend upon the nature of these contracts”); *see also* EASTERBROOK & FISCHEL, *supra* note 290, at 16–17 (discussing the variety of contracts that come together in a corporation); Butler & Ribstein, *supra* note 290, at 770 (characterizing the corporation as a nexus of contracts).

293 *See* EASTERBROOK & FISCHEL, *supra* note 290, at 34.

fiduciaries for the shareholders.<sup>294</sup> The relative efficiency of monitoring by a single class of beneficiaries is said to best limit managerial shirking and opportunism.<sup>295</sup> This well-known “shareholder primacy” model means that the purpose of the corporation is to make profits for its shareholders and that their interests must be preferred to those of other claimants.<sup>296</sup> The job of the corporation’s officers and directors thus is to maximize its residual value—the amount that is left after satisfying all nonshareholder claims.<sup>297</sup> Although moderated by the balloon and collapse of the infamous 21st-century market bubbles, it is thought that the operation of active financial markets generally will lead stock price to efficiently—and rationally—reflect that value.<sup>298</sup> Efficient markets will signal occasions of underperformance by management, exerting market discipline by, among other things, attracting prospective acquirers.<sup>299</sup>

Although the portrayal is ruthlessly spare, for purposes of the following analysis, contractarianism as described above will be further distilled to two central tenets.<sup>300</sup> One is the assumption of rationality, both on the part of corporate constituents and on the part of stock markets.<sup>301</sup> The other is the celebration of shareholder centrism.<sup>302</sup> It is essential to note, however, that shareholder centrism need not translate into an obsessive interest in stock price; in fact, the classic articulation of the duty of the board and officers to maximize “residual value” sounds of something more long-term.<sup>303</sup> Moreover, given the assumption of rationality (and efficiency) on the part of markets,<sup>304</sup> stock price is supposed to be an indicator, not a driver, of corporate strategy.

*Rational Self-Interest.* Bachelder’s tone in recounting her corporate experience is so reasoned that it makes the experience itself

<sup>294</sup> See *id.* at 90–91.

<sup>295</sup> See *id.* at 35–38.

<sup>296</sup> See *id.* at 90–93.

<sup>297</sup> See *id.* at 36.

<sup>298</sup> See generally Theresa A. Gabaldon, *John Law, with a Tulip, in the South Seas: Gambling and the Regulation of Euphoric Market Transactions*, 26 J. CORP. L. 225 (2001) (discussing assumptions of market rationality and their failure).

<sup>299</sup> See Theresa A. Gabaldon, *The Disclosure of Preliminary Merger Negotiations as an Imperfect Paradigm of Rule 10b-5 Analysis*, 62 N.Y.U. L. REV. 1218, 1226–28 (1987) (explaining that acquirers search for target entities that are being managed poorly in order to purchase controlling shares at prices significantly below the predicted future value).

<sup>300</sup> See *supra* notes 290–94 and accompanying text.

<sup>301</sup> See generally Gabaldon, *supra* note 298.

<sup>302</sup> See EASTERBROOK & FISCHER, *supra* note 290, at 36, 90–93.

<sup>303</sup> See *id.* at 36.

<sup>304</sup> See generally Gabaldon, *supra* note 298.

sound supremely rational. Hers is a world in which employees are motivated to improve, restaurants and menus are designed to be more appealing, satisfied diners eat more chicken, profits increase, and stock price rises.<sup>305</sup> Lurking on the fringes, though, are a significant proportion of employees who still are underengaged (and who may therefore be shirking)<sup>306</sup> and franchisees who have opinions about restaurant design that inexplicably (and possibly irrationally) differ from those of corporate management.<sup>307</sup> Moreover, given that the premise of her book, as well as her own leadership style, is service to others,<sup>308</sup> it is difficult to say that her account sustains a contractarian vision based on negotiated self-interest.

Whitman discusses eBay's purpose of using auctions to rationalize the trading of hard-to-price and scarce items, saying "eBay's innovation was making inefficient markets efficient."<sup>309</sup> She recounts with obvious pleasure someone else's observation that the eBay marketplace is similar to the stock market itself.<sup>310</sup> She nonetheless pointedly speaks of the importance of focusing on profit—the difference between revenue and expense—rather than stock price, noting that the latter can be "delusional."<sup>311</sup> Whitman is clearly the most overt of the authors in insisting that the purpose of the corporation is to make profits and that stock price untethered to profit should be irrelevant to corporate planning.<sup>312</sup> This is clear evidence of a view that markets can be irrational. In addition, she, even more clearly than Bachelder, has written a book (titled *The Power of Many*, after all) that is intended to suggest some vision of American business that is more inclusive and co-operative than the contractarians would seem to have. Her discussions of doing the right thing even when not legally required and her celebration of the idea that eBay's business model largely is based on trust simply are not a good match for the contractarian's harsh terrain.<sup>313</sup>

Fiorina insists that personality often dictates irrational outcomes. As discussed above, she talks about decisions made outside the formal decisionmaking structure and notes that formal decisions are under-

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305 See BACHELDER, *supra* note 4, at 8, 47, 52, 58, 73, 96, and 143.

306 See *id.* at 78.

307 See *id.* at 22, 85.

308 See *id.* at 2.

309 WHITMAN & HAMILTON, *supra* note 7, at 16–17, 20.

310 *Id.* at 26.

311 *Id.* at 142.

312 See *id.*

313 See *id.* at 2, 18, 63–68.

mined when they are not acknowledged.<sup>314</sup> Within HP, she portrays a world of corporate skullduggery, with shareholders acting out of family hubris and directors plotting behind closed doors.<sup>315</sup> She more broadly observes that Wall Street is “driven by emotion” and the “thrill of a deal,” although if “enough people [have] enough money” eventually “common sense will prevail.”<sup>316</sup>

Sandberg has nothing to say about markets, but her extended discussion of gender bias clearly puts at least partial lie to any rational actor theory. If, indeed, the corporate world systematically undervalues the talents of approximately 50% of its possible contributors,<sup>317</sup> something markedly inefficient seems to be taking place. (Fiorina makes the same point, albeit much more briefly.<sup>318</sup>)

*Shareholder Centrism.* Cheryl Bachelder’s leadership style and stated priorities are, at first glance, anything but shareholder-centric. She describes her personal purpose as developing leadership in others, and, because of their long-term commitment, she places franchisees at the top of the pantheon of constituents to be served.<sup>319</sup> It is clear, however, that this is instrumental casting: the franchisees’ long-term satisfaction is intended to lead to a more profitable corporation and, ultimately, to the higher stock price Bachelder prizes.<sup>320</sup> The Bachelder model thus does not seem fundamentally discordant with contractarian analysis and seems to align ultimate shareholder interests with long-term planning rather than short-term goals. This is interesting given her admission that she was fired from her position at KFC because her long-term planning approach did not mesh well with the board’s interest in short-term profit.<sup>321</sup> It suggests, however, the view that stock price should and does rationally reflect not only the last quarter’s earnings but something more forward looking as well. It may well be that this relationship is more sustainable for the bricks and mortar (chicken and biscuit?) world that Bachelder inhabits than for the more highly technical and intangible planets of eBay, Facebook, and HP. Nonetheless, her expressed interest in stock price is that it will sustain the corporation’s access to capital, rather than simply ben-

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<sup>314</sup> See *supra* text accompanying note 180.

<sup>315</sup> See FIORINA, *supra* note 5, at 129, 248.

<sup>316</sup> *Id.* at 129–30.

<sup>317</sup> See SANDBERG, *supra* note 6, at 160.

<sup>318</sup> See FIORINA, *supra* note 5, at 322.

<sup>319</sup> See BACHELDER, *supra* note 4, at 21, 64–65.

<sup>320</sup> See *id.* at 20–22.

<sup>321</sup> See *supra* text accompanying note 27.

efit the shareholders.<sup>322</sup> This returns us to a vision of the corporation as something other than shareholder-centric.

As noted above, Whitman specifically articulates allegiance to shareholder primacy but also talks about energizing the company rather than the stock.<sup>323</sup> Moreover, she sees eBay's "many"—the users—as an important part of the corporate team and talks about doing the right, rather than the most profitable, thing.<sup>324</sup> This is a judgment that a contractarian might find discordant.

Sandberg expresses no opinions clearly linked to shareholder primacy or lack thereof. Next to her, Fiorina seems the least interested in shareholders, even as a matter of lip service. She fully expected stock price to take a hit over Compaq and said that the merger was a matter of putting consumers first.<sup>325</sup> Of course, she is the one who was most famously fired,<sup>326</sup> and there quite probably is a lesson there. It could be one about what the market and, through its prospective discipline, the board of directors think about value for shareholders (either in stock price or long-term value). On the other hand, the way Fiorina herself explains her downfall has almost nothing to do with market discipline and much more to do with dysfunctional board decisionmaking.<sup>327</sup>

If one stands back, eyes half closed, to survey the patchwork of landscapes limned by the multiple authors, it actually appears that shareholders are not all that interesting—or interested. With the single exception of the proxy battle and follow-on litigation launched by a major shareholder who was the heir of one HP's founders,<sup>328</sup> they do not appear to be doing all that much in terms of monitoring, and they do virtually nothing with respect to electing the board. This is not surprising. With respect to the former (the prospect of monitoring through litigation), the ability to bring derivative causes of action has been so severely restricted,<sup>329</sup> and the liability of officers and directors so limited,<sup>330</sup> as to diminish the right to relative triviality.<sup>331</sup> With re-

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322 BACHELDER, *supra* note 4, at 20.

323 See WHITMAN & HAMILTON, *supra* note 7, at 9, 27, 228.

324 See *id.* at 8–9, 118.

325 See FIORINA, *supra* note 5, at 245.

326 See *id.* at 302–03.

327 See *id.* at 313.

328 See *id.* at 247–48, 255–56.

329 See Arthur R. Pinto, *Corporate Governance: Monitoring the Board of Directors in American Corporations*, 46 AM. J. COMP. L. (SUPPLEMENT) 317, 342 (1998).

330 See Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355, 387 (1994).

331 The right also is one regularly only exercised at the instigation of self-interested attor-

spect to the latter, shareholders of public corporations historically are infamous for rubber stamping the slate of directors that management suggests.<sup>332</sup>

In fact, of the roles assigned to them by contractarians, shareholders seem only up to the task of serving as residual claimants. In considering the significance of that role, it is important (if obvious) to note that, given the existence of limited liability, shareholders never suffer the loss of anything beyond their initial capital input.<sup>333</sup> This is precisely the same type of risk that a creditor accepts; the only difference has to do with the size of the risk, driven by relative legal priority.<sup>334</sup> Risk differentials are, of course, easily dealt with by adjusting rates of return. In other words, highly compensated creditors would do just as well as shareholders when it comes to the task of bearing risk.

This analysis poses and answers the question of whether shareholders must receive the prospect of unlimited returns—the “residue”—in order to induce them to accept the limited risk of loss of their capital. As a matter of logic, all that shareholders should require is an adequate return to make foregoing alternate investments worthwhile. The real role of shareholders of public corporations, then, is to permit some amount of capital-raising in which the terms of repayment and return are relatively unspecified. This may be convenient for the corporation but is not necessary for entities with any sort of proven track record any more than open-ended repayment terms are necessary for borrowers of loans to buy homes. Even its convenience for the corporation is dubious, given that the debt market is the source of much more capital than the stock market.<sup>335</sup>

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neys. See Theresa A. Gabaldon, *Free Riders and the Greedy Gadfly: Examining Aspects of Shareholder Litigation as an Exercise in Integrating Ethical Regulation and Laws of General Applicability*, 73 MINN. L. REV. 425, 439–40 (1988) (highlighting the ethical problems that arise by lawyer solicitations of various corporate derivative suits).

<sup>332</sup> See Pinto, *supra* note 329, at 325–26 (suggesting that management’s control over corporate information and proxy solicitation at the corporation’s expense, as well as stockholders’ general passivity, allow them to influence a shareholder’s voting decision).

<sup>333</sup> Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89–90 (1985); see also Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 81 n.1 (1991).

<sup>334</sup> To find original versions of substantially all of this paragraph and the two that follow, see Gabaldon, *Like a Fish Needs a Bicycle*, *supra* note \*, at 565–66.

<sup>335</sup> See John Floegel, *Equity Financing for Public Corporations: Reasons and Methods to Encourage It*, 138 U. PA. L. REV. 1411, 1419 (1990) (explaining that in 1990, “equity financings represent[ed] a negligible percentage of total corporate financing”); Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regu-*



Arguably, since shareholders are not necessary to be residual risk bearers (and in fact are not residual risk bearers, given their limited liability), their only real job is to justify a corporation's generation of profits in excess of its costs, including its cost of capital.<sup>336</sup> This gives corporations a purpose that otherwise would be difficult to define, given our commitment to capitalism and open markets.<sup>337</sup> After all, were there no deemed motive to benefit shareholders, what would the corporation's purpose be?<sup>338</sup> Might all publicly held corporations be managed primarily for the purpose of creating goods and providing services, creating jobs, and the like?<sup>339</sup> If so, the corporate vision would be closer to that proposed by either the team production<sup>340</sup> or progressive corporate law<sup>341</sup> scholars discussed below.

*The Team Production Model.* The "team production" approach speaks the language of neoclassical law and economics but makes a critically different starting assumption.<sup>342</sup> Team production scholars characterize the board of directors as an independent "hierarch" mediating among all those with team-specific inputs to the corporation.<sup>343</sup> The proper function of the board is to employ the inputs of financiers (both creditors and shareholders), workers, communities, and others in order to maximize the value of the firm. Not incidentally, this requires the board to allocate corporate profits among all inputting groups in a manner all the participants will tolerate.<sup>344</sup> The proponents of the model have not characterized consumers as having team-specific inputs, presumably because of an assumption that consumers have alternative sources for the products they require.<sup>345</sup> They have,

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*lation*, 87 MICH. L. REV. 613, 645 (1988) (explaining that "[f]irms rarely use equity issues to raise capital").

<sup>336</sup> Gabaldon, *Like a Fish Needs a Bicycle*, *supra* note \*, at 566.

<sup>337</sup> *Id.* at 566–67.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> See generally *infra* notes 342–55 and accompanying text.

<sup>341</sup> See generally *infra* notes 356–61 and accompanying text.

<sup>342</sup> See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999) (questioning whether principal-agent problems are unique to corporations as compared to other business firms and suggesting the team production approach to the corporation).

<sup>343</sup> See *id.* at 250–51.

<sup>344</sup> See *id.* ("Within the corporation, control over those assets [belonging to team members] is exercised by an internal hierarchy whose job is to coordinate the activities of the team members, allocate the resulting production, and mediate disputes among team members over that allocation.").

<sup>345</sup> This assumption is demonstrably untrue in the case of consumers who are bonded by, for example, dependence on either life-saving or addictive pharmaceuticals. See generally Theresa A. Gabaldon, *Exploitation and Antidotes: A Corporate Law-Based Approach to*

however, acknowledged the board of directors' ability to engage in corporate philanthropy.<sup>346</sup> Some adherents have even endowed the team production model with sufficient latitude to permit the board to engage in at least limited moral decisionmaking—extensive enough, at any rate, to roughly emulate the non-self-interested conduct of individual entrepreneurs.<sup>347</sup>

Compared with contractarianism, the team production model (which in fact was pioneered by two women) almost certainly comes closer to describing the corporate world inhabited by the three authorial CEOs—Bachelder, Fiorina, and Whitman. Bachelder, working with her leadership team, set out a list of those they served: the guests, the shareholders, the franchise owners, the leadership team members themselves, the board of directors, the regulators, and the accountants.<sup>348</sup> According to Fiorina in a report to the board, “management’s performance is measured against a balanced scorecard of financial performance, operational improvements, customer-driven metrics, and employee-related items.”<sup>349</sup> Whitman and Fiorina both are interested fiercely in the desires of consumers, and both at least mention the legitimacy of corporate philanthropy.<sup>350</sup> Although Sandberg refers to the concept of a “team” 70 times, it is never invoked in a context more comprehensive than an internal operational or managerial team,<sup>351</sup> and she exhibits no particular interest in the concept of constituencies. This presumably is a function either of the responsibilities of her position or the purpose of her book.

In any event, there is a lack of fit between the team production model and the CEOs' corporate worldviews in one important regard. The team production model is board-centric. The actual boards depicted by Whitman are, for the most part, no more than a Greek chorus to a heroic CEO and her leadership team. Whitman discusses leaving a “rubber stamp” board, describes coaxing her own directors to take more interest in corporate affairs, and regards one of the bene-

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*Overmarketing and Overpricing by Big Pharma*, 2 *BUS. & FIN. L. REV.* 32 (2018) (discussing failure of various corporate law assumptions in the context of “bonded” consumers).

<sup>346</sup> See generally Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 *STETSON L. REV.* 27 (1998) (invoking the team production model in defense of corporate charity).

<sup>347</sup> See generally Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 *N.Y.U. L. REV.* 733 (2005) (arguing that the law allows corporate managers to at least somewhat forego profits for the public interest).

<sup>348</sup> BACHELDER, *supra* note 4, at 19–21.

<sup>349</sup> FIORINA, *supra* note 5, at 300.

<sup>350</sup> See *id.* at 214–15; WHITMAN & HAMILTON, *supra* note 7, at 34–35.

<sup>351</sup> See SANDBERG, *supra* note 6, at 126, 147–49.

fits of the Sarbanes-Oxley Act to be that it forces the board to do a more penetrating job.<sup>352</sup> Fiorina says that the HP board that hired her was too tired to supervise her predecessor, and she describes the lengths she went to in order to involve them more actively—except when she wished they would butt out.<sup>353</sup> She also bemoans the board's dysfunctionality at the point it ceased to cooperate with her.<sup>354</sup> Bachelder hardly mentions the Popeyes board at all, although the short-term focus of the KFC board led to her departure from that organization.<sup>355</sup>

Still, it seems from the writings of Fiorina and Whitman that they yearn for a board to do exactly—and effectively—what the team production model suggests. Neither says exactly why active engagement by the board is desirable but the reason probably is intended to be self-evident.

*Progressive Corporate Law.* During the 1990s, a group of vaguely-to-expressly self-identifying communitarian corporate law scholars also self-identified as “progressive”<sup>356</sup> and proceeded to thumb their collective nose at shareholder primacy.<sup>357</sup> Corporate progressives generally endorse an expansion of the goals of the corporation and the duties of management to include responsibility to other constituents,<sup>358</sup> frequently arguing for the recognition of enforceable fiduciary duties running from directors to groups such as creditors and employees.<sup>359</sup> As an alternative or supplemental approach, progressives also have proposed methods of increasing the board's discretion to recog-

352 See WHITMAN & HAMILTON, *supra* note 7, at 90, 131.

353 See FIORINA, *supra* note 5, at 158, 210–11.

354 See *id.*

355 See Lebowitz, *supra* note 26.

356 See David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 16–22 (Lawrence E. Mitchell ed., 1995); see also Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857 n.1 (1997) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995)) (criticizing the use of the term).

357 See Millon, *supra* note 356, at 16–22.

358 See, e.g., Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 589 (1997) (arguing that the model of shareholder primacy should be replaced with a regime under which “[b]oards must consider equally the interests of non-shareholding stakeholders and shareholders when making decisions that can affect both groups”); Millon, *supra* note 356, at 1 (“Those scholars who have challenged the shareholder primacy principle may be referred to as communitarians, because . . . their work focuses on the sociological and moral phenomenon of the corporation as community, in contrast to the individualistic, self-reliant, contractarian stance . . .”).

359 See Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165, 1178 (1990) (arguing that fiduciary rights should be extended to corporate bondholders); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a*

nize nonshareholder interests.<sup>360</sup> These methods include adopting statutory safe harbors for consideration of the interests of nonshareholder constituencies and extending the terms for which members of the board are elected.<sup>361</sup>

To the extent that progressive corporate law scholars call for board reforms to accomplish social goals, there is a clear inconsistency with the volumes reviewed. As noted above, the actual boards described by Bachelder, Fiorina, and Whitman are not particularly vigilant, much less perspicacious, so relying on them for much of anything at all seems a bit dangerous. On the other hand, progressive proposals would actually give corporate boards something to do that might be sufficiently interesting to engage them—particularly if coupled with new fiduciary duties to multiple constituents.<sup>362</sup>

Board centrism aside, there is evidence in the accounts of Bachelder, Fiorina, and Whitman of a great deal of interest in serving multiple constituents,<sup>363</sup> with, in the case of both Fiorina and Whitman, the notable absence of employees. Fiorina is famous for her layoffs and in her book is scornful of the idea that, before her tenure, “[e]veryone had a secure job.”<sup>364</sup> Whitman speaks of “par[ing] back teams” in order to “run lean” and calls for practicing “exclusion” up to the point of demotivating employees.<sup>365</sup> This is a jarring disconnect with the progressive vision.

*Models Modified.* The contractarian and team production schools specifically address the functioning of corporate law in terms of fairly spare models that are claimed to be both descriptively accurate and normatively desirable. Progressive corporate law makes the lesser claim of normative desirability, but still speaks in terms of barebones templates. All three schools probably have something to learn from the criticisms of legal decision theorists described below.

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*Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1194–96 (1991) (arguing that fiduciary duties should extend to displaced workers).

<sup>360</sup> See Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 582–86 (1992).

<sup>361</sup> See LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY* 112–19 (2001) (advocating for self-perpetuating boards); Mitchell, *supra* note 360, at 635–40 (explaining a method of enforcing constituency statutes that accounts for and protects multiple interests).

<sup>362</sup> Presumably, in order to have much effect the new duties would need to be exempt from the coverage of the “raincoat” provisions described above. See *supra* note 201 and accompanying text.

<sup>363</sup> See BACHELDER, *supra* note 4, at 19; FIORINA, *supra* note 5, at 125, 279; WHITMAN & HAMILTON, *supra* note 7, at 118.

<sup>364</sup> FIORINA, *supra* note 5, at 232.

<sup>365</sup> WHITMAN & HAMILTON, *supra* note 7, at 119–20, 122.

The term “legal decision theorists” is used to refer to scholars who advocate the behavioral analysis of law.<sup>366</sup> They apply the insights of social psychology and related fields in aspiring toward a genuine account of how decisions actually are made in contexts relevant to law and lawmaking.<sup>367</sup> In the specific contexts of financial markets and profit-making entities, they debunk assumptions about the rationality of the relevant actors.<sup>368</sup> They deny the ability of many of those actors to conform to procedural norms of rationality, explaining the predictable cognitive heuristics that permit humans to make decisions—or even identify their own preferences—in light of limits on time, information, and cognitive ability.<sup>369</sup> Legal decision theorists thus have concluded that “human decisionmaking processes are prone to nonrational, yet systematic, tendencies,” resulting in bounds on rationality and free will.<sup>370</sup> One of these has to do with the willingness of a majority of individuals to respond to role assignment by engaging in conduct that is expected rather than acting consistently with individual taste. In this regard, studies have assessed and demonstrated test subjects’ willingness to administer electric shocks to other participants who are crying in pain and to act as abusive prison guards when they perceive it is their “job” to do so in furtherance of science.<sup>371</sup>

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<sup>366</sup> Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67, 78–79 (2002).

<sup>367</sup> See *id.* at 69 n.2 (extensively cataloging scholarship in the behavioral analysis of law).

<sup>368</sup> See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 634–35 (1999) (“Ultimately, any legal concept that relies in some sense on a notion of reasonableness or that is premised on the existence of a reasonable or rational decisionmaker will need to be reassessed in light of the mounting evidence that a human is ‘a reasoning rather than a reasonable animal.’” (quoting Alexander Hamilton, *quoted in* LAURENCE J. PETER, *PETER’S QUOTATIONS: IDEAS FOR OUR TIME* 315 (1977))).

<sup>369</sup> See Mitchell, *supra* note 366, at 69 (“[A] fundamental assumption of the new behavioral law and economics movement is that individuals systematically fall prey to a host of ‘cognitive illusions’ that lead to predictable nonrational behaviors both inside and outside traditional markets. Thus, whereas law and economics treats all legal actors in all situations as if they were perfectly rational, behavioral law and economics treats all legal actors in all situations as if they were equally predisposed to commit errors of judgment and choice.” (footnote omitted)).

<sup>370</sup> Hanson & Kysar, *supra* note 368, at 633.

<sup>371</sup> There are multiple studies demonstrating willingness to administer increasingly painful electric shocks as part of a “teaching” experiment. See Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 456–59 (2007) (describing Stanley Milgram’s teacher-learner electric shock experiment). Over time, a majority of participants have shown the willingness to follow the directions of the experimenter, notwithstanding cries of pain from the putative subjects. See *id.* at 458 (noting that 65% of Milgram’s subjects, when directed to do so, continued to administer an “electric shock” for the duration of the experiment); Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 AM. PSYCHOLOGIST 1, 1, 8 (2009) (recreating Milgram’s experiment and finding that 70% of participants continued to apply a higher “voltage” and “had to be stopped by the experi-

There almost certainly is a lesson here for corporate law. To reiterate, the majority of individuals are willing to cause physical pain in accordance with the perceived demands of a role they have voluntarily assumed. It is not that much of a stretch to think they might be just as willing to inflict economic pain on nonbeneficiaries in accordance with the perceived demands of the role of corporate fiduciary. Returning to the books reviewed for purposes of this Article, role responsiveness certainly would be consistent with the relative indifference of Whitman and Fiorina to the needs of employees (especially the thousands shed by HP).

Another lesson inheres in the legal decision theorists' finding that bounds on rationality do not apply uniformly across all populations and in all situations. There are educational, cultural, and many other types of variances; there is, for instance, documented variance dependent on the decisionmaker's accountability.<sup>372</sup> One would generally anticipate that accountability would tend to improve the quality of decisionmaking, insofar as the decisionmaker might be expected to take more care (engage in less shirking) and eschew self-interest more thoroughly than otherwise would be the case.<sup>373</sup> Accountability researchers have suggested, however, that "[s]elf-critical and effortful thinking" is most likely to occur where a decisionmaker feels he or she will be accountable to an audience with an interest in process rather than specific outcomes.<sup>374</sup> Where the views of the audience on outcomes are known, it may well be the case that decisionmaking processes will be truncated and existing biases (including those of role) will be amplified.<sup>375</sup>

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menter"). Somewhat similarly, in the famous "Stanford Prison" experiment, randomly assigned "prison guards" rapidly became abusive, while the randomly assigned "prisoners" just as quickly exhibited symptoms of depression and anxiety. See Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 69-73, 80-81 (1973).

<sup>372</sup> Mitchell, *supra* note 366, at 110 (calling this the "situational variable with perhaps the most far-reaching effects on judgment and decisionmaking behavior, yet a variable often neglected in experimental studies and in legal decision theorists' analyses of legal decisionmaking").

<sup>373</sup> See *id.* at 110-14 (noting that "predecisional accountability to a legitimate audience with unknown views may well cause decisionmakers to engage in self-critical thinking that often, though not always, leads to more rational behavior").

<sup>374</sup> Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 259 (1999).

<sup>375</sup> See *id.* at 256 (observing that when a decisionmaker knows his or her audience's views before making a decision, "[p]eople can simply adopt positions likely to gain the favor of those to whom they are accountable, thereby allowing them to avoid the unnecessary cognitive work of analyzing the pros and cons of alternative courses of action, interpreting complex patterns of information, and making difficult trade-offs").

It seems fairly obvious that, by reason of the business judgment rule,<sup>376</sup> as well as statutes and provisions in articles of incorporation holding officers and directors financially harmless,<sup>377</sup> there is no real legal accountability for the outcome of a decisionmaker's actions, much less liability for process defects.<sup>378</sup> Not only do the Facebook, Popeyes, HP, and eBay boards come across as somewhere in the range of invisible, lax, and slightly demented, none of the four authors seemed particularly motivated by the prospect of personal liability. When sued for a breach of the duty of loyalty (which she did not specifically name), Whitman settled to get past the "distraction."<sup>379</sup> She did characterize the event as a reminder to avoid even the appearance of a conflict of interest,<sup>380</sup> however, so perhaps there was some subsequent shaping of her conduct.<sup>381</sup> Moreover, both Whitman and Fiorina alluded to the structures of the Sarbanes-Oxley Act,<sup>382</sup> many of which indeed were designed to increase accountability in the process of preparing financial statements.<sup>383</sup>

Sarbanes-Oxley enforcement aside, it seems as though the only available accountability metric for corporate decisionmakers is some combination of stock price and bottom lines (which, as Whitman pithily instructs, are not necessarily related).<sup>384</sup> This is reflected throughout the books written by the three CEOs (as noted above, either Sandberg's non-CEO position or the purpose of her book may have left her silent on some matters the other three authors address). Thus, although all three CEOs seem to see their organizations in terms of teams and a network of interests larger than those of just the stockholders,<sup>385</sup> the nexus does not seem to extend to employees. This may well be the function of role constraints rather than sheer class indifference—if the perceived purpose of the corporation is to make profit and profitable companies must "run lean," it may well be that corpo-

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<sup>376</sup> See *supra* text accompanying note 195.

<sup>377</sup> See *supra* note 201 (sources cited).

<sup>378</sup> The statement in the text does not extend to breaches of the duty of loyalty, which corporate law takes more seriously. See *supra* note 201 (sources cited).

<sup>379</sup> WHITMAN & HAMILTON, *supra* note 7, at 149–50.

<sup>380</sup> *Id.*

<sup>381</sup> For amplification of the theory of the shaping value of rules, see Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & LAW 1, 8–13 (1995).

<sup>382</sup> See FIORINA, *supra* note 5, at 281; WHITMAN & HAMILTON, *supra* note 7, at 131.

<sup>383</sup> See generally LARRY D. SODERQUIST & THERESA A. GABALDON, *SECURITIES REGULATION* 367–71 (9th ed. 2018) (discussing effects of Sarbanes-Oxley Act).

<sup>384</sup> WHITMAN & HAMILTON, *supra* note 7, at 141–42.

<sup>385</sup> See *supra* text accompanying notes 348–50.



rate decisionmakers simply cannot cognitively afford to regard employees as genuine stakeholders.<sup>386</sup>

Although not self-identifying as “legal decision theory,” cultural cognition theory certainly is thematically linked insofar as it recognizes the priority of culture in an individual’s assessment of such matters as the validity of facts and the perception of risk.<sup>387</sup> Pursuant to the theory, “culture” or “worldview” can be classified by “group” and “grid.”<sup>388</sup> “Group” is a question of whether one is oriented toward individualism or communitarianism.<sup>389</sup> “Grid” refers to whether one is inclined toward hierarchical or egalitarian values.<sup>390</sup> Attitudes toward the operation of the free market play a critical role in establishing whether one is individualistic or communitarian: “[A] hardcore methodological individualist . . . insists that all human institutions and states of affairs be linked to the decisions of self-interested individuals.”<sup>391</sup> Presumably, then, individualists generally will believe in market rationality and would, if required to think about corporate law, ascribe to contractarian or, at a stretch, team production views.

The proponents of cultural cognition theory freely admit that critics identify suspicious similarities between “hierarchical individualists” and “conservative[s]”—or even “Republican[s].”<sup>392</sup> This is matched, of course, by similarities between “egalitarian communitarian[s]” and “liberal[s]”—or even “Democrat[s].”<sup>393</sup> The proponents have well demonstrated, however, that group and grid analysis is a superior tool for identifying the positions—and reasons for the positions—of independents.<sup>394</sup> (All that said, and as simplifying as it may be, it is irresistible to note that both Whitman and Fiorina have run for high political office as Republicans.<sup>395</sup>)

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<sup>386</sup> See FIORINA, *supra* note 5, at 232, 235–37; WHITMAN & HAMILTON, *supra* note 7, at 119–20.

<sup>387</sup> See Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 150–57 (2006) (defining “cultural cognition” as “the psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation”).

<sup>388</sup> *Id.* at 153.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 154.

<sup>392</sup> Dan Kahan, *Politically Nonpartisan Folks Are Culturally Polarized on Climate Change*, CULTURAL COGNITION PROJECT YALE L. SCH. (June 21, 2012, 9:08 AM), <http://www.culturalcognition.net/blog/2012/6/21/politically-nonpartisan-folks-are-culturally-polarized-on-cl.html> [<https://perma.cc/HJ8Q-L5Z9>].

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> See Anna Giaritelli, *Carly Fiorina ‘Certainly Would Consider’ Another Run for Presi-*



In light of the composition of CEO ranks and corporate boards, some of cultural cognition's most intriguing insights relate to what is known as "the white-male effect." According to an important article co-authored by several of the founders of the school, it has long been recognized that white men fear almost all manner of risks (maybe not prostate cancer) less than women and minorities.<sup>396</sup> The explanation posited by Professor Dan Kahan and his co-authors is that "individuals selectively credit and dismiss asserted dangers in a manner supportive of their cultural identities."<sup>397</sup> The "white-male effect" thus "reflects the risk skepticism that hierarchical and individualistic white males display when activities integral to their cultural identities are challenged as harmful."<sup>398</sup> It is easy to see (and is well explained) how this skepticism extends to views about risks to the environment: insofar as

assertions of environmental risk are perceived as symbolizing a challenge to the prerogatives and competence of social and governmental elites, it is hierarchical men—and particularly white ones, insofar as minorities are more likely to be disproportionately egalitarian in their outlooks—whose identities are the most threatened, and who are thus most likely to form an extremely dismissive posture toward asserted risks.<sup>399</sup>

One might be tempted to speculate that women—Republican or not—who are highly placed in corporate structures might be acculturated similarly to white males. Indeed, Fiorina and Whitman both were extremely vocal on the importance of taking risks—and relatively untrammelled by any concerns with the environment (Whitman mentions the environment only briefly and Fiorina not at all).<sup>400</sup> This type of speculation doubtless represents logically flawed backwards reasoning, leaping from attitudes about two particular issues to conclusions

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dent, WASH. EXAMINER (June 22, 2017, 11:54 AM), <https://www.washingtonexaminer.com/carly-fiorina-certainly-would-consider-another-run-for-president> [https://perma.cc/BE2L-MUN2]; Ruben Navarrette Jr., *How Meg Whitman Spent a Fortune—and Lost*, CNN (Nov. 3, 2010, 11:40 AM), <http://www.cnn.com/2010/OPINION/11/03/navarrette.california.whitman/index.html> [https://perma.cc/3JLN-85NM].

<sup>396</sup> See Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 465 (2007).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 474 (emphasis omitted) (citation omitted).

<sup>400</sup> See generally FIORINA, *supra* note 5, at 200–01, 321 (discussing importance of risk-taking without reference to the environment); WHITMAN & HAMILTON, *supra* note 7, at 68–69, 107–08.

about the authors' cultural worldviews, so let us see if we can rehabilitate the analysis with something a bit more granular.

For cultural cognition purposes, hierarchy assessments survey attitudes about the traditional role of women, with hierarchists associating themselves with such assertions as

It seems like blacks, women, homosexuals and other groups don't want equal rights, they want special rights just for them . . . .

The women's rights movement has gone too far . . . . [and] A lot of problems in our society today come from the decline in the traditional family, where the man works and the woman stays home.<sup>401</sup>

You would not think high-achieving women would hold such views, but perhaps this should cause rethinking of the meaning of hierarchy—which cultural cognition seems to associate with preservation of privileged status. Women who have achieved high status might be expected to value the “prerogatives and competence of social and governmental elites” in essentially the same way as white males, while still disagreeing that societal problems are attributable to women leaving their place in the home.<sup>402</sup> On the other hand (or perhaps the same hand), it is hierarchical women who are most likely to disbelieve other women's assertions of sexual assault by acquaintances.<sup>403</sup> This seems not unrelated to Sandberg's report that women who have achieved high status are less likely to identify instances of gender bias against others.<sup>404</sup>

### III. LIMITATIONS, CONCLUSIONS, AND FURTHER QUESTIONS

The foregoing reportage and analysis are decidedly unscientific; there is no male cohort as a control group and all evidence mustered is anecdotal rather than empirical in either an experimental or survey

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<sup>401</sup> David Ropeik, *Take the Cultural Cognition Quiz*, PSYCHOL. TODAY (Mar. 9, 2011), <https://www.psychologytoday.com/us/blog/how-risky-is-it-really/201103/take-the-cultural-cognition-quiz> [<https://perma.cc/SK45-6VWB>].

<sup>402</sup> Kahan et al., *supra* note 396, at 474.

<sup>403</sup> See Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance Rape Cases*, 158 U. PA. L. REV. 729, 729 (2010) (“The effect of hierarchy in inclining subjects to favor acquittal was greatest among women; this finding was consistent with the hypothesis that hierarchical women have a distinctive interest in stigmatizing rape complainants whose behavior deviates from hierarchical gender norms.”); see also Dan Kahan, *Women for & Against Trump: Who Sees What and Why . . . .* CULTURAL COGNITION PROJECT YALE L. SCH. (Oct. 17, 2016, 7:52 AM), <http://www.culturalcognition.net/blog/2016/10/17/women-for-against-trump-who-sees-what-why.html> [<https://perma.cc/2FEP-VHV8>].

<sup>404</sup> See *supra* text accompanying note 287.

sense.<sup>405</sup> The results might well be described as an impressionist watercolor painted in the rain. The picture is mildly inconsistent with contractarianism but gives modest support to the team production theory, at least as it might be tweaked into alignment with the legal decision theorists' recognition of role constraints. There is clearly no image of a communitarian kumbaya for the progressives.

What, if anything, might the brushstrokes suggest for a feminist analysis? The Introduction posited that there is value simply in hearing the stories of "corporate women": four of them have been told. Sandberg acknowledges a belief in a biological imperative involving the pull of motherhood but regards it as something to be overcome with the help of a fully involved partner.<sup>406</sup> Bachelder describes "act[ing] like a lady" but "think[ing] like a man."<sup>407</sup> Fiorina extensively details gender discrimination that she at least temporarily overcame (donning artificial testicles in the process).<sup>408</sup> Whitman recalls no overt discrimination but felt that women needed to outperform those who seemed intent on making their lives more difficult.<sup>409</sup> There does not seem to be any strong evidence that any of the authors necessarily believes that women in the workplace function differently than men, except insofar as Sandberg describes their general diffidence and lack of leadership ambition.<sup>410</sup> There also is no evidence that any of them have managerial concerns that are distinct from standard male concerns, with the notable exception of Sandberg's, Fiorina's, and (to a lesser extent) Whitman's trepidations with respect to the treatment of women.<sup>411</sup> Not one of the authors is any more touchy-feely in her care

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<sup>405</sup> Note that this distinction has been noted and well discussed in the context of evaluating the work of legal decision theorists. See, e.g., Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1945–46 (2002) (criticizing empirical behavioral decision studies for "neglect[ing] or downplay[ing]" subjects' rational responses and for promoting a deeply flawed "mythology of decision making" that "developed through the repeated use of standard research paradigms that are designed to show biased behavior" and uses "statistical methodology that stacks the decks in favor of finding biased behavior without concern for the practical importance of the behavior outside of the laboratory").

<sup>406</sup> SANDBERG, *supra* note 6, at 104–20.

<sup>407</sup> BACHELDER, *supra* note 4, at 101.

<sup>408</sup> See FIORINA, *supra* note 5, at 142–43.

<sup>409</sup> WHITMAN & HAMILTON, *supra* note 7, at 79–80, 84–85.

<sup>410</sup> See SANDBERG, *supra* note 6, at 12–26 (Chapter One, "The Leadership Ambition Gap: What Would You Do If You Weren't Afraid?").

<sup>411</sup> Sandberg describes consistent biases against women. See *supra* text accompanying notes 275–78. Fiorina details multiple instances of belittlement. See *supra* notes 246–56 and accompanying text. Whitman recounts a feeling that she did not belong. See *supra* text accompanying note 230.

for employees or the environment than the popular perception of the ordinary (most frequently male) corporate decisionmaker.<sup>412</sup>

The cultural cognition approach may well predict that high-achieving corporate women generally will share the cultural attitudes of corporate men insofar as they have the same hierarchical concerns to protect.<sup>413</sup> Characterization of such women as, essentially, “white male wannabes”<sup>414</sup> also is consistent with common sense. After all, if women aspiring to corporate heights were functioning in a markedly different way than their male predecessors, or expressing attitudes that were notably divergent, they most likely would be less successful.

This begs the question, however, of just why studies do show better bottom lines for companies with a critical mass of women on the board.<sup>415</sup> It is possible, of course, that the job of director is distinct enough from the job of CEO or COO to make a difference, at least insofar as it inherently involves teamwork. Perhaps being part of a female team emboldens women directors to cast aside their white male disguises and think and act differently. If so, perhaps that critical mass somehow revitalizes the board, transforming it from Greek chorus into something a bit more (ironically) muscular. Perhaps it is a matter of expanding the pool of talent by 50%, thus allowing corporations to replace their lowest functioning three directors with three who simply are more capable.<sup>416</sup> Perhaps it is because there is a shown correlation (with no shown causal connection) between the number of women on the board and improved talent management throughout the organization.<sup>417</sup> In other words, perhaps corporations that are better managed also are just more willing to be progressive in nominating female directors. Obviously, there is more work to be done in this regard.

In addition to positing the value of women’s stories, the Introduction sought at least tentative conclusions about three specific ques-

<sup>412</sup> See *supra* text accompanying notes 148–68; *supra* text accompanying note 400.

<sup>413</sup> See *supra* text accompanying note 402.

<sup>414</sup> This is a term inelegantly employed by the author in earlier works. See, e.g., Gabaldon, *supra* note 345, at 72.

<sup>415</sup> Rachel Orbach, Note, *Bringing Talent Off the Bench and into the Game: The Underrepresentation of Women in the Boardroom*, 22 *FORDHAM J. CORP. & FIN. L.* 203, 236 (2017).

<sup>416</sup> This seems somewhat unlikely, given Professor Douglas Branson’s identification of the phenomenon of female “trophy directors” (i.e., female or minority individuals holding multiple directorships). See Symposium, *Women and Corporate Governance: A Conference Exploring the Role and Impact of Women in the Governance of Public Corporations*, 87 *GEO. WASH. L. REV.* 1031 (2019). See generally DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* 97 (2007).

<sup>417</sup> See *supra* note 17.

tions. One was whether high-achieving women believe that the vaunted glass ceiling has been cracked and that women might now have the same opportunities for upward career mobility as men. *Dare to Serve: How to Drive Superior Results by Serving Others* gives no evidence that Bachelder ever perceived a glass ceiling, although she did see the need to think like a man to achieve success.<sup>418</sup> *Tough Choices: A Memoir* made it clear that although Fiorina once denied the existence of a glass ceiling, she saw a panoply of obstacles that a determined woman would have to fight—but could successfully fight—to overcome.<sup>419</sup> In *Lean In: Women, Work, and the Will to Lead*, Sandberg gives the impression that it is hard to tell whether there is a glass ceiling, since, although bias is real,<sup>420</sup> it is hard to separate its effect from the effect of women's own reluctance to grab for fruit hanging on the upper branches of the corporate tree.<sup>421</sup> *The Power of Many: Values for Success in Business and in Life* portrays Whitman's rise as fairly effortless—except for all the hard work at, well, working, and being “likable and fun.”<sup>422</sup> In net, it appears either that there indeed was no remaining glass ceiling *circa* 2010 or that the four authors have fallen prey to the phenomenon described by Sandberg: a limited ability of high-achieving women to perceive gender bias against others.<sup>423</sup>

A second question to be investigated was whether high-achieving women believe that gender may affect performance and, if so, that women may actually bring about “better” results in terms of financial bottom lines. Fiorina suggests this is the case, but it is not clear whether she believes it to be true because of women's gendered attributes or because they are 50% of the talent pool.<sup>424</sup> Both Bachelder and Whitman enthusiastically embraced values that they specifically attribute to male predecessors,<sup>425</sup> so it would be difficult to say that they believed that their success in raising bottom lines was gendered. Still, Bachelder scoffs at the primary leadership model of leveraging power over others, and it would be equally difficult to deny that this is

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418 See generally BACHELDER, *supra* note 4.

419 See generally FIORINA, *supra* note 5.

420 See *supra* text accompanying notes 275–78.

421 See *supra* text accompanying notes 259–61; *supra* text accompanying note 406.

422 WHITMAN & HAMILTON, *supra* note 7, at 81.

423 See *supra* text accompanying note 287.

424 See *supra* text accompanying note 258.

425 See *supra* text accompanying note 103; *supra* text accompanying note 99.

a model developed predominantly, if not exclusively, by men.<sup>426</sup> Sandberg does not address the matter.

The third question posed was whether high-achieving women evidence interest in achieving better results in terms of softer social metrics, such as considering the interests of more constituents or providing better environmental stewardship. Sandberg again is silent, but Bachelder, Fiorina, and Whitman all are notably absorbed in the need for teamwork and are attentive to the interests of consumers (and, in the case of Bachelder, franchisees).<sup>427</sup> Bachelder is concerned with whether “Popeyes people” find their work rewarding,<sup>428</sup> but Fiorina and Whitman give the impression that they probably would prefer to replace employees with robots, which would be easier to retire.<sup>429</sup> None of the authors seem to assume any serious responsibility for the environment or other social concerns (with, again, the exception of gender equity).

#### CONCLUSION

The answers to the questions raised in the Introduction suggest logical follow-ons. The most obvious is whether corporate gender diversity really is just a matter of fairness or whether it also can be a matter of financial and social progress. Given the microscopically small number of female CEOs heading publicly traded companies, and given the tendency manifest in the reviewed volumes not to stand out from men, no empirical conclusion is likely forthcoming anytime soon. Less palpable but perhaps more answerable is the question of how well models for corporate law fit the functioning of organizations led by either women or men. The board-centered models of team production and progressive corporate law do not easily reconcile with the descriptions given by Bachelder, Fiorina, and Whitman, nor does the rationality and shareholder centrism of the contractarians. These are matters that might be preliminarily addressed, at least anecdotally (and enjoyably), by reading at least a few autobiographies authored by “corporate men.”

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<sup>426</sup> See *supra* text accompanying note 76.

<sup>427</sup> See *supra* text accompanying notes 89–92, 142–43, 148–49; *supra* text accompanying notes 79–84, 144–47; *supra* text accompanying notes 85–88, 138–41.

<sup>428</sup> See *supra* text accompanying notes 148–49.

<sup>429</sup> See *supra* text accompanying notes 160–61; *supra* text accompanying notes 150–51.