

SEX AND CAPITAL: WHAT THEY TELL US ABOUT OURSELVES

CLAIRE MOORE DICKERSON[†]

INTRODUCTION

In developing economies,¹ the public corporation is principally a vehicle for privatization, rather than a means of raising capital.² Thus, a public corporations' significance in those

[†] Professor of Law and Arthur L. Dickson Scholar, Rutgers Law School - Newark; Wellesley College, A.B., Columbia University, J.D., New York University, LL.M. in Taxation. My thanks to Gregory A. Mark, to the participants at St. John's University School of Law's conference on "People of Color, Women, and the Public Corporation," to Temple Law School's workshop, and to the Dean's Research Fund at Rutgers Law School - Newark.

¹ The definition of development is not simple. Consider the assertion of Jeffrey Sachs and his co-authors stating that development can be measured by analyzing a combination of gross national income (the World Bank's replacement for gross domestic product), average annual growth in gross domestic product per capita, life expectancy at birth, under-five mortality rate, and the annual growth of the population. See Jeffrey Sachs, John W. MacArthur, Guido Schmidt-Traub, Margaret Kruk, Chandrika Bahadur, Michael Faye & Gordon McCord, *Ending Africa's Poverty Trap*, 2004 BROOKINGS PAPERS ON ECON. ACTIVITY 117, 118 (2004) (selecting certain indicators of development). On the other hand, Amartya Sen speaks of development in terms of human capability. The goal under this view is to achieve a society where people can live the life they would plan for themselves. Importantly, the question is not whether the individual in fact so functions; rather, the issue is whether he or she has the choice to do so. See AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 30-31 (1982) (discussing capability as the ability to function as the individual wishes). For others, the right to development focuses on the rights of states, with a strong sense that each state has the right to determine its own meaning of development. See Mohammed Bedjaoui, *The Right to Development*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 1177, 1182-83 (Mohammed Bedjaoui ed., 1991) (describing the right to development in the context of the right of a state as against other states). Because this Article focuses on business aspects, development can mean all of these things; our focus is on the contribution to be derived from supporting the entrepreneurial efforts of women, the preservation of national patrimony, and the reduction of political corruption.

² See Kathryn C. Lavelle, *Architecture of Equity Markets: The Abidjan Regional Bourse*, 55 INT'L ORG. 717, 719-26 (2001) (discussing states in emerging markets and their use of local, "peripheral" exchanges as vehicles for privatization, not for corporate capital-raising); *infra* Parts I.B & II.B (comparing public markets in West Africa and those in developed countries, particularly the United States).

economies is different from what we in the North have learned to expect from our own local experience.³ Two critical consequences for women in emerging markets flow from this fact. First, entrepreneurship based on private-source capital is central to the lives of many businesswomen. Second, because women entrepreneurs often are both owner and employee in their own businesses,⁴ the owner-employee distinction is blurred. Indeed, women entrepreneurs' networks emphasize class-based differences.⁵ Comparative analysis of these realities offers us in the developed world a fresh perspective on public corporations, on women in business, and on how they interact with each other and in the context of the larger society.⁶

First, I will focus on perceptions within the developing world, and in West Africa specifically. In that context, I will explore the emerging classes of women entrepreneurs in that part of the world, focusing on how they raise capital and perform business, that is, how they perform the role of the developed-world public corporation. Next, I will sketch out the role of the public corporation in West Africa—if women entrepreneurs have to source capital by other means, of what use are public corporations? What is the significance of corporate governance to the developing-world reality that relegates public corporations to the role of political tool?

Against this backdrop, we look at the United States. Using the West African experience as counterpoint, the comparative

³ See generally COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH (Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch & Stefan Prigge, eds., 1998) (revealing that academics in the U.S. look at developments in Germany, the U.K., and Japan, and their academics look back at us; we do not take ourselves out of our own economically developed milieu).

⁴ See generally Jean-Pierre Lachaud, *Le Secteur Informel Urbain et L'informatisation du Travail en Afrique: Rhétorique et Réalités. Le Cas de la Côte d'Ivoire* (1995), available at <http://ced.u-bordeaux4.fr/ceddt5.pdf> (antedating the 2002 civil unrest, reporting that in urban Côte d'Ivoire, family-based entrepreneurship provides revenues for most workers; the great majority of workers, and of women in particular, are in the informal economy and thus very far from public-market capital; and there are relatively few large "modern" businesses as the economy becomes increasingly informal).

⁵ See *infra* Part I.A (discussing class structure of women's networks in West Africa).

⁶ See, e.g., Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 230–50, 256–75, 282–83 (1999) (discussing classical and less traditional reasons for studying comparative law, and encouraging an approach that combines an open mind and humility).

analysis offers a new, class-based perspective on the roles of women in the commercial arena. Next, I will show that although U.S. public corporations have evolved into vehicles to maximize shareholder wealth, the comparative analysis emphasizes that our society need not limit itself to this view. In the wake of massive scandals such as the Enron and WorldCom debacles, we have watched our federal and state governments wrestle with issues relating to the governance of public corporations. The West African understanding of governance takes the issue out of its narrow, corporate-commercial box and places it squarely in the larger, socio-political context. This analysis focuses our attention where it should be: on us, the social and political actors within the affected community.

I. THE DEVELOPING WORLD: A COMPARATIVE PERSPECTIVE

A. *Women Entrepreneurs: The Class Structure*

There are two classes of women entrepreneurs in West Africa.⁷ One class is traditional to the region; the other has emerged more recently.⁸ There are both similarities and differences between those classes: as entrepreneurs, the women in both classes are by definition innovative and effective in organizing their commercial ventures,⁹ but they differ in their education, in their geographic reach, and even in the products and services they provide.

The women who run the smaller enterprises tend to sell products that are traditionally connected to their family obligations such as food and crafts. These women typically work in the informal market and often are illiterate. The traditional women entrepreneurs' supply networks cross national borders within the region, and are built on a broad range of familial

⁷ This statement has the respectability of any generalization backed by evidence. See, e.g., Anita Spring, *Gender and the Range of Entrepreneurial Strategies: The Typical and the New Woman Entrepreneur*, in BLACK BUSINESS AND ECONOMIC POWER 381, 382–83 (Alusine Jalloh & Toyin Falola eds., 2002) (discussing the “traditional” and “new” classes of women entrepreneurs in Africa).

⁸ See *id.*

⁹ See Peggy Brizinski & Linda Jaine, *Native Women as Entrepreneurs*, in WOMEN, FEMINISM AND DEVELOPMENT/FEMMES, FÉMINISME ET DÉVELOPPEMENT 378, 382 (Huguette Dagenais & Denise Piché eds., 1994) (defining “entrepreneur” to “describe innovation and effective organization in family and community work”).

relationships, including kinship.¹⁰

For these traditional businesses, there is also a more negative narrative about the impact of social norms. Even at home, the women appear to operate in a kind of informal, transgressive manner. For example, they reportedly often have to hide earnings from spouses in order to feed the family.¹¹ Nor do the much-touted benefits of microfinance free the women from living the subtext. Despite all the descriptions of successful businesses launched through micro-loans extended by the Grameen Bank and its knock-offs,¹² this other story is grim. The reason male-dominated banks lend to women is not because of women's empowerment or because of assistance targeting needy children, but rather because women are simply deemed more compliant than men.¹³ Thus, it is a narrative of male relatives instructing the women to borrow from the bank and funnel the

¹⁰ See Lila E. Engberg, Susan A. Beckerson & Edith François, *Women and Household Production: An Ecosystem Perspective with a Comparison of Two Studies from Africa*, in WOMEN, FEMINISM AND DEVELOPMENT/FEMMES, FÉMINISME ET DÉVELOPPEMENT, *supra* note 9, at 152, 154–57 (describing the importance of kinship networks, the role of women within them, including the concerning trade in food, and the inadequacy of male-dominated states' efforts to support the women's efforts). There appears to be a contrast with male entrepreneurs here. See DAVID S. FICK, *ENTREPRENEURSHIP IN AFRICA: A STUDY OF SUCCESS* 21 (2002) (depicting Nigeria and local entrepreneurs); see also Engberg, Beckerson & François, *supra*, at 154–57; Anita Spring & Barbara E. McDade, *Entrepreneurship in Africa: Traditional and Contemporary Paradigms*, in AFRICAN ENTREPRENEURSHIP: THEORY AND REALITY 1, 20–21 (Anita Spring & Barbara E. McDade eds., 1998) (describing the women's greater difficulty in raising capital and in finding time away from domestic obligations). But see Yvette Monga, *A Historical Perspective on African Entrepreneurship: Lessons from the Duala Experience in Cameroon*, in AFRICAN ENTREPRENEURSHIP: THEORY AND REALITY, *supra*, at 169, 177 (emphasizing that the kinship networks are not necessarily explained by "cultural generalizations" but may, instead, be analogous to immigrant networks in other countries). "Duala" is an alternate (English) spelling for "Douala," the commercial capital of Cameroon.

With respect to the informal market, in Côte d'Ivoire, for example, the bulk of that market, 71%, is projected to stay at a subsistence level; 30% of these businesses are headed by women. See Lachaud, *supra* note 4, at 8–9 (discussing the Ivorian informal economy prior to the 2002 civil war).

¹¹ See, e.g., Spring, *supra* note 7, at 382 (describing traditional wives' tendency to hide revenues and assets in order to avoid harassment).

¹² See FICK, *supra* note 10, at 42 (describing a woman entrepreneur's restaurant in Bukina-Faso, launched on the proceeds of microloans); see also Grameen: Banking for the Poor, <http://www.grameen-info.org> (last visited Oct. 14, 2005) (detailing the offering of micro-loans).

¹³ See AMINUR RAHMAN, *WOMEN AND MICROCREDIT IN RURAL BANGLADESH* 73–74 (1999).

loan proceeds to the male leaders of the family.¹⁴ Further, the entrepreneurial work of these women is in addition to their domestic obligations, resulting in the second shift familiar to developed-country women.¹⁵ The manifestation in the developing-country context, however, has particular urgency given the subsistence level of the family's existence.¹⁶

The other class of woman entrepreneur, the new category, features women who tend to have university education and often possess overseas employment experience. These are the women in charge of larger enterprises, and their businesses are involved in many different industries, from telecommunications to manufacturing to tourism. These entrepreneurs' products and services cross borders in a new way. Not limited to family and kinship networks, the "new" businesswomen are deep in the globalized economy.¹⁷

What we find, then, is that these new entrepreneurs belong to a favored class and deal in goods and services that might be called gender neutral—or even traditionally male.¹⁸ Arguably, these women are un-gendered by their privilege and their

¹⁴ See *id.* at 76 (providing a subtext to the classic micro-loan narrative).

¹⁵ See Claire C. Robertson, *Women Entrepreneurs? Trade and the Gender Division of Labor in Nairobi*, in AFRICAN ENTREPRENEURSHIP: THEORY AND REALITY, *supra* note 10, at 109, 122–23.

¹⁶ See ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 239–45 (1989) (describing the professional and domestic obligations of modern women in the United States); Engberg, Beckerson & François, *supra* note 10, at 162–68 (describing the allocation of work between men and women); Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1268–69 (2004) (providing a personal vignette into the "second shift" in the contemporary United States). However, some of it is cultural. See generally RAHMAN, *supra* note 13; Engberg, Beckerson & François, *supra* note 10, at 162–68 (describing the allocation of work between men and women).

¹⁷ See Spring, *supra* note 7, at 383 (discussing the new women entrepreneurs in Africa). Sources of capital remain a difficult problem, solved partly by formal banking arrangements, but also by marshalling traditional networks built on kinship and the like. See *id.* at 387–88 (indicating women tend to have "less start-up and operating capital" and "rely on their spouses and relatives for start-up capital," or they participate in rotating savings and credit associations in which a group of women contribute, and each week a different participant is awarded the entire pot); see also Akanmu G. Adebayo, *Money, Credit and Banking in Colonial and Post Colonial West Africa*, in BLACK BUSINESS AND ECONOMIC POWER, *supra* note 7, at 147, 158–59, 166 (noting that traditional capital-sourcing systems persist in anglophone West Africa).

¹⁸ See Robertson, *supra* note 15, at 110.

activities, at least in the professional arena.

I limit the assertion about un-gendering to professional life because even these women are stretched across the work-family divide. A snippet from a conversation with two Cameroonian women reflects the dual responsibilities that the "new" businesswomen, too, must shoulder. One of my interlocutors was Maître Mandessi-Bell, a very entrepreneurial and successful lawyer. On her own, she has launched and maintains a website that provides free updates on the new, regional business laws applicable throughout most of non-anglophone West Africa.¹⁹ In her entrepreneurial mode, she is advertising very much in the same way that lawyers in the United States and Europe do. Given the unreliable Internet connectivity within Cameroon, she cannot expect to reach a wide public. Instead, she is addressing the major domestic investors (they are most likely to have a satellite feed), and the foreign developed-world investors (they have no connectivity problems). Maître Mandessi-Bell is a highly effective and thoroughly impressive individual.

The other Cameroonian present was a young woman (probably in her early twenties), in the process of completing her law degree, with an undergraduate degree in the French educational system. After some prefatory shop-talk, Maître Mandessi-Bell turned the conversation to the harsh realities for women in the law. She advised the younger woman to plan carefully on how to balance her chosen profession and the demands of a future household. The law student responded pragmatically about the constraining impact of the stuttering economy on any possibilities of advancement in any niche of the profession, even before factoring in the issue of balancing home and professional life. And then she proceeded to expand on the difficulties that she foresees because of her gender.²⁰ This conversation, held in Douala, Cameroon while casually waiting for a taxi, is deeply familiar to developed-world women professionals of my generation.

Whatever the difficulties the elite women face, their realities are in important ways profoundly different in degree from those confronting the traditional women entrepreneurs. A Ghanaian

¹⁹ See Interview with Maître Evelyne Mandessi-Bell in Douala, Cameroon (July 3, 2005).

²⁰ See *id.*; Interview with Mlle. Z.U. in Douala, Cameroon (July 3, 2005) (anonymity to protect interviewee).

“new” entrepreneur used her retirement bonus from a nursing career in England and arbitrated it into a successful tuna-fishing operation in Ghana. She now supplies a U.S.-controlled canning operation.²¹ A Senegalese fashion-designer, together with her French husband, launched a successful event-production company and Internet café in Dakar.²² Another anecdote about an elite entrepreneur features a U.S.-born woman who, with her Ghanaian husband, founded car-rental and tour businesses in Ghana. This businesswoman was brought up in the United States, and received both her university education and early employment experience entirely in the United States. She has energized the Ghanaian tourist industry, and her tour company is today one of the most successful in that country.²³ To summarize, the first of these women is native to West Africa but spent her career in England; the second is Senegalese but established her businesses together with her French husband; the third was born and raised in the United States, and manages companies she founded with her husband. These anecdotes suggest that the successful new entrepreneurs do benefit from direct or indirect exposure to northern business practices, and that their husbands are useful, too. At the most concrete level, the spouses are an additional source of or conduit to capital.²⁴

Perhaps the most energizing story is that of the Ghanaian Lucia Quachey. She began a clothing manufacturing business out of her house over thirty-five years ago, and now owns and manages a factory. She has also founded a Ghanaian organization to foster women entrepreneurs, and is a leader in a similar pan-African organization. Her Ghanaian association boasts a membership of 650 companies that cut across the boundary between traditional and “new” women entrepreneurs.²⁵

²¹ See FICK, *supra* note 10, at 36.

²² See *id.* at 44.

²³ See *id.* at 27–28.

²⁴ See Spring, *supra* note 7, at 388–89 (stating that the “new” businesswoman may have access to family money, or to capital through family connections). Depending on the definition of indigenous, there are other relevant, non-indigenous sources of expertise and capital in West Africa besides the North. In Côte d’Ivoire, for example, second and third-generation Lebanese “control more than [50%] of the economic activities.” FICK, *supra* note 10, at 40. For a general discussion of minority ethnic groups in the developing world, see Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998).

²⁵ FICK, *supra* note 10, at 33–35 (reporting that represented industries of Ghana

In West Africa, then, women entrepreneurs fall into two classes. The products and territories are different, as are the education levels of the businesswomen. However, there also are similarities across the classes. Even beyond the start-up phase, both classes use sources of capital other than the public markets, and both are subject to social pressures. Currently, elite businesswomen are including the traditional entrepreneurs in their efforts to reform the structures affecting women in business.²⁶

B. Public Corporations in the Developing World

1. West African Public Corporations Are Privatization Tools

Public corporations in the developing world are unusual to the northern eye. In the North, we understand public corporations to be those whose shares are traded on a national or regional exchange, or over the counter. Applying that definition to the developing world,²⁷ we do find a few such corporations. In West Africa, for example, the regional exchange located in Abidjan, Côte d'Ivoire, lists forty companies.²⁸ In comparison, the New York Stock Exchange lists some 2,800 companies, and Euronext lists 1,333.²⁹ West African public corporations, the

Association of Women Entrepreneurs ("GAWE") and African Federation of Women Entrepreneurs ("AFWE") include food processing, day-care centers, crafts, pharmaceuticals, and hotels); *see also* Spring, *supra* note 7 (reporting conversations with Quachey).

²⁶ *See generally* FICK, *supra* note 10.

²⁷ The relevant countries, including Cameroon, Ghana, Nigeria and Senegal, are all on the World Bank's list of "low-income economies." The other categories are "lower-middle income," "upper-middle income," and "high income economies." *See* World Bank Group, Data and Statistics: Country Classification: Country Groups, *available at* <http://www.worldbank.org/data/countryclass/classgroups.htm> (last visited Oct. 14, 2005).

²⁸ All but one are Ivorian; the outlier is Senegalese. For a description of the Bourse Régionale des Valeurs Mobilières ("BRVM"), *see* MBendi, Bourse Regionale des Valeurs Mobilières, <http://www.mbendi.co.za/exch/25/p0005.htm> (last visited Oct. 14, 2005) (stating that it serves eight countries: Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo).

²⁹ *See* Euronext, Chiffres Clés, *available at* http://www.euronext.com/editorial/anchors/wide/0,5371,1679_78742,00.html (last visited Oct. 14, 2005); N.Y. Stock Exch., Listed Company Directory, *available at* <http://www.nyse.com/about/listed/listed.html> (last visited Oct. 14, 2005). Euronext is the result of the merger of the Amsterdam, Brussels, and Paris stock exchanges, which the Portuguese exchange and London International Financial Futures Exchange ("LIFFE") later joined. *See* Euronext, Regulatory Structure, *available at* <http://www.euronext.com/>

most formal denizens of the formal economy, are unlikely to increase rapidly in number given the importance and extent of the region's informal economy. Since business people in the informal economy tend not to pay taxes, they are unlikely to want to tell the government of their activities. Thus, they are unlikely to choose to file formal organizational papers, let alone list on an exchange, even if they can afford the cost.³⁰ In West Africa, the businesses that do register tend to take a form that inevitably is privately held.³¹ Public corporations not only are unusual, but they are likely to remain so for the foreseeable future.

The second reality about public corporations in developing countries, and in West Africa in particular, is that they exist as a privatization tool.³² A government may seek to privatize its utilities or other nationalized businesses by conviction, or due to conditions imposed by an international financial institution such as the World Bank.³³ In either case, the government is using the local stock market to make some portion of the formerly parastatal organization available to the local population.³⁴

When choosing to privatize a business, the government must find a purchaser with sufficient capital, and buyers in the public market are only one potential source. The government could, instead, seek out a juridical or natural person with assets available to purchase the parastatal; in most cases the likely source of capital for such a purchase is a foreign multinational

editorial/wide/0,5371,1732_4528690,00.html (last visited Oct. 14, 2005).

³⁰ For example, there is a vibrant informal market in the Côte d'Ivoire. See Lachaud, *supra* note 4 (describing the Côte d'Ivoire's informal economies and their increasing size); see also HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 85 (2000) (discussing extralegal sectors outside West Africa); Katharina Pistor & Daniel Berkowitz, *Of Legal Transplants, Legal Irritants, and Economic Development*, in *CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY* 347, 352 (Peter K. Cornelius & Bruce Kogut eds., 2003) (discussing the Kirby effect: entrepreneurs use the title "LLC" for their businesses but forgo limiting the liability by actually registering the businesses as LLCs for fear of being noticed by governmental authorities).

³¹ See, e.g., Interview with T.E., D.L., and Q.F. in Abidjan, Côte d'Ivoire (June 28, 2004) (anonymity to protect interviewees) (noting that the SARL is the most widely used business form in the Côte d'Ivoire).

³² See Lavelle, *supra* note 2, at 722.

³³ See *id.*

³⁴ See *id.* at 722–26 (discussing the use of exchanges as vehicles for privatization).

corporation.³⁵ Pricing a business is always fraught with guesswork, or at least with a heavy application of judgment. However, that valuation is particularly an art rather than a science when the company's accounting has been non-transparent, as is often the case for a parastatal business. If the government prices the company too high, it simply will not sell. This could be embarrassing for the government, and there certainly would be excessive transaction costs including wasteful delays; however, the failed-sale outcome at least does not entail the export of a substantial portion of a national asset. In contrast, if the government sets the price too low in its dealings with the foreign purchaser, the property of the state—of the people—is sold below market to a foreigner.³⁶ The state has transferred without adequate compensation part of the national patrimony to the foreign purchaser. This is not good from an economic standpoint; it may be problematic politically as well.³⁷

The alternative to selling to a foreigner is to privatize by doing an initial public offering on the local stock exchange. The local market may help the government price the shares, but if the market is relatively thin, the risk of mispricing remains significant. If the government's price is too high, however, the only harm is a waste of transaction costs because the stock simply will not sell, barring issues of asymmetry of information.³⁸ If the government-dictated price is too low, on the other hand, a stock market provides a distinct advantage over the private sale: a government that, through an exchange, offers shares at below market has some chance of selling to its own local citizenry.³⁹ In that case, the good news is that the national patrimony—the windfall—is transferred to domestic holders; it is not exported.⁴⁰

³⁵ See *id.* at 736 (listing the largest shareholders, most of which are foreign multinationals, of companies listed on the regional exchange in Abidjan, Côte d'Ivoire).

³⁶ See *infra* Part II.B (discussing privatization).

³⁷ See *infra* Part II.B.

³⁸ The venue makes no difference here: the outcome would be the same in an attempted private sale.

³⁹ See Lavelle, *supra* note 2, at 727–28, 735 (noting the significant Ivorian and West African participation in the regional stock market).

⁴⁰ See, e.g., Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000) (describing the corruption that occurred at the time of the post-Communist, Russian privatization). Depending on negotiations with potential purchasers, the state might end up with a hybrid sale, i.e., part of the parastatal sold to a foreign

2. Only Domestic “Public Corporations” Are Relevant for Purposes of Comparison

These developing-country public corporations traded on local exchanges as a consequence of privatization are not necessarily the only public corporations present in developing countries. A foreign multinational may be trading goods or services, or investing, directly in that country; if the multinational’s shares are publicly traded in its home jurisdiction, it is of course a public corporation operating in the developing world. However, I am directing the discussion of public corporations to only those corporations that are publicly traded on local developing-country exchanges and are, as a practical matter, formed under local laws.⁴¹ Foreign multinationals with any serious investment or other presence in a developing country generally operate through a controlled or wholly owned subsidiary corporation.⁴² That wholly owned subsidiary obviously is not publicly held. If, instead of being 100% owned by the foreign multinational, the controlled subsidiary has some of its shares locally traded, the foreign owner likely purchased its interest when the subsidiary corporation was being denationalized. In other words, most subsidiaries are not publicly held, and those that are partially traded on a public market tend to be majority-held by the foreign parent.⁴³ That is the classic configuration of the developing-country public company. Whatever its impact on the emerging economy, the foreign multinational company itself is not a developing-country, public company.

The more conceptual reason for ignoring the foreign multinational directly present in a developing country and

purchaser, and part sold on the local stock exchange. It is unlikely that local purchasers will have sufficient capital to purchase the entire business directly from the government; it is equally unlikely that the parastatal could be sold on a foreign market. With this kind of arrangement, too, at least the pricing is in part determined by a market, and at least some of the shares will remain with the local citizenry to reduce the damages caused mispricing. *See infra* Part II.B (discussing privatization).

⁴¹ The regional stock exchange in Abidjan is a case in point: every listed company is Ivorian, except for a Senegalese company. *See* MBendi, *supra* note 28 (describing the regional stock exchange’s listed companies).

⁴² *See, e.g.,* Lavelle, *supra* note 2, at 735, 738 (describing access of the Ivorian “capitalist class” to shares in foreign multinationals’ subsidiaries).

⁴³ *See id.* at 735 (showing that in 1999, Ivorian interests held a majority interest, or were the largest single shareholder, of only 20% of the companies listed on the Abidjan exchange).

focusing instead on that country's domestic public corporations is to offer a comparative analysis. In order to derive benefit from the unique perspective that a comparison offers, the categories must be meaningful and clear. On the developed-country side of the equation, we will look at U.S. public corporations traded on a U.S. exchange. On the West African side of the equation, we must similarly consider corporations formed in West Africa and traded there.⁴⁴

For our purposes, then, the core learning is that West African stock exchanges are vehicles for privatization and that corporations list on these exchanges to help the government limit export of the national patrimony.⁴⁵

C. Governance: Political Versus Corporate Issues

"Governance" has no special meaning in West Africa with respect to corporations and is thus a false cognate for lawyers trained in the North.⁴⁶ Developing-country private practitioners, even sophisticated ones involved in corporate practice and consistently in contact with northern law firms, perceive "governance" and, specifically, "good governance," as terms referring to the political sphere.⁴⁷ While law professors are prepared to discuss the topic with respect to its applicability to the corporate arena, most dismiss it as irrelevant,⁴⁸ or even dangerous.⁴⁹

⁴⁴ A multinational will tend to carry its own norms with it. See, e.g., Claire Moore Dickerson, *Spinning Out of Control: The Virtual Organization and Conflicting Governance Vectors*, 59 U. PITT. L. REV. 759, 789-93 (1998) (discussing the impact in developing countries of a United States corporation's developed-country norms—both pro-shareholder norms formed by the business community and stakeholder norms championed by, inter alia, anti-apartheid or pro-worker activists).

⁴⁵ This does not eliminate the local elites' incentive to retain and expand their economic influence, and thus to support for their own reasons the use of the local exchange as the privatization vehicle. See, e.g., Lavelle, *supra* note 2, at 725-26 (describing the elites' interest); see also *infra* Part II.B (discussing the effects of using vouchers in the context of privatization).

⁴⁶ See Interview with Me. B.K. in Douala, Cameroon (July 5, 2004) (anonymity to protect interviewee).

⁴⁷ See *id.*; Interview with Me. F.B. in Douala, Cameroon (July 5, 2004) (anonymity to protect interviewee).

⁴⁸ See Interview with Anne-Marie Assi-Esso, Professor of Law, in Abidjan, Côte d'Ivoire (June 30, 2004).

⁴⁹ See, e.g., Interview with Paul-Gérard Pougoué, Vice Rector and Professor of Law, in Soa, Cameroon (July 9, 2004) (discussing "*intérêt social*" as a way of avoiding "*abus*").

Concepts of corporate governance are irrelevant for one simple reason—social issues tend to overwhelm corporations. The absence or presence of political corruption, for example, is a crucial distinction when determining how, and for whose benefit, the corporation is governed. If a country is tied for 129th position out of a possible 145 countries on Transparency International's Corruption Perceptions Index, niceties such as being able to distinguish the role of a director from that of a shareholder become irrelevant.⁵⁰ If the country is significantly more autocratic than democratic,⁵¹ the problem of corruption typically becomes that much more intractable.⁵²

In Cameroon, a practicing lawyer told me that the government participates in the exercise of “*chantage alimentaire*,” or blackmail by starvation, against judges.⁵³ What

⁵⁰ In 2004, Cameroon, for example, was tied for 129th out of 145 countries. See TRANSPARENCY INT'L, TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTIONS INDEX 2004, at 4 tbl.1 (2004), available at <http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004>. Cameroon's Corruption Perceptions Index was 2.1, as compared to the highest score of 9.7 held by Finland, and the lowest of 1.5 held by Haiti. See *id.* In West Africa, the Democratic Republic of Congo and the Côte d'Ivoire (tied for 133rd with a score of 2.0), Chad (in 142nd place with an index of 1.7), and Nigeria (in 144th with an index of 1.6), were identified as even more corrupt. See *id.* By way of comparison, the United States was tied for 17th with a score of 7.5. See *id.*

⁵¹ See Polity IV Country Report 2003: Cameroon, available at <http://www.cidcm.umd.edu/inscr/polity/Cao1.htm> (last visited Oct. 14, 2005) (indicating that Cameroon scored at a -4 on Polity IV's scale measuring the level of a country's autocracy or democracy). This scale indicates constructed annual measures for both institutionalized democracy and autocracy—a +10 indicating a full democracy, and a -10 indicating a full autocracy. See POLITY IV PROJECT: DATASET USERS' MANUAL 13 (2002), available at <http://www.cidcm.umd.edu/inscr/polity/p4manualv2002.pdf>. For its purpose, Polity IV defines democracy as follows:

Institutionalized Democracy: Democracy is conceived as three essential, interdependent elements. One is the presence of institutions and procedures through which citizens can express effective preferences about alternative policies and leaders. Second is the existence of institutionalized constraints on the exercise of power by the executive. Third is the guarantee of civil liberties to all citizens in their daily lives and in acts of political participation.

Id.

⁵² Sadly, promoting woman-owned businesses does not appear to be a means of reducing corruption. See Ranjana Mukherjee & Omer Gokcekus, *Gender and Corruption in the Public Sector*, in GLOBAL CORRUPTION REPORT 2004, at 337, 337–39 (Robin Hodess, Tania Inowlocki, Diana Rodriguez, & Toby Wolfe, eds., 2004), available at <http://www.globalcorruptionreport.org/gcr2004.html> (noting that corruption is higher where there are either too few women, or too many, but also conceding that the causal vector may be in the other direction—that pre-existing corruption, itself, creates the gender imbalance).

⁵³ See Interview with Me. Q.T. in Douala, Cameroon (July 2004) (anonymity to

this usually means is that a judge, who does not comply with governmental wishes, will be transferred to a less desirable part of the country—a particularly persuasive sentence since the victim is left with no viable alternative.⁵⁴ Under the French system in general, and in Cameroon in particular, a judge and practicing lawyer perform on such different tracks that a former judge does not even have the option of moving into private practice to gain shelter from governmental excess.⁵⁵ In this context, corporate governance can easily seem irrelevant.

Concepts of corporate governance can even be dangerous. Focusing on corporate governance when there is significant political failure can seem like a waste of effort; however, it can be worse: it can create an environment favorable to political corruption. In West Africa, as elsewhere, many articulated principles of corporate governance are more akin to standards than rules. For example, sixteen West African countries have adopted a corporate law that is based on the French legal system. Consequently, the standard of corporate social responsibility recognized in these countries is, likewise, inherited from the French—one referred to as “*intérêt social*.”⁵⁶ This concept, roughly translated as “corporate interest” or “social interest,” instructs managers to consider the interests not only of shareholders, but also of employees, and of suppliers or customers.⁵⁷ The broadest definition of “*intérêt social*” demands that managers take into account even the interests of the State before acting.⁵⁸ What are the risks created by such a wide-

protect interviewee).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See MAMADOU KONÉ, LE NOUVEAU DROIT COMMERCIAL DES PAYS DE LA ZONE OHADA: COMPARAISONS AVEC LE DROIT FRANCAIS 157–58 (2003).

⁵⁷ See *id.*

⁵⁸ The sixteen countries, mostly francophone former French colonies, adopted the OHADA Treaty in 1993 that formed the Organization for the Harmonization in Africa of Business Laws (“OHADA”). See *Célébration du 10ème anniversaire du Traité OHADA signé à Port Louis le 17 Octobre 1993* (Oct. 17, 2003), http://www.ohada.net/article_fr.php?idac=41. See generally OHADA.com, <http://www.ohada.com> (last visited Oct. 14, 2005) (providing general information on OHADA); OHADA.org, <http://www.ohada.org> (last visited Oct. 14, 2005) (OHADA’s official website). Pursuant to the OHADA Treaty, uniform laws, including the one on business organizations, have become internal laws of the OHADA state-parties. See OHADA Treaty, art. 10, Uniform Act Relating to Commercial Companies and Economic Interest Group, available at <http://www.ohada.com/textes.php?categorie=100> (last visited Oct. 14, 2005) (providing that the Uniform

ranging standard?

As emphasized by a Cameroonian academic, to the extent that judges are venal or incompetent, or that they have been merely co-opted by the government through blackmail by starvation, it is particularly dangerous to allow them the discretion that is inevitably involved in the application of standards.⁵⁹ Thus, surprising to us in the North, the path to a cleaner economy includes replacing standard-based issues of corporate governance by clear rules that eliminate the need for judicial discretion.⁶⁰

Finally, in an environment wasted by endemic diseases from malaria to AIDS, and where per capita income is below two dollars a day, corporate governance is a luxury. As I argue elsewhere, I do believe that this attitude is unnecessarily defeatist.⁶¹ Nevertheless, as a descriptive matter, the dominant perception in the region holds that the political system's catastrophic failure renders corporate governance meaningless.⁶² What is needed is good political governance, not merely good corporate governance.

Acts adopted pursuant to the treaty become automatically the internal law of the state-parties to the treaty); Ohada.org, Organisation et Harmonisation des Comptabilités des Entreprises, http://www.ohada.net/actescons_fr.php?IDTexte=14 (last visited Oct. 14, 2005). The concept of "*intérêt social*" (corporate interest) is a principle that is stakeholder in nature. See, e.g., KONÉ, *supra* note 56, at 157–58 (discussing the three theories of *intérêt social* under French corporate law). See generally Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. (forthcoming 2005) (describing OHADA).

⁵⁹ This is Professor Pougoué's point. See Interview with Paul-Gérard Pougoué, *supra* note 49 (cautioning against giving discretion to judges).

⁶⁰ These issues of corporate governance can arise whenever there is any separation of management from ownership. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 247–76 (1933) (describing the separation of ownership from management). Thus, the issues do manifest themselves even where there are few public corporations; all that is necessary is the absence of absolute identity between owner(s) and manager(s). Of course, replacing standards by rules creates its own problems. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976) (discussing standards versus rules).

⁶¹ Norms, even of limited application, can be aspirational and influence further changes. See Dickerson, *supra* note 58.

⁶² See, e.g., Interview with Me. F.B., *supra* note 47 (discussing corruption and dismissing the concept of "*intérêt social*").

II. THE COMPARATIVE ANALYSIS PUTS THE NORTH IN RELIEF

A comparative analysis helps contextualize the relationship of gender to governance of public corporations. The West African experience shifts our point of perspective—it questions the centrality of our northern, developed-country experience. Instead of comparing the rest of the world to us, we are comparing ourselves to another reality.

To effect this comparison, we have to consider for the United States the same factors that we reviewed for West Africa. Our study must focus on the context for women in business, on the purpose of the public corporation, and on political realities in general. By using comparative law as a tool, we can gain enough distance to obtain a new perspective on the progress and position of our own nest.

A. *Women Entrepreneurs: The Class Structure in the Developed World*

We saw that in West Africa, the role of women in business is largely divorced from public companies, in part because there are very few domestic public corporations.⁶³ We also saw that women in business fall into two large categories defined on the one hand by wealth and education, and on the other by the products they offer and the geographic range they roam.⁶⁴ One class of women serves as entrepreneurs in small-scale enterprises. While this is vital to the informal economy, it is constrained by traditional understandings of social roles.⁶⁵ This class is also constrained by a lack of capital assets—a problem inadequately and unreliably alleviated by outside sources' ostensibly well-meaning efforts to remedy the situation through micro-loans.⁶⁶ The other elite class of women in business includes leaders in larger enterprises concerned with a wider variety of products.⁶⁷ Although they offer much promise for the future, it is hard to say that the new class to which these businesswomen belong already has a greater impact on the local economy than does the old class. The small-scale businesswomen are much more numerous than the elite businesswomen, and they operate in an informal economy that is

⁶³ See *supra* Part I.B (discussing public corporations).

⁶⁴ See *supra* Part I.A (discussing classes of women).

⁶⁵ See *supra* Part I.A and accompanying notes.

⁶⁶ See *supra* Part I.A and accompanying notes.

⁶⁷ See *supra* Part I.A and accompanying notes.

very significant in size and reach.⁶⁸

Comparison suggests the necessity of an analysis broader than a mere contrast of the public corporation in developing countries with the public corporation in developed countries; it suggests the necessity of an analysis more dependent on function than on classification. Consider, for example, that the concentration of wealth in many developing countries is even greater than in the United States.⁶⁹ To the extent that, for example, families and kinship affiliations are the source of business capital, they are the appropriate analogies in West Africa to the United States' public corporations. Thus, the comparative discussion asks us to consider the role of northern women close to capital.

In the very recent past, we have had the edifying experience of watching the rise and fall of Carly Fiorina at Hewlett-Packard, a U.S.-based public corporation.⁷⁰ As the chief executive officer of Hewlett-Packard, she was close to capital. The media rehearsed, in detail, whether she was fired because she is a woman, not fired earlier because she is a woman, and even whether she had originally been hired because she is a woman.⁷¹ This kind of discussion describes the outer boundaries of class-based un-gendering: the media raised these gender-based questions after Fiorina lost her job—after she lost her elite status.

What is interesting to me is how the Fiorina example underscores that our discussion of corporate governance has become fragmented when talking about the role of women. Many women's work issues are discussed generically, without focusing on their particular role in the business hierarchy. In contrast, if women are identified primarily as senior managers, we may consider board members like Wendy Gramm in roughly the same

⁶⁸ See Spring, *supra* note 7, at 384–87 & tbl.1.

⁶⁹ See Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 316 (2003) (noting the increasing concentration of wealth in post-communist and developing countries).

⁷⁰ See generally Claudia H. Deutsch, *Carl Fiorina? He'd Probably Be Out of Work, Too*, N.Y. TIMES, Feb. 13, 2005, at 3 (characterizing Fiorina's up and down tenure as chief executive of Hewlett-Packard as "turbulent").

⁷¹ See *id.* (discussing whether Carleton "Carly" Fiorina would have kept her job longer had she been a man); see also Carol Hymowitz, *Shake-Up at Hewlett-Packard—In the Lead: Carly Fiorina's Lesson in Equality*, WALL ST. J., Feb. 10, 2005, at A9 (asserting that Fiorina's firing is evidence that women are treated like men).

conceptual paragraph,⁷² but we discuss, separately, women in smaller roles, for example as employees.⁷³

There exist many possible reasons for this phenomenon, including the fact that the legal field creates a division of subject matter between corporate law, on the one hand, and labor and employment law on the other. Even when we lawyers in the United States limit our scope of view to business, and specifically to public corporations, we avoid overt reference to class. Instead of discussing women managers and employees as similarly situated, except for class, we choose to analyze the roles of managers and employees as wholly separate functions.

Because of realities in the developing world, in contrast, studies of those regions do not tend to focus on employee-status as a separate category—that is not the fault-line.⁷⁴ The evolving discussion is, instead, about women entrepreneurs and their overtly class-based networks,⁷⁵ and it is this division between the networks of entrepreneurial West African women that invites us to search for class differences in our own environment. The developed-country functional analogue to the woman entrepreneur with both the greatest sophistication and greatest access to capital, namely the elite entrepreneur, is a public corporation's female senior manager. Similarly, in the public-corporation setting, the developed-country functional analogue to the small-scale entrepreneur is that corporation's female employee. For each of these developed-world classes, questions wrung from the West African experience include: How can these

⁷² See, e.g., Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1236 n.19, 1264 n.172 (2003) (noting Wendy Gramm's presence on Enron's board).

⁷³ See Claire Moore Dickerson, *Corporations as Cities: Targeting the Nodes in Overlapping Networks*, 29 J. CORP. L. 533, 550 (2004) (discussing the separation in analysis between labor and employment law, on the one hand, and corporate law on the other). Compare O'Connor, *supra* note 72, at 1233–67 (discussing directors, without specifically focusing on women), with O'Connor-Felman, *supra* note 16, at 1287–93 (emphasizing women as employees).

⁷⁴ There are discussions about women as founder-entrepreneurs of developed-country public corporations, but these women represent a small segment of business women in the developed world. Currently, the most prominent example may be eBay's Meg Whitman. See, e.g., Merissa Marr, Mylene Mangalindan & Joanne S. Lublin, *Cast Change: Disney Turns to Insider Iger to Take CEO Reins from Eisner*, WALL ST. J., Mar. 14, 2005, at A1 (alluding to the fact that Disney's board would have considered it highly positive to have lured Meg Whitman, eBay's founder and CEO, to replace departing CEO Michael Eisner).

⁷⁵ See generally Spring, *supra* note 7.

women obtain fair access to capital and the opportunity to develop it, and how does class difference affect our answers?

From the perspective of power and independence, the separation by class in West Africa is, indeed, not so different from the unarticulated fragmentation that we find in the United States. Interestingly, however, there is evidence that, soon after studies identified the distinction between traditional and elite female entrepreneurs, West African women were already using their business associations to reach across the newly articulated class barrier.⁷⁶ This outcome is not entirely surprising given that the need for capital and the issues of second shift are similar for both West African classes. Nevertheless, we have also seen that there are profound differences between these West African classes concerning the amount of capital their members seek, and concerning how subjugation to the second shift manifests itself. In West Africa, the salience of these differences may attenuate as the women articulate the divide, and then seek to bridge it.⁷⁷ If developed-country organizations, including the legal academy, were to address expressly and systematically, as a unified topic, the similarities and differences of employees' and senior managers' gender-based experiences, perhaps these, too, would begin to change.

As another aspect of the comparative analysis, we could also ask whether West African public corporations would more frequently leave the national patrimony in the hands of the local citizenry if more women were in a leadership position. Assuming that the women in question have the education and experience to evaluate pricing mechanisms, the central question will concern the likelihood that women, as compared to men, will take advantage of the well-known opportunity to skim financial benefits for themselves in the privatization process.⁷⁸ In other words, do women, in fact, further the purpose of West African corporations? This question focuses us on the realization that in order to appreciate what role women should play in northern

⁷⁶ See *id.* at 387–88.

⁷⁷ See *supra* Part I.A (indicating that the “traditional” female entrepreneurs catered mostly to their immediate geographical region through familial ties whereas the “elite” class organized a more “global” network).

⁷⁸ See *infra* Part II.B (describing, generally, Russian privatization efforts to limit abuse). See generally Black, Kraakman & Tarassova, *supra* note 40 (detailing the flood of “self-dealing” and corruption that existed during Russia’s endeavor towards mass privatization in the early 1990s).

public corporations, we have to understand what society intends these public corporations to accomplish. This requires a discussion concerning the role of public corporations in the developed world. As a society, we need to identify the benefit that society is to derive from the concentration of capital generated by public issuance of securities. This issue is the subject of the next section.

B. Public Corporations in the Developed World

Public corporations are different from private corporations. Private corporations issue shares to persons who often will remain engaged in the management of the incorporated business. Public corporations issue shares to members of the public who typically have no expectation of significant input into managerial decisions.⁷⁹ Why does a corporation in the United States choose to be public and to be faced with the separation of ownership from management? Whether we adopt Milton Friedman's assertion that a corporation's job is to increase its profits,⁸⁰ or instead adhere to the progressives' understanding that a corporation has an obligation to constituencies in addition to its stockholders,⁸¹ or perhaps adopt some third set of assumptions about a corporation's role in society including those inherent in other developed-country jurisdictions,⁸² there is a single, simple answer to explain why a corporation goes public in the United States. Straightforwardly, the corporation wants to raise capital, or, more precisely, once its managers have taken care of their own liquidity needs, they want the corporation to raise capital.⁸³

⁷⁹ BERLE & MEANS, *supra* note 60, at 274–76 (discussing the separation of ownership from management).

⁸⁰ See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 17 (discussing his own theory on corporate social responsibility).

⁸¹ See generally PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) (collecting essays of progressive corporate lawyers at the height of the Progressives' push).

⁸² See Cynthia A. Williams & John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct*, CORNELL INT'L L.J. (forthcoming 2005) (arguing that the U.K. has moved to a middle ground between the U.S. and the continent); see also Claire Moore Dickerson, *Ozymandias as Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035, 1055–58 (2003) (describing U.K. efforts at corporate governance reform during the 1990s).

⁸³ See William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1317 (2002) (noting that in the context of the accounting

This is a very different reason from that extant in West Africa. There, a corporation goes public as a way of preserving a nation's patrimony when it privatizes businesses.⁸⁴ This West-African role creates a social benefit as it offers an important constraint on self-dealing by elites. Those who can buy property through the privatization process will likely possess economic power that is very significant in the context, and thus the risk of abuse is far from negligible.⁸⁵ As we saw, using a stock market to effect denationalization of the economy reduces the opportunity for, and the negative impact of, such abuse. Of course, the risk of abuse is not eliminated so long as the probability of under-pricing is substantial; this outcome is virtually inevitable in a privatizing economy because comparables are few and imponderables are many.⁸⁶ Nevertheless, the market notionally helps establish a fair price, and the citizens who (indirectly) owned the corporation before denationalization can retain their interest by purchasing shares from the government.

manipulations of Enron, a public corporation, "[o]ne issues stock to raise capital"). Interestingly, the capital-raising purpose of public corporations is one of these truisms that law reviews do not generally write about, and neither do practitioners. The recent Google, Inc. initial public offering ("IPO"), for example, certainly made the founders paper-rich and will provide them an exit strategy, but the founders also emphasized that the IPO-generated funds will help the company continue to evolve. See Shane Kite, *Capital Markets: Google Goes Dutch, Rocking IPO Sector*, BANKING TECH. NEWS, Aug. 4, 2004, at 27 (reporting that the challenge to those trying to convince corporate treasurers to perform a Google-style Dutch auction IPO instead of using traditional, investment-banking methods is to convince corporate treasurers that the price (and thus the proceeds to the corporation) will be higher with the Dutch auction). *But see* Bernard S. Black & Ronald J. Gilson, *Does Venture Capital Require an Active Stock Market?*, 11 J. APPLIED CORP. FIN. 36, 41 (1999) (noting that a stock market is necessary for a venture capitalist's exit, and therefore its involvement); Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 647 (1988) (pointing out that there are many sources of financing for corporations other than public equity markets). In other words, raising capital for the corporate issuer is a reason, but not necessarily the only reason, for developed country IPOs.

⁸⁴ See *supra* Part I.B (describing the privatization system in West Africa).

⁸⁵ See generally Anthony V. Raftopol, Note, *Russian Roulette: A Theoretical Analysis of Voucher Privatization in Russia*, 11 B.U. INT'L L.J. 435 (1993) (offering a comprehensive review of Russia's voucher program). *But see* Black, Kraakman & Tarassova, *supra* note 40, at 1746–49 (describing the kleptocracy that ensued).

⁸⁶ See Susan S. Cummings, *Environmental Protection and Privatization: The Allocation of Environmental Responsibility and Liability in Sale Transactions of State-Owned Companies in Poland*, 17 HASTINGS INT'L & COMP. L. REV. 551, 557–58 (1994) (describing the uncertainty surrounding the enforcement of environmental laws in post-Communist Poland, and the consequent impact on potential purchasers' valuation of businesses that the government was seeking to privatize).

What the market does not do is raise capital. This is especially true if, as has occurred in Russia, the citizens receive scrip from the government so that they do not have to pay again for property that theoretically belonged to them even before privatization.⁸⁷ With that arrangement, the corporation obviously receives no funds since none are paid. Further, even if the citizens have to generate conventional capital with which to purchase the privatizing shares through the exchange, the corporation still receives no assets. Only the government as the seller receives compensation. Although the nation benefits both when the patrimony is retained within the nation and as the government receives compensation, the corporation raises no capital.⁸⁸

In contrast, as we have seen when a corporation goes public in the United States or in another developed country, it issues shares or other securities to natural and juridical persons who, in return, pour the purchase price into the corporation's coffers. As a descriptive matter, the act of raising capital from the public distinguishes public from private corporations.⁸⁹

By starting from the issues raised by the comparative analysis, and by questioning why we allow this method of aggregating capital, we are prepared to see that the separation of ownership from management is a means of encouraging the use of public capital. Without stretching the thought too far, the 1990s scandals now wending their ignominious way through our courts demonstrate that at least some managers held the normative belief that capital received from shareholders is ripe for the taking. Their criminal activities were designed to increase the stock price which would, among other consequences, increase the ease with which their corporations could raise

⁸⁷ See Raftopol, *supra* note 85, at 455–58 (discussing the flow of vouchers in Russia between citizens and the government).

⁸⁸ See *id.* (describing Russia's voucher program).

⁸⁹ Professors argue about management's duty to public shareholders, but lawyers and businesspeople in the thick of public offerings recognize that the core focus is on the corporation's ability to raise capital in the public markets. See *supra* note 83 (discussing capital-raising). Compare Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 606–07 (2002) (discussing permissive statutes), with Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1435–47 (1993) (offering a spirited defense of the shareholder wealth/profit-maximization model).

capital from the largely powerless and ignorant public.⁹⁰ That is why managers hid company liabilities by moving them off balance sheet (Enron), falsified profits by capitalizing expenses (WorldCom), and generally flattened the volatility of their earnings (General Electric).⁹¹

The developed-world public corporation's ability to raise capital is a powerful tool, tempting to managers. Our comparative analysis prompts a question. We saw that in West Africa the corporation's purpose for issuing securities to the public was at least ostensibly tied to a public good, namely the increased ability to preserve the assets' value for the citizens.⁹² What then is the public purpose in allowing a corporation to issue securities in the United States in order to raise capital?

Looking for the purpose of raising capital, we can be grandiose and claim along with former General Motors Chief Executive Officer Charles Wilson that, "what is good for General Motors is good for the nation."⁹³ What is central to this

⁹⁰ The public's ignorance may be willful. See *infra* note 107 and accompanying text (emphasizing the willfulness).

⁹¹ The fact that many senior managers had shares and options and therefore directly benefited from artificially high stock prices does not reduce the importance of maintaining the ability to issue shares for new capital, including in the context of an acquisition. See Marc F. Holzapfel, *An Analysis of the Section 3(a)(10) Exemption Under the Securities Act of 1933 in the Context of the Public Offering Component of Section 3(c)(1) of the Investment Company Act of 1940*, 8 FORDHAM J. CORP. & FIN. L. 427, 437 n.62 (2003) (describing corporations' use of their own shares, especially if highly priced, as acquisition compensation); see also Bratton, *supra* note 83, at 1282–85 (describing the Enron debacle); David Millon, *Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It?*, 70 GEO. WASH. L. REV. 890, 898–99 (2002) (discussing WorldCom's capitalization of expenses in order to hide the later and inflate profits, and General Electric's "elaborate financial manipulations" designed to squeeze volatility out of its earnings).

⁹² See *supra* Part I.B (discussing public corporations in West Africa). There is also, of course, the elites' opportunity to skim financial gain from any major restructuring. See, e.g., Lavelle, *supra* note 2, at 725 (discussing the elites' interest). This is similar to the developed country founders, including the venture capital firms' use of the IPO as an exit. For our purposes, the articulated existence of a public-good explanation is important as that is the conversation that the developed world no longer broaches.

⁹³ TOM LEWIS, DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE 106–07 (1999) (quoting Charles Wilson, U.S. Secretary of Defense and former CEO of GM). But see SIDNEY DELL, THE UNITED NATIONS AND INTERNATIONAL BUSINESS 55 (1990) (quoting U.S. Secretary of Defense Charles Wilson to have said, "What is good for the country is good for General Motors, and what's good for General Motors is good for the country"); A DICTIONARY OF ECONOMIC QUOTATIONS 9 (Simon James ed., 2d ed. 1984) (asserting that in 1953 Charles Wilson actually said to Congress, "What is good for the country

discussion, however, is to avoid assuming the inevitability of the current reality. Although separation of management from ownership facilitates raising capital, we should not focus only on that separation, as so many of us who study corporate law have done since Berle and Means first articulated the issue.⁹⁴ Even the progressive corporate scholars' analysis starts by questioning the consequence of the separation—to whom do the managers owe a duty?⁹⁵ To be sure, separation of ownership fueled the U.S. scandals of the 1990s since managers needed to have an “other” from whom to steal. Nevertheless, a comparative analysis offers us the clear opportunity to ask foundational questions: why does society allow managers, through the public corporations, to use citizens' wealth? Should society demand a quid pro quo for that tremendous advantage, in addition to shareholders' right to participate in the vicissitudes of the corporation's business, and if so, what should the quid pro quo be?

Comparative analysis will not give us the answers; that is our job as members of the society that authorizes these corporations. However, recognizing the question is the first step to addressing it, and we may be surprised by the answer. There is some evidence that the larger U.S. community's view of corporate responsibility is not fiercely pro-shareholder.⁹⁶ The body politic might lean toward application of at least a narrow conception of “*intérêt social*,” in which case the debate would involve topics well-known to academics, such as longer time-horizons and increased productivity.⁹⁷ Interestingly, this discussion leads us overtly to the political context of corporate

is good for General Motors, and vice versa”); Gregory Gelfand, “*Taking*” *Informational Property Through Discovery*, 66 WASH. U. L.Q. 703, 728 n.99 (1988) (listing the above permutations of the quote ascribed to Charles Wilson).

⁹⁴ See William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 752 (2001) (discussing the authors' expectation that separation would become increasingly acute); see also *supra* note 60 (discussing Berle & Means).

⁹⁵ See LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* 115–16 (2001) (discussing the conflicts and pressures on even the most well-meaning managers, caused by the markets' scrutiny of short-term results).

⁹⁶ An example would include the arguably pro-stakeholder demands of activists demanding better conditions for workers producing Nike products. See Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611, 641–43, 650–53 (2001) (discussing consumer activists' pressure on Nike).

⁹⁷ See MITCHELL, *supra* note 95, at 157–58.

governance.

C. Governance: Political Versus Corporate Issues

In West Africa, issues of political governance loom larger than those of corporate governance. When the scholars in the United States analyze corporate governance, they instead focus deliberately on corporations. In fact, in the United States, we tend to ignore the impact of the corporation's socio-political surroundings.⁹⁸ The progressive corporate governance scholars consider those surroundings more than do the shareholder-primacy aficionados because the progressives argue that the corporation has obligations to a broader constituency than only shareholders. Thus, they urge us to consider a corporation's impact on a larger category of persons.⁹⁹ Nevertheless, as a general matter, we in the United States focus on private rather than political actors.

The Sarbanes-Oxley Act of 2002¹⁰⁰ is a case in point. It introduces detailed procedures to constrain managers from the misbehavior that was the hallmark of the 1990s. Senior management is now obligated to certify the accuracy of certain financial documents, and boards must include so-called independent directors to populate the board committee responsible for supervising audits.¹⁰¹ Many of us consider "SOX," as the Sarbanes-Oxley Act is somewhat derisively known, to be largely cosmetic.¹⁰²

⁹⁸ See Curtis J. Milhaupt, *Property Rights in Firms*, 84 VA. L. REV. 1145, 1174 (1998) (discussing political agents in the U.S., whose willingness to structure the capital markets without interfering with them has been central to the markets' development).

⁹⁹ See generally PROGRESSIVE CORPORATE LAW, *supra* note 81.

¹⁰⁰ Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15, 18 U.S.C.).

¹⁰¹ See *id.* §§ 301, 116 Stat. at 775-77 (amending 15 U.S.C. § 78j-1, requiring independent directors for the audit committee), 302, 116 Stat. at 777-78 (requiring the CEO and CFO, or their functional equivalents, to certify in various ways their company's financial statements). Listing requirements for NASDAQ and the New York Stock Exchange have piggy-backed SOX and now stipulate that independent directors also determine the process for nominating directors. See David F. Morrison, *Shareholder Proxy Access—America Should Not Go It Alone Again*, INSIGHTS, Aug. 2004, at 2, 2 (summarizing certain new, post-SOX listing requirements).

¹⁰² See Dickerson, *supra* note 82, at 1054-55 (asserting that SOX is partly redundant and partly irrelevant); Lisa M. Fairfax, *The Sarbanes-Oxley Act as Confirmation of Recent Trends in Director and Officer Fiduciary Obligations*, 76 ST. JOHN'S L. REV. 953, 976-77 (2002) (questioning the impact of SOX); see also Steve

One point is certain, however; SOX does not invite us to question any of the fundamental assumptions, large or small, about corporate governance.¹⁰³ It does not ask whether corporations should focus on shareholder profit maximization.¹⁰⁴ It does not ask whether we have to assume that people appointed to senior posts need SOX's brand of blunt-tool protection from venal pressures.¹⁰⁵ More generally, SOX does not inquire whether the wrongs of the 1990s were the result of a particularly vicious swing of the normative pendulum.¹⁰⁶ It does not consider that members of the public knew about many of the excesses during the 1990s but were shocked (shocked!) only after the market had crashed.¹⁰⁷ The reason why SOX does not focus on the public's expectation is because SOX's drafters and adopters, in their eagerness to remedy specific wrongs, resolutely ignored the larger socio-political considerations. The vast swath of corporate scholarship and media analysis of corporations in the United States simply does not think of corporations in a socio-political context. We worry about specifics—about shareholders first and foremost. In truly horrendous circumstances, the immiserated employees receive some attention. For example, Enron employees suffered large losses in the value of their retirement plan investments during a “blackout period” when they were banned from trading. In response, SOX now prevents directors and executive officers from trading even outside the

Seidenberg, *Compliance Alert: Companies Across the Board Are Re-Examining Their Ethics Policies*, NAT'L L.J., Aug. 26, 2002, at A14, 14–15 (reporting comments of Daniel J. Churay, senior counsel at Fulbright & Jaworski, Houston, to the effect that SOX merely codifies pre-SOX best practices). Arguably, the Republicans in Congress who currently seek to weaken SOX agree since they complain about SOX's cost: if the benefit is little, any additional cost is too great. See Stephen Laboton, *A New Mood in Congress to Relax Corporate Scrutiny*, N.Y. TIMES, Mar. 10, 2005, at C3 (reporting that Sen. Richard C. Shelby, Ala. R., Sarbane's successor as chair of the Senate Banking Committee, is focusing SOX's cost to small business, and argues that SOX “may have gone too far”).

¹⁰³ See Dickerson, *supra* note 82, at 1053–54 (discussing the limitations of SOX and the potential lack of impact SOX will have on corporate behavior).

¹⁰⁴ See generally Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915 (2003) (detailing SOX's provisions which do not include any mention of maximizing shareholder profit).

¹⁰⁵ See Fairfax, *supra* note 102, at 977 (questioning the ability of the Sarbanes Oxley Act to compel directors to comply with their responsibilities).

¹⁰⁶ See Dickerson, *supra* note 82, at 1054–55.

¹⁰⁷ See *id.* at 1035 (noting that the U.S. public knew of the Enron excesses but did not care that transparency is not a panacea).

plan during such a period,¹⁰⁸ but that is a very narrow response to a problem reflecting a broad social reality about business norms.

In contrast, our review of the West African perspective on corporate governance reveals an emphasis on political governance. We explored the reasons for this focus and noted that the political situation in the United States is less authoritarian and less prone to political corruption.¹⁰⁹ Nevertheless, the comparative analysis offers an interesting point of view: what could we learn by considering corporate governance to be a deeply political issue?

If we examine corporations in a political context but from a great altitude, we could see that the corporation is not merely a nexus of contracts as Jensen and Meckling famously asserted.¹¹⁰ Instead, the corporation is a network: just as the entrepreneurs in West Africa build their businesses through networks of relationships,¹¹¹ there is a network within the corporation built on interactions among those who work within the corporation. There also is a network between those people and their counterparts in the roles of suppliers and customers. Thus, instead of being merely an interaction at the level of managers and shareholders, a corporation is a community and is part of other communities.¹¹² If we understand the corporation to be embedded in rather than separated from society's non-business aspects, we are again prompted to ask why society allows the public corporation to concentrate wealth, and what the corporation owes society in return.

This conception of the corporation as a community and as part of the larger socio-political community also invites us to question where the boundaries of the various communities are located. In the West African context, the boundaries are defined

¹⁰⁸ See Janice Kay McClendon, *Bringing the Bulls to Bear: Regulating Executive Compensation to Realign Management and Shareholders' Interests and Promote Corporate Long-Term Productivity*, 39 WAKE FOREST L. REV. 971, 1003-04 (2004) (describing the "blackout period," the Enron employees' losses, and the SOX response).

¹⁰⁹ See Polity IV Country Report 2003: Cameroon, *supra* note 51.

¹¹⁰ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 n.13 (1976) (referring to the nexus of contracts).

¹¹¹ See *supra* Part I.A (depicting the class structure and women entrepreneurs).

¹¹² See Dickerson, *supra* note 73, at 550.

by the reach of familial and business relationships within each class of entrepreneurs. The comparative analysis encourages an exploration of the boundaries in the developed world, an exploration that would go well beyond the progressives' suggestion that the corporation's community includes more than managers and shareholders. Instead of viewing the corporation as acting through its managers on constituencies that perhaps include others in addition to shareholders, the comparative analysis shows us that business in West Africa depends on networks. This helps us see that the boundaries have as many locations as there are communities and are porous to social influence both from these communities out, and from the outside in.¹¹³ That is why political corruption is so dangerous and why the discretion inherent in "*intérêt social*" is also dangerous, despite the fact that the concept is wholly compatible with porous borders. This issue of boundaries deserves explicit and direct discussion: the exuberance of the Enron managers translated to Main Street which, by turning a blind eye crossed back into the corporation and encouraged further excesses.¹¹⁴

Taking a closer, more detailed view, we can see that explicitly considering the larger political reality allows us to appreciate more fully traditional concepts of corporate governance, including board-composition. In this connection, the recognition that the corporation is part of the larger political reality also swings us back to the role of women, both in senior

¹¹³ Note that we would not be the only developed nation to speak about community. In the 1920s, the French anthropologist and sociologist, Maurice Mauss, described a return to collectivism which he considered central to the French culture. See MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 65 (Ian Cunnison trans., 1967) (1925) (describing the resurgence of collectivism in France); see also BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 48–52 (1926) (describing a functioning group in an archaic society, but arguably describing a form of government in actuality). Instead of celebrating the nexus of a contracts concept central to our anglo-saxon theory of the firm, he reports an impulse toward community. See MAUSS, *supra*, at 67 (describing the evolving sense of community in France); see also R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 389 (1937) (describing the firm as a massive relational contract); Williams & Conley, *supra* note 82 (describing the U.K.'s middle way, located between the U.S.'s shareholder primacy and the continent's stakeholderism). A central tenet of French corporate law contains a strong sense of community. See, e.g., KONÉ, *supra* note 56 (comparing "*intérêt social*" in France to its meaning under West Africa's OHADA regime); Dickerson, *supra* note 82, at 1059–60 (discussing "*intérêt social*" in France).

¹¹⁴ See Andy Pasztor, *Boeing Management Comes Under Fire*, WALL ST. J., Feb. 18, 2005, at A3.

management and as employees.

Turning again to the West African focus on political governance, when we understand public corporations to be communities within communities, we are invited to look at the role of women in the context of political corruption. Consider, then, the recent disclosures concerning Boeing, the Pentagon, and political corruption.¹¹⁵ In the context of military procurement, two former senior Pentagon officials, one of whom is a woman, and one former senior Boeing officer have already been convicted of criminal violations and sentenced to prison terms and fines.¹¹⁶ Perhaps the literature on board composition,¹¹⁷ combined with the West African focus on political governance, could help clean up this corporate governance scandal. For example, would greater diversity in senior management, in this case having more women both at Boeing and at the Pentagon, have changed the likelihood of such bribery occurring?

To the extent that I can offer an answer, it is frankly disappointing. According to a study in a series of developing countries,¹¹⁸ an imbalance in the number of women relative to men, whether it is few women or many, correlates positively with more corruption.¹¹⁹ This suggests that simply using women to fill the ranks of upper management at public corporations or in government will not improve integrity. On the other hand, as the authors of the study themselves concede, it is possible that in the

¹¹⁵ See David Bowermaster, *Ex-Pentagon Official Admits to More Illegal Help to Boeing*, SEATTLE TIMES, Oct. 2, 2004, at A1 (discussing the admissions of Darleen Druyun to illegally securing Defense Department contracts).

¹¹⁶ See Andy Pasztor, *Boeing Ex-Officer Gets Prison Term Over Hiring Talks*, WALL ST. J., Feb. 22, 2005, at A5 (describing the prison sentence of former Boeing-CFO Michael Sears); see also Tim Weiner, *Boeing Hires a Legal Team to Handle Scandal Cases*, N.Y. TIMES, Feb. 4 2005, at C3 (describing, inter alia, the involvement of Darleen A. Druyun, who was “the Air Force’s chief weapons buyer” and, briefly, a senior Boeing executive, in a massive procurement scandal for which she received a nine month prison sentence).

¹¹⁷ See, e.g., IRVING L. JANIS, VICTIMS OF GROUPTHINK (1972). See generally Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 810, 816 (2001) (discussing “groupthink” and asserting the importance that each group has a “critical mass”); O’Connor, *supra* note 72.

¹¹⁸ See Mukherjee & Gokcekus, *supra* note 52, at 337–39 (discussing a study conducted in Argentina, Bolivia, Bulgaria, Guyana, Indonesia, and Moldova).

¹¹⁹ This outcome is consistent with the concept of groupthink. See *supra* note 117 (discussing groupthink).

circumstances they reviewed corruption had preceded the imbalance in genders rather than the other way around.¹²⁰ If that is correct and the disproportionately high representation of women is the result and not the cause of the corruption, I can still indulge in essentialist thinking. Thus, I can still hope that a group with a supermajority of women will generally be less corrupt than one with a supermajority of men, but the evidence does not yet justify that conclusion.¹²¹

On the other hand, the study does demonstrate that there is a positive correlation between lack of corruption and a roughly equal number of men and women participating in a business.¹²² While we cannot yet be certain what that finding means, it does suggest additional questions. For example, since women are part of the larger community, as well as of the smaller communities within a public corporation, we should seek to determine whether corruption would in fact be reduced if each relevant community possessed a balance of men and women. A reduction in corruption would be consistent with other studies concerning the effects of diversity on the board,¹²³ but what should be the practical result if the study's suggestion is borne out by further evidence? The easy answer is that boards of directors and employment pools should both approach an equal distribution of male and female participants. Also, they should presumably seek out other forms of diversity while always ensuring that each subgroup has a critical mass.¹²⁴

Consider one additional wrinkle. If essentialist thinking is too rigid and, instead, gender is to some significant degree socially constructed,¹²⁵ then attenuation of gender differences will reduce gender effects—both positive and negative. Because the boundary between the corporation and the rest of society is porous, the anti-corruption effects of diversity apply only when

¹²⁰ See Mukherjee & Gokcekus, *supra* note 52, at 339.

¹²¹ See *id.* at 337–39.

¹²² See *id.*

¹²³ See *supra* note 74 (concerning founder-entrepreneurs of developed-country public corporations).

¹²⁴ See O'Connor, *supra* note 72, at 1306–11 (discussing social psychology's insights concerning diversity on the board, including the requirement that the diversifying subgroup be large enough to be self supporting).

¹²⁵ See, e.g., SONYA ANDERMAHR, TERRY LOVELL & CAROL WOLKOWITZ, A CONCISE GLOSSARY OF FEMINIST THEORY 182 (1997) (asserting that the "whole gender order . . . is socially constructed").

2005]

SEX AND CAPITAL

1191

society creates the diversity—creates a source for the different experience and perspective. Thus, to the extent that elite status un-genders women in the professional context, having an equal number of women and men in positions of authority will not reduce corruption. On the other hand, to the extent that diversity does exist as a social reality, its anti-corruption effects apply equally to corporate and to political governance.

CONCLUSION

This comparative analysis provides us in the developed world with three new points of view from which to consider public corporations and their impact on businesswomen. It invites us to look at the similarities in the situations of women owners, executives, and employees, crossing for the purpose the artificial boundaries perpetuated by our compartmentalized legal categories. It asks us to analyze whether our society derives appropriate and sufficient benefits from having authorized an entire regime for the raising of capital. And as a related point, it reminds us that corporate governance, like the role of women and public corporations, is but a small part of a much larger political debate.