Power, Choice, Exposure, and Fragility: Reframing Fairness in Equity for the Corporate and Insolvency Sphere

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1. Introduction

1.1. Where is the Human in the Corporation?

The corporation was designed to provide a vehicle through which people could engage with commerce, particularly in those commercial endeavours that had a risk of failure. In the seventeenth century, these endeavours often included trans-oceanic trade, colonial expansion, exploration, and the search or exploitation of wealth in natural resources from 'exotic' places such as the New World of the Americas and Africa.[1] These endeavours were inherently risky both for their uncertainty and physical danger of foundering on the high seas, losing ship, sailors, and cargo at once. In order to obtain the capital needed to put on these expeditions, which were often partly owned by the government historically, it was necessary to mitigate the risk. Shares or stocks, sometimes converted from government debt as a result of the cost of wars, were sold in companies such as the East India Trading Company and the South Sea Trading Company as 'get rich quick' schemes where individuals could put money in to support the expedition while only risking the amount invested. These alternative ways of making money are some of the earliest institutions of modern capitalism,[2] and lead to the development of the joint stock company, and eventually to the limited liability company throughout the world,[3] bringing with it the often controversial characteristic of a separate legal personality.

If one examines the etymology of 'corporation' or 'company', the Latin roots are demonstrable of its original purpose: to bring a community of individuals together for a single shared purpose

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[1] TS Ashton, *An Economic History of England: The Eighteenth Century* (Methuen 1955); BC Hunt, *The Development of the Business Corporation in England 1800-1867* (HUP 1936).

[2] While institutions of capitalism such as banking, letters of credit, and lending has been around for millennia, with the Medicis some of the best-known medieval banking examples, the corporation itself did not develop until the 17th century in a form that is recognisable as a precursor to what the corporation is today.

[3] Alice Marples, 'The South Sea Bubble of 1720' (The National Archives 2020) <https://blog.nationalarchives.gov.uk/the-south-sea-bubble-of-1720/> accessed 28 July 2024; 'The South Sea Bubble, 1720' (Harvard Library Curiosity Archives) <https://curiosity.lib.harvard.edu/south-sea-bubble/feature/the-founding-of-the-south-sea-company> accessed 28 July 2024.

of providing benefits to be collectively shared by that community.[4] In short, that corporations should provide advantage and benefit to human beings while spreading risk among them was the central purpose of the development of the body corporate, a fictive legal entity which in modern times often seems to operate independently of the collective human focus for which it was originally devised, more regularly today the interests of the few who control the decision-making. This is not to say that all corporate decision making is only self-serving. But the wealth gap is evidence that capitalism depending as it does on the profits of business certainly serves the interests of a few better than the human collective.[5]

Along with the development of the corporation and a modern approach to economic development, financial institutions and instruments developed in parallel to support commercial expansion and the spread of wealth. These institutions include legal regulation of the corporation aimed to resolve financial distress fairly for those owed debts by the company (insolvency law). While true that some kind of financial distress resolution mechanism has been in existence since the time of Hammurabi,[6] and certainly in ancient Rome when creditors would 'break the benches' of debtors who were unable to repay their debts, with sanctions that could go so far to include enslavement and even dismemberment,[7] it was not until the shift toward a largely capitalist world economy that financial distress resolution mechanisms were developed in insolvency procedures to do more than divide up the spoils among a debtor's creditors. Today, in order to facilitate the maximisation and preservation of wealth, support the continuation of business for the benefit of economy, and ultimately humanity one could say, though this is also arguable as will become clear below, a myriad of informal and formal procedures have been developed to find the best, most economically beneficial way of resolving financial distress for the benefit of a company's mainly *contractual* creditors. Whether this is through an efficient liquidation and distribution or through the rescue and/or restructuring of viable businesses.

The reliance on monetary wealth as an underpinning factor of the modern economy, in other words the evolution of capitalism, put financial wealth into a position of such power that it has continued to provide the backdrop for human development over the last four or five centuries.

[4] 'Corporation (noun)' (Online Etymology Dictionary) <https://www.etymonline.com/word/corporation> accessed 26 June 2024. The roots of company come from the Latin, *cum panis,* meaning 'with bread'; the French *societas* from the Latin *socii*, meaning neighbour; and the root of corporation and *corporatio* from the Latin *corpus,* meaning 'body'.
[5] See for example Fabian T Pfeffer and Nora Waitkus, 'The Wealth Inequality of Nations' (2021) 86(4) American Sociological Radio 567.
[6] Hammurabi (1792-1750 BCE) was an ancient Babylonian king who is credited with one of the earliest complete legal codes, which included an early form of debt resolution, thought his was quite violent in its form. See 'Code of Hammurabi' (Brittanica) <https://www.britannica.com/topic/Code-of-Hammurabi> accessed 29 July 2024.
[7] Paul J Omar, *European Insolvency Law* (Ashgate 2004) 4. See David Graeber, *Debt the First 5,000 Years* (Melville House Publishing 2011) 198 -207 for a discussion on debt in Ancient Rome generally.

However, while money, the corporation, neo-liberal economics, and democracy were invented by humans to serve humanity, it is evident today that many of these institutions certainly fail to serve *all* humans equally. In fact, it is hard to dispute that over time, there has been collective forgetfulness of the services that these institutions should give to humankind. Rather, institutions such as the corporation hold such power and control in many cases to the ultimate detriment of humanity, but often in service to individual or oligarchic greed,[8] keeping money for money's sake with no real social benefit for the profit decisions that are made.

1.2. The Connection between Corporate and Insolvency Law

Although this article focuses primarily on fairness in the way that corporate financial distress is resolved through insolvency and rescue mechanisms, the principles of priority and even wealth maximisation are closely connected to the character of the modern corporation and those who make corporate decisions. The fairness gap, however, becomes clearer when a company encounters financial distress and is forced to resort to restructuring or insolvency mechanisms to resolve it. If one examines from first principles the purposes for which the modern corporation exists, the focus on contractual rights and the debts owed to those who have negotiated for their position makes rational sense. This focus can then be seen in the insolvency principle of protecting pre-insolvency entitlements and predicating the distributions on the priorities assessed to these contractual (or statutory) rights.[9] However, not all entities that are connected and affected by a company's financial distress have legal entitlements prior to a company's insolvency that might be prioritised within the current insolvency frameworks of most jurisdictions.

While the legal institutions upon which corporate law rest – freedom of contract, separate legal personality, limited liability, and arguably autonomy in corporate decision-making – are clearly important in a democratic society within a free market economic system,[10] this legal and economic focus tends to ignore connected parties who have not fully bargained for their position in the corporation. It has often been argued that it is within the power of stakeholders to bargain for their position by including interest on overdue debts, utilising mechanisms such as retention of title, or securing their debt against company assets, not every individual or

[8] For discussion and critique of issues around capitalism, the free market, and inequality, see for example Robert Reich, *Saving Capitalism: For the Many, not the Few* (Icon Books Ltd 2015); Richard Posner, *The Crisis of Capitalist Democracy* (Harvard University Press 2010); David Graeber (n 7); Joseph E Stiglitz, *The Price of Inequality* (Penguin Books 2012); Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin Books 2012).

[9] See for example Insolvency Act 1986 (IA 1986), s 386 and Schedule 6 which specifies that certain debts owed to employees should be preferential up to a certain limit.

[10] Brian R Cheffins, *Company Law: Theory, Structure and Operation* (Clarendon Press 1997) 499 – 508 discusses aspects of limited liability and touches upon these issues.

organisation has either the bargaining power in that relationship, choice of their connection to the corporation and its impact on them, or even knowledge of the effect that a corporation's financial distress may have on them.[11] Without power or knowledge the argument that all stakeholders should bargain for their position falls flat, particularly when fault lies with a corporation for its impact involuntarily felt by stakeholders.

Although stakeholders are discussed in more detail in section 3.1, it should be noted at the outset that the paper is focusing on vulnerable stakeholders who may be characterised at times and depending on how they are connected to the company and impacted by its financial distress as involuntary, non-adjusting, and undiversified. These are the connected or affected entities that have not chosen their connection to the company, such as tort creditors and the environment. Employees would fall within the non-adjusting category in most cass, along with being undiversified owing to having likely just the one job. Certainly, small suppliers and MSME debtors can also be undiversified or non-adjusting or at least lacking in the same level of bargaining power to protect their position in a corporation's financial distress.

1.3. Rationale for Reframing of Insolvency Theory: The Shift to the Rescue Culture

Insolvency law has for most of corporate history generally had the purpose of protecting creditors and, until recently, punishing or restraining the debtor. Additional purposes for insolvency law were accepted and recognised with reforms in the 1960s, 1970s, and 1980s,[12] though the results largely remained liquidation until the turn of the millennium in most developed jurisdictions.[13] The position of employees gained preferential treatment of some sort in most modern insolvency frameworks,[14] as did the government (tax authorities).[15] Some early forms of corporate rescue and restructuring were introduced, though remaining mostly creditor friendly, with some notable exceptions such as the United States' Chapter 11[16] and several French procedures.[17] Corporate rescue procedures at this time would still often lead to asset sales and if not dissolution, or the sale of the company's going concern businesses, which would often more adversely impact vulnerable creditors, along with the communities within

[11] See for example Eugenio Vaccari and Tara Van Ho, 'Insolvency Law through the Lens of Human Rights Theories' in Emilie Ghio, John Wood, and Jennifer L L Gant (eds), *Re-Examining Insolvency Law and Theory: Perspectives for the 21st Century* (Elgar 2023); for a discussion on the classic competing views on how pre-insolvency positions should affect insolvency processes, see Roy Goode, *Principles of Corporate Insolvency Law – Student Edition* (Sweet and Maxwell 2005) 41—63.
[12] See in the UK Department of Trade, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1983) (Cork Report); Australia - The Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988) (Harmer Report); and in the United States these shifts were evident in the Bankruptcy Reform Act of 1978, as amended, codified in Title 11 of the United States Code.
[13] See Omar (n 7) 3-19.
[14] IA 1986, Schedule 6 para 1.
[15] IA 1986, Schedule 6 para 3.
[16] 11 USC Ch. 11: REORGANIZATION.
[17] Book VI of the French Commercial Code 'Amicable Restructuring', the *sauvegarde* or *sauvegarde accélérée* are also procedures aimed at rescue that can only be commenced by the debtor.

which the companies operated. When liquidation is the primary outcome of insolvency processes, traditional approaches can work from a fairness perspective as there is less to work with due to the decrease in asset value and availability.

Since the turn of the millennium, however, there has been a real shift in the way that insolvency procedures are being developed and used. The rescue culture has developed over the last several decades encouraging a shift away from liquidation and debtor wealth distribution to contractual creditors on the selling of the company and its assets.[18] Today most modern insolvency frameworks favour rescuing viable companies where possible to the benefit of all interested parties. These parties include a much broader array of stakeholders than was previously considered.[19] It is this broader purpose, and extended inclusivity, that provides one rationale for reconsidering how we find fairness when resolving corporate financial distress. The most recent developments have come to include prevention through restructuring where possible.[20]

Liquidation has a different purpose than rescue and preventive restructuring procedures. Whereas liquidation is fundamentally a collective debt resolution mechanism aimed to maximise distributions to contractual creditors, rescue processes usually result in a company continuing to trade, ideally beyond the completion of the process if a rescue is successful. There is also greater flexibility in terms what deals can be made, outcomes can be achieved, and ultimately the level of impact that the company's decision making can have on the parties who may be impacted by the company's financial distress. Rescue procedures will also inevitably require creditors to adjust their expectations in terms of repayment if they wish for the process to be successful. If these processes aimed merely at debt collection, it is likely that every restructuring would end in liquidation, with the associated depletion of value in the assets of the company. The flexibility inherent in that corporate decision-making and broader considerations involved provide another rationale to reconsider fairness and distribution issues from how they would be traditionally considered in a liquidation. The shift in policy itself therefore reveals something about the readiness of the law from a theoretical perspective to

[18] Vanessa Finch, 'Corporate Rescue in a World of Debt' (2008) 8 JBL 756.
[19] See Douglas G Baird and Robert K Rasmussen, 'Antibankruptcy' (2010) 119 Yale L J 648; Gert Jan Boon, 'Harmonising European Insolvency Law: The Emerging Role of Stakeholders' (2018) 27 IIR 150; and Emilie Ghio, et al, 'Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the Covid-19 Pandemic' (2021) 30(3) IIR 427, 431-433.
[20] See Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) and its implementation throughout the EU (PRD).

embrace a new paradigm that justifies fairness in relation to the *relative resilience* of the stakeholders impacted by a company's financial distress.

Corporate rescue is accompanied by a far more complex array of considerations than liquidation and dissolution. When there is no possibility of continuing as a going concern, the only logical approach should be to sell assets and find a way of fairly distributing those proceeds. Insolvency law generally does a decent job of this, though arguably some priorities should be revisited from a social fairness and accountability perspective (tort/environmental changes). Rescue processes, however, maintain companies or their businesses so the connection to stakeholders continue. The continuation of a company or its business could mean a continuation of damaging practices, shifting liabilities through assets or debt sales, learning some issues unresolved for those most affected. These affected stakeholders – the most vulnerable to decision-making in rescue processes as they will largely have little or no voice at a negotiating table, deserve to be heard and considered along with secured creditors and contractual parties. The prevalence of rescue itself therefore suggests a need to reconsider how we consider fairness in a corporate rescue process so that the least resilient stakeholders have an opportunity to have their say and are prioritised to a greater extent.

An approach that considers stakeholders from a social accountability and equitable position would go some way toward achieving the goals of greater fairness in insolvency and rescue procedures. As observed in section 5.1, equal treatment cannot always amount to fair treatment, particularly when there are huge differentials in bargaining power and choice from the start.

1.4. Research Question, Aims, and Original Contribution

Placing the human back at the centre of the aims and purposes of the corporation and by extension of debt resolution mechanisms (corporate insolvency and rescue) would further the more socially conscious and sustainable approaches that now underpin much regulatory development in this area. Recalibrating how fairness is optimised in the operation of legal and commercial institutions is one way to support this shift. One way to approach the optimisation of human benefit in the corporate paradigm, is to consider the resilience of the broad contingent of stakeholders affected by a company's financial distress as it emerges through their relative exposure and fragility, power and choice in corporate decision-making.

The purpose of this article is therefore to provide an answer to the following question: *How should the legal frameworks aiming to resolve corporate financial be designed to accomodate the dependencies of the human condition as it affects stakeholders with less power and choice,*

with more exposure and fragility, in their association with the corporate debtor? This question requires an innovative critical approach that will be taken to view current insolvency law theories through the lens of feminist legal theory, applying Martha Fineman's Vulnerability Theory[21] as a heuristic model by which equity among all stakeholders, including involuntary, unwilling participants who may also be non-adjusting and undiversified – in short, the least resilient entities affected by a company's financial distress.

In order to provide a full answer to this question, a contextual discussion of the corporate purpose is needed (section 2) along with consideration of its social purpose, which provides another rationale for a reconsideration of theoretical approaches. While this paper is focused on insolvency and rescue, underpinning foundations of corporate law and the corporation influence the treatment of corporate debt and creditors. As such, a discussion of the corporation is a necessary starting point. This article also focuses on 'stakeholders', which must be contrasted from traditional stakeholder concepts found within the business ethics' Stakeholder Theory.

The article will discuss employees, tort creditors, and environmental claims as examples of involuntary, unwilling, non-adjusting, or undiversified stakeholders who would and should benefit from a recalibration of fairness based in equity (section 3). Section 4 will then turn to the core purpose of this article in its critique of the current theoretical norms of fairness in the design of insolvency and restructuring frameworks through the lens of feminist legal jurisprudence, which leads on to a conclusion (section 5) which provides Vulnerability Theory[22] as a device through which a recalibration of that fairness calculus can be made based on the dependencies stakeholders may have and their resilience in recovering from the impact of a company's financial distress.

While it is pretty non-contentious to state that employees are often badly affected by a company's financial distress, there are many different categories of stakeholders that are often overlooked by the mechanisms that aim to resolve financial distress in terms of equity of distribution, information asymmetries, and involvement in the decision-making processes. The stakeholders referred to in this article will include environmental claims and tort creditors, but this is not exhaustive of the potential stakeholders that can be considered vulnerable in their

[21] See for example, M Fineman, 'The Social Foundations of Law' (2005) 54 Emory Law Journal 201; 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1; ' "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20(2) The Elder Law Journal 71; 'Vulnerability and Inevitable Inequality' (2017) 4(3) Oslo Law Review 133; 'Beyond Equality and Discrimination' (2020) 73 SMU L Rev F 51; and Rights Resilience and Responsibility' (2022) 71 Emory LJ 1435.
[22] ibid.

association with the company. The underlying paradigm of those processes that aim to resolve corporate financial distress tend to transform debts and the creditors owed them into commodities that can monetarily valued, and categorised in terms of preference, priority, and payment, reducing the value of the broader categories of stakeholders, including employees, into simplistic asset value.[23] However, not all value can be monetised considering the social or community impact of corporate financial distress.[24]

Given the nature of these stakeholders, there is a moral imperative to ensure that the damage they suffer by actions perpetrated by the company are more equitably resolved, taking into account the broader social contract issues inherent in their positions and the obligations owed by companies as parties to that contract. The original contribution that this article intends to provide to the literature on insolvency, and to some extent, corporate law theory, is the introduction of and rationale supporting a new theoretical paradigm within which true fairness based in equity can be provided for all stakeholders affected by corporate financial distress, regardless of their position of power within the framework of corporate rescue.

2. The Original Position: Background and Context

2.1. The Purpose of the Corporation

In its essence, the corporation 'is conceived in law as an artificial legal person whose personality is separate from its constituent members.'[25] Early corporations were designed with national economic growth, individual wealth generation, and risk mitigation in mind. Originally, the corporation was applied to a monarch, with guilds, universities, inns of court, convents, charitable foundations, and cities also adopting this concept in the earliest medieval corporate form. Early business orientated corporations tended to be focused on profit while mitigating the risk of dangerous overseas exploration. The cooperative nature spread the risk among a number of investors, which encouraged investment and allowed individuals to raise money by gaining profits on shares purchased in lucrative successful ventures.[26] These profitable projects encouraged the modernisation of financial institutions, development of economic concepts, enriched average wealth in society (though not equitably), and supported the evolution of capitalism as a form of economy.[27]

[23] Jennifer L L Gant, 'Floating Charges and Moral Hazard: Finding Fairness for Involuntary and Vulnerable Stakeholders' in Jonathan Hardman and Alistair MacPherson (eds), *The Floating Charge in Scotland: New Perspectives and Current Issues* (Edinburgh University Press 2022) 228.
[24] Karen Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Wash ULQ 1031.
[25] Janet McLean, 'The Transnational Corporation in History: Lessons for Today?' (2003) 79 Ind LJ 363, 364.
[26] ibid 365.
[27] E E Rich and C Wilson (eds), *The Cambridge Economic History of Europe, Volume 5: The Economic Organisation of Early Modern Europe* (CUP 1977) 290-392.

The early corporate form also provided a vital public service as they were a 'major source of public finance by which the monarch could raise revenue without Parliament and at the same time further foreign policy on a self-funding basis.' This allowed the monarch to provide for public services that would otherwise be delayed in parliamentary processes.[28] This public benefit is no longer present in the modern corporation, apart from what is contributed through corporate taxation, which it seems can be more easily avoided than it can be by normal non-billionaire individuals.

The corporate form provided flexibility to what the monarch could do in terms of funding innovation, allowing for more rapid economic development. However, while the corporation played an important role in the mechanisms of colonisation,[29] a less than socially acceptable idea today, the rationale, mechanisms, and supporting institutions were far simpler then. It was far easier at that time to engage in commerce and corporate opportunities as an individual without a higher education degree in business, economics, or finance.

The nature of the corporation in modern times is hugely complex and often based on intangible assets that are difficult to value. The monopolies of the railroads and oil companies of the nineteenth century were clearer and easier to understand, whereas today massive transnational corporations such as Google, Facebook, and Apple can dominate many aspects of the market-based systems in which they operate.[30] Contracts used to be simpler too, as there tended to be more equality in bargaining power before the advent of complex and often standardised contracts that are typically dictated by a much more powerful corporate party.[31] The growing complexity of the modern economy, corporate form, and financial institutions is one of the key rationales for regulation in this area.

As noted by Robert Reich, the rules that governments impose on the market can be designed with many different purposes in mind, such as to maximise:

1. Efficiency, given the current distribution of income and wealth in society; or
2. Growth, depending on who benefits from that growth and what a society is willing to sacrifice to achieve it, such as fouling the environment; or
3. Fairness, depending on prevailing norms about what constitutes a fair and decent society; or

[28] Ron Harris, *Industrialising English Law: Entrepreneurship and Business Organisation 1720-1844* (CUP 2000) 20.
[29] McLean (n 25) 365.
[30] For discussions on the market impact and complexities of the example companies, see Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, Ebay: Is the Internet Driving Competition or Market Monopolisation?' (2013) 11 Int Econ Policy 49.
[31] Reich (n 8) 7.

4. Profits of large corporations and big banks, and the wealth of those already very wealthy.[32]

Considered from the perspective of a working democratic society, rules should be roughly drafted in line with the values of most citizens, in order to give voice to the desires of the majority for their governing institutions.[33] Given the increasing wealth inequality in society, it seems that the rules currently applied to regulate the markets are geared towards corporate profit.[34] This has allowed corporations to operate independently through the decision-making of their managers behind the corporate veil from what, theoretically, they should owe as a result of the social contract to which they are inherently a party.

It is asserted that today the corporate form often provides a vehicle through which human greed triumphs by taking an impersonal, profit driven approach without the mitigation that human morality and conscience would have in the same circumstances. While true that humans still make the decisions, this author proposes that at least in some circumstances, limited liability is a justification for human greed that continues to perpetuate the wealth inequality in society. This is a huge claim, admittedly, and a topic for a more in-depth philosophical discussion on its own, but for the purposes of this paper, this position helps to rationalise the basis clearly for advocating holistic change.

Were the market geared and regulated to reflect the views of the typical citizen per a Rawlsian view of fair rule choice,[35] it would 'generate the outcomes that improved the well-being of the vast majority.'[36] However, current regulatory frameworks in many western jurisdictions, the USA and UK in particular have entrenched the profit motive and, due to steady retrenchment of financial regulation over the last decade plus, have only made it easier for corporaations to serve the few rather than the many. Rather than looking at the social and economic outcomes of corporate operations and profit-making, pricing in the costs of bad behaviour on the overall margin,[37] the regulatory framework, in this author's view, takes a top down, limited approach that continues to embrace money over people.

Granted, the foregoing statements are clearly generalisations and there are certainly companies out there today that embrace their environmental, sustainability obligations through good

[32] ibid 9.
[33] Reich (n 8) 8-10.
[34] Michal Vaughan and Sarah Kerr, 'Changing the Narrative on Wealth Inequality' (Joseph Rountree Foundation 2024) <https://www.jrf.org.uk/wealth-funding-and-investment-practice/changing-the-narrative-on-wealth-inequality> accessed 14 July 2024.
[35] John Rawls, *A Theory of Justice* (revised edn, Belknap Press 1999) 102-168.
[36] Reich (n 8) 10.
[37] Ronald Coase, 'The Problem of Social Costs' (1960) 3 J Law and Econ 1.

corporate governance. However, it cannot be disputed that wealth is concentrated among a very small number of individuals who have been able to use the corporation and the rules around it and financial distress resolution to concretise their position and maintain and increase their financial status and as often comes with that power in society generally.[38]

2.2. Social Justice Within the Corporate Form

While this article is aimed at presenting a critique of the current theoretical approach to fairness in procedures aimed to resolve financial distress through corporate insolvency and rescue procedures, any discussion of fairness must begin with fairness in the corporate form and the rules that regulate how businesses can operate in the economy.

Some research has been conducted around the responsibilities that corporations *should* have in a just society within the academy of business ethics. Business ethics should arguably underpin or provide a foundation for the way that justice and fairness is approached when a company is heading into financial distress as well. If one considers from first principles the idea that as a legal *person*, corporations are also party to the hypothetical social contract, then it stands to reason that they should owe the same obligations to individuals and communities as natural persons. It is conceded that the reality is of course that it is the humans making decisions who are really obligated under the social contract, but it seems that the distance created by the corporate veil make impersonal profit driven decisions in some contexts. The other side of this is that corporations are also rights bearing entities by definition of the law. A key right is autonomy, derived from their definition as being autonomous entities separate and independent from the people who create it. A corporation must also have the rights needed to function as an economic entity and seek profits,[39] which will inevitably include a wide array of activities.

While corporations are not (and cannot logically be) included in a Rawlsian original position behind a veil of ignorance[40] given they are created by law and therefore cannot be considered from a pre-legal perspective, this approach can still provide a view on how the rights and responsibilities of corporations could be construed in a hypothetical social contract.[41] Applying a Rawlsian theoretical approach, John Douglas Bishop determines that in addition to the right to operate autonomously, corporations also owe at least two key obligations to society under the social contract:

[38] See for example Lisa A Keister, 'The One Percent' (2014) 40 Annual Review of Sociology 347. .
[39] John Douglas Bishop, 'For-Profit Corporations in a Just Society: A Social Contract Argument Concerning the Rights and Responsibilities of Corporations' (2008) 18(2) Business Ethics Quarterly 191, 194.
[40] Rawls (n 35).
[41] Bishop (n 39) 192.

> First, corporations should respect human rights and liberties of all people. Second, given the impact corporations have on wealth distribution, corporations should recognise a legitimate government mandate to implement safety-net and job preparation programs that have a wealth re-distributional effect.[42]

Is there a 'social purpose' beyond the requirements under the hypothetical social contract? Clearly the frequent focus on corporate social responsibility within corporate governance discussions,[43] and questions around sustainability[44] have brought social issues into the thinking around the nature and purposes of the corporate form. A corporation's social purpose is connected to 'the contribution that a corporation makes to advancing societal goals.' [45] While clearly a corporation will have the purpose of producing goods and/or services for a profit under the framework in which individuals have joined to organise joint activities, they do not only produce value for customers. In providing employment, they provide income to individuals as well as a sense of purpose and personal development. They are also investment vehicles for owners and shareholders, as well as contributing to local economies and community development.[46] These social *impacts* could be viewed as the social purpose that all corporations should acknowledge and consider when making decisions, including how best to resolve financial distress insofar as it may impact those to whom they have an ethical and moral responsibility, beyond the traditional considerations of *stakeholders*, discussed in greater detail below.[47]

Bishop's conclusions do not deal with the many nuanced issues discussed previously, but it does provide a starting point from which re-distribution and collective fairness can be argued to extend beyond contractual stakeholders, which is an important consideration when considering fairness in insolvency and rescue proceedings. Add to this the social purpose that corporations inherently have due to the way that they operate in society, and there is a case to

[42] Bishop (n 39) 204.
[43] See for example Marjan Marandi Parkinson, *Corporate Governance in Transition: Dealing with Financial Distress and Insolvency in UK Companies* (Palgrave MacMillan 2018); Roman Tomasic, 'Raising Corporate Governance Standards in Response to Corporate Rescue and Insolvency' (2009) 2(1) Corporate Rescue & Insolvency 5; and Searat Ali, Nazim Hussain, and Jamshed Iqbal, 'Corporate Governance and the Insolvency Risk of Financial Institutions' (2021) 55 North American Journal of Economics and Finance 101311; and Aurelio Gurrea Martinez, 'Insolvency Law in Times of COVID 19' (2023) Gurrea-Martínez, Aurelio, Insolvency Law in Times of COVID-19 (June 9, 2020). Ibero-American Institute for Law and Finance, Working Paper 2/2020, Available at SSRN <https://ssrn.com/abstract=3562685> accessed 19 August 2024.
[44] See for example Tuula Linna, 'Business Sustainability and Insolvency Proceedings—The EU Perspective' (2020) 2(2) J Sustain Res e200019 and 'Company Purpose in the Context of Business Sustainability and Insolvency Proceedings' (2021) 18(5) European Company Law 162; Mulevičienė, Salvija, 'Evaluation of the Effectiveness of Insolvency Frameworks: Does the Small Business Perspective Matter?' (2020) 8(2) Entrepreneurship and Sustainability Center 383; and Saqib Aziz, Mahabubur Rahman, Dildar Hussain, and Duc K Nguyen, 'Does Corporate Environmentalism Affect Corporate Insolvency Risk? The Role of Market Power and Competitive Intensity' (2021) 189 Ecological Economics 107182.
[45] Nien-He Hsieh, Marco Meyer, David Rodin, and Jens Van 't Klooster, 'The Social Purpose of Corporations' (2018) 6(s1) Journal of the British Academy 49, 51.
[46] ibid 53.
[47] Section 3.

be made for a broader view of how fairness should be considered in the corporate framework, particularly when it comes to resolving financial distress and those affected by it. Stakeholders are therefore a key consideration of this article going forward and the following section will define what is meant by the term in this context, while also offering examples that help to justify why there should be a shift in the way that fairness is achieved in a process aimed to resolve financial distress.

3. Who are the 'Vulnerable' Stakeholders?

3.1. Defining 'Stakeholders'

Corporate theory and business ethics have a long running conversation about 'stakeholders' and their impact and influence on corporate strategy, as well as the corporation's impact on stakeholders.[48] Stakeholder theory was initially developed as a way of simply organising information for the purpose of strategic planning in business.[49] Its development, initially attributed to R Edward Freeman, was aimed to meet the needs of a fast changing business climate in which 'existing management theories were not equipped to address the "quantity and kinds of change which are occurring in the business environment."'[50] While this article is not based on 'stakeholder theory' when discussing the relevant stakeholders to a company's financial distress, it is worth explaining the contrasting position to dispel any misconceptions going forward.

Insolvency stakeholders have traditionally been identified in connection with their pre-insolvency entitlements; however, this is a narrow view that excludes a number of other entities that may be affected by a company's financial distress with little choice in that connection.[51] This aligns to some degree with the purpose of stakeholder theory in business ethics wherein it was recommended that corporations should consider both internal and external stakeholders, including those the business relies upon to operate, and those that rely on the business for their subsistence, survival, and community cohesion.[52] This diverged from the traditional stockholder focus which can be seen to permeate the contractarian insolvency theoretical paradigms, in particular the Creditors' Bargain Theory (CBT).[53]

[48] Jennifer L L Gant, 'Vulnerability Theory in Insolvency Law' in Emilie Ghio, John Wood, and Jennifer L L Gant (eds), *Rethinking Insolvency Law Theories in a Changing World: Perspectives for the 21st Century* (Elgar 2023) 167-168.
[49] R E Freeman, Robert Phillips, and Rajendra Sisodia, 'Tensions in Stakeholder Theory' (2018) 59 Business & Society 213, 217.
[50] R E Freeman, *Strategic Management: A Stakeholder Approach* (Pitman 1984) 5.
[51] Jennifer L L Gant, 'Vulnerability, Resilience, and Employees: Can a Higher Degree of Fairness be Achieved by Looking Beyond Traditional Insolvency Norms?' in Jason Harris (ed), *Insolvency: A Research Agenda* (Elgar 2024) (forthcoming).
[52] Freeman (n 50) 25.
[53] See section 4.2.

Stakeholder theory, however, from a business ethics perspective, does not situate itself from a position of compassion and inclusion. Rather, it considered stakeholder groups from the perspective of how they could affect the efficient operations of a business and to build strategies to deal with these in the company's best interest. This is a non-moral perspective, and rather relies on an economic calculus concerned with the consequences of a company's actions and how those present actions might affect the future corporate success.[54] It is thus a self-interested approach from the company's perspective that does not adopt a moral concern in any sense for avoiding injury or unfairness of those affected by the actions of the company, or by extension the impact of a company's financial distress.

Like any good legal theory, stakeholder theory has evolved over time. It has come to consider the human actors in the corporate process beyond the effect they may have on a company and its profit margin. It has been recognised that a definition of stakeholders should include the 'alignment of values, norms, and ethics as mechanisms for efficient and effective flourishing within and among organisations.'[55] This takes a more socially realistic and human approach to the consideration of stakeholders of a corporation, recognising that:

> Society depends on human activities that both society and people are changeable and affected by each other. Social realists also accept that, in the context of social interaction, actions are taken and ideas formed in relation to a perceived (socially constructed) reality, thereby changing the social reality.[56]

This approach echoes the premise in the introduction that corporations, legal institutions, and regulatory frameworks are essential constructs of society framed within law and principles developed by human beings. The power of corporations and legal institutions would not exist without the permission of the human beings who should be served by the institutions they have created. Thus, a social realist approach is sensible as it allows the consideration of wider implications of the operation of corporations and legal regulation, beyond the economic and financial value that can be extracted from them. If institutions such as the corporation and legal regulation should have the inherent aim to serve humanity, then it is only logical that there should be a wider view of the impact of the corporation, along with its financial viability, insofar as the actions of that 'legal person' may affect stakeholders who may not have chosen to be so affected.

[54] K E Goodpaster, 'Business Ethics and Stakeholder Analysis' (1991) 1 Business Ethics Quarterly 53, 60.
[55] Freeman, Phillips, & Sisodia (n 49) 219.
[56] A L Friedman and S Miles, 'Developing Stakeholder Theory' (2002) 39 Journal of Management Studies 1, 3.

The stakeholders of greatest concern in this article have an inherent human or societal character and are non-adjusting, involuntary, and undiversified in their connection with a company in financial distress. They are vulnerable to the impact of the decision-making of a company and lack resilience to recover from these impacts. They will also tend to have little effect on the company if they are not treated well in an insolvency or restructuring process as the current frameworks do not tend to provide participatory choices to stakeholders of this character. Therefore, a more socially realist approach is justified in order to ensure that these less powerful stakeholders have a more equal footing at the bargaining table. These considerations introduce an ethical and moral dimension that has been studiously neglected or ignored in classic insolvency theoretical paradigms.

3.2. Employees

Employees are one of the easiest of the involuntary and non-adjusting stakeholders to define and they have been afforded more consideration within insolvency frameworks for some time due to the preferences that their claims are often accorded in many jurisdictions.[57] They are involuntary because they have little choice but to provide their labour in exchange for their livelihood. Their investment in the employing company is also undiversified as they tend to work for a single employer exclusively, often as a requirement for being party to an employment contract. If the employing company subsequently fails, an employee will lose their job, which will have an impact on their families, potentially the wider community, and the government (the taxpayer) should they require unemployment support.[58] An employee may also suffer future damage due to the impact on their pensions.[59]

Whereas treating employees solely as providers of labour valued on a labour market, essentially commoditising the humans working for a firm, was the traditional approach during the Industrial Revolution, modern considerations have acknowledged that employees should not be considered a commodity in this sense. Treating them as such has an adverse societal impact as it tends to stymie innovation and constitutes a barrier to human development.[60] Rather, labour is a fictive commodity as it has a distinctly human aspect. Humans can decide how hard they work and what level of care they apply. They are also affected by their environment, which can impact decision-making and the quality of work provided. Commodities are raw basic

[57] Federico M Mucciarelli, 'Employee Insolvency Priorities and Employment Protection in France, Germany, and the United Kingdom' (2017) 44(2) J L & Soc 255.
[58] Jennifer L L Gant, 'The Role of Social Policy in Corporate Rescue and Restructuring: a Messy Business" in Jennifer L L Gant and Paul J Omar (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing 2021) 479.
[59] Janis Sarra, 'Widening the Insolvency Lens: The Treatment of Employee Claims' in Paul J Omar (ed), *International Insolvency Law: Themes and Perspectives* (Taylor & Francis 2008) 297.
[60] K Marx, 'Economic and Philosophic Manuscript' in T B Bottomore (ed), *Early Writings* (first published 1844, C A Watts 1963) 76.

materials that remain the same unless some interference has occurred to change them. Clearly, human beings cannot be considered in the same light.[61]

Employees also provide 'firm specific human capital' to their employers, including unique skills and expertise that are integrated into a business.[62] They will also gain skills while working for the business, which is an additional investment that should add value to their position. Firm specific human capital is often overlooked in the valuation of employees in an insolvency framework.[63] The underlying approach, despite priorities and preference that employees benefit from in a number of insolvency frameworks, resembles a:

> […]re-commoditisation of labour as one of a number of stakeholders who become categorised in terms of preference, priority and payment as creditors, reducing employees to the value of what they are owed for their labour.[64]

This is backward looking if the goal is to treat employees like human beings, rather than sources of labour. Thus employees should be considered from the perspective of their human condition in any revised stakeholder analysis that considers fairness and equitable treatment during a company's financial distress.

3.3. Environmental Claims

Damage to the environment and pollution have existential social and sustainability implications. The environmental law principle that the polluter should pay lies at the root of most statutory environmental law obligations.[65] The priorities in an insolvency or rescue procedure will often conflict with these fundamentals of environmental law if it leads to reduced or non-payment of claims, or even disclaimer of property to which such claims may be attached.[66] However, it could be argued that the obligation to pay goes well beyond legalities. Rather, there is also a moral imperative that an entity damaging the environment within which all humans must live should repair the damage done as it could be considered 'right in the interests of justice that polluters *should* pay.'[67] This could be applied to the

[61] For discussions on this concept, see Albert Dragstedt, *Value: Studies by Karl Marx* (New Park Publications, 1976) 7-40 <https://www.marxists.org/archive/marx/works/1867-c1/commodity.htm> accessed 9 June 2025; see also Stein Evju, 'Labour is not a Commodity: Reappraising the Origins of the Maxim' (2013) 4(3) Eur Lab LJ 222.
[62] Margaret M Blair, 'Firm-Specific Human Capital and Theories of the Firm' in M Blair and M Roe (eds), *Employees and Corporate Governance* (Brookings Institution Press 1999).
[63] Gant (n 23) 257-260.
[64] ibid 229.
[65] Jonatan Schytzer, et al (eds), *The 'Insolvent Polluter Still Pays' Principle?* (Boom (The Hague) 2024).
[66] Andrew Keay & Paula de Prez, 'Insolvency and Environmental Principles: a Case Study in a Conflict of Public Interests' (2001) 3 Env L Rev 90, 95.
[67] Department of the Environment evidence submitted to the House of Lords Select Committee on EC, *The Polluter Pays Principle* (10th Report) HL 131 Session 1982-83.

remediation of contaminated land,[68] maintenance and adherence to waste management licences,[69] payment of judgment compensation for environmental claims, and generally taking responsibility for actions taken that result in damaging the environment.

A collective proceeding such as liquidation relies on the *pari passu* principle to ensure 'fair' treatment of the collective of creditors, according to their pre-liquidation *entitlements*.[70] The environment does not present an 'entitlement' *per se*. Only through adherence to the statutory environmental law framework will an entitlement arise that could require a party pay out, thus becoming an involuntary stakeholder to the insolvency or rescue procedure. In addition, typically, environmental claims will be considered 'ordinary', and therefore figure quite low in the priority of distribution along with unsecured creditors. This means that there will usually be little cash left to allocate toward rectification when the solution is liquidation. In a restructuring, there are also actions that can be taken to avoid environmental claims. In some jurisdictions, such as the UK, insolvency procedures can be used to disclaim onerous property, which may well include the environmental liabilities that could be costly and reduce the asset value of the company being restructured.[71]

In the event that claims for environmental damage go unpaid, or a company does not have the funds to rectify the damage they have done, it falls on governments and by extension the taxpayer to do so. There is also a big picture social issue here that is often overlooked. Damage to the environment, pollution, and negligent waste management affect the potential survival of humans as a species and should therefore have a far more important place in priority when it comes to resolving financial distress. The public interest is key when considering damage to the environment and how to rectify it when there is no money to do so.[72] The human condition, the involuntary and non-adjusting nature of environmental debts, in whatever guise they take, are vital issues to consider that go beyond cash value and asset value preservation.

While creditors have the ability to pursue enforcement actions prior to the commencement of a collective proceeding, the environment on its own will not have such a choice. Enforcement must occur on its behalf. A few suggestions have been made that could ensure corporate polluters pay, despite their financial situation. It has been suggested that environmental claims could be treated as secured creditors or be counted as a cost of the liquidation, thereby being

[68] Lloyd A Brown, 'Bad Debt and Green Issues: Managing Environmental Risks in Borrowers Corporate Insolvencies' (2018) 20(3) Env L Rev 137.
[69] Blanca Mamutse, 'Environmental Liabilities in Insolvency – an Area Ripe for Reform?' (2016) 8(3) Int'l J L Built Env 243.
[70] R Goode, *Principles of Corporate Insolvency Law* (2nd edn, Sweet and Maxwell 1997) 142.
[71] David Ehmke & Eugenio Vaccari, 'Environmental Liabilities in Insolvency' in Emilie Ghio and Eugenio Vaccari (eds), *The Perpetual Renewal of European Insolvency Law* (INSOL Europe 2023) 29.
[72] Keay & de Prez (n 66).

accorded a higher priority in most jurisdictions.[73] Alternatively, the acuteness of the environmental hazard could be assessed and allocated a priority in line with the environmental importance of its remediation.[74] In any event, the social, moral, and human importance of maintaining and ameliorating the environment is valuable from a non-financial perspective that prioritising, insurance, or other traditional solutions cannot resolve fairly or equitably with its impact on the human condition taking a priority decision in decision-making.

3.4. Tort Claim Creditors

Much of the literature that discusses tort claims in an insolvency process relate to mass tort settlements.[75] These claims deal with the widespread detrimental impacts of a company's operations or production. Some examples include working with asbestos and other industrial products causing disease in workers; drugs given to pregnant women that cause disorders and deformities in children; the prescribing of opioids and subsequent addiction; and the carcinogenic effects of smoking that was long denied by tobacco companies.[76] The human impact of company operations in these cases is high, and therefore merits full accountability for their criminal or negligent actions. Placing the human condition at the centre of the corporate purpose means ascribing priority to those claims that aim to remediate the damages done by a company, in similar fashion to damage to the environment described in the previous section. However, these cases can raise a number of issues for a company that is trying to meet their obligations while also trying to survive them in the long term.[77]

One big issue with mass tort claims is that the compensation judgement may exceed the enterprise value, resulting in liquidation and leaving the tort claimants unsatisfied or satisfied only in small proportion to the compensation assessed.[78] Firstly, insolvency frameworks tend to prioritise senior creditors in absolute or relative priority, before the most junior stakeholders are repaid in proportion to the debt they are owed and usually far less than the original debt. As civil claims rank as unsecured in most jurisdictions, without reference to the moral or ethical origins of those claims, treating them merely as additional debts over which the creditors have

[73] M P Ram Mohan and Siriam Prasad, 'Is Insurance a Solution to Address Environmental Considerations in Insolvency? A Conceptual Exploration' in *Yearbook 2023 – Harmonisation and other Challenges for the Insolvency Profession 2023* (INSOL Europe 2023) 93-96.
[74] Tuula Linna, 'Insolvency Proceedings from a Sustainability Perspective' (2019) 28(2) International Insolvency Review 210, 220-221.
[75] See Mark J Roe, 'Bankruptcy and Mass Tort' (1984) 84 Colum L Rev 846; Lewis A Kornhauser & Richard L Revesz, 'Multidefendant Settlements under Joint and Several Liability: The Problem of Insolvency' (1994) 23 K Legal Stud 517; Troy A McKenzie, 'The Mass Tort Bankruptcy: a Pre-History' (2012) 5(1-2) J Tort L 59; Lindsey D Simon, 'Bankruptcy Grifters' (2022) 131 Yale L J 1154; Samir D Parikh, 'The New Mass Torts Bargain' (2022) 91 Fordham L Rev 447; Jason Jia Zi Wu, 'How do "Bankruptcy Grifters" Destroy Value in Mass Tort Settlements? *In tr Purdue Pharma* as a Bargaining Failure' (2024) 32 American Bankruptcy Institute L Rev (forthcoming).
[76] D Simon, 'Bankruptcy Grifters' (2022) 131 Yale L J 1154, 1164-65.
[77] Some jurisdictions to allocate preferential treatment to tort claims, such as Spain and Belgium. In addition, some are exempted from the effect of discharge per the Directive (EU) 2019/1023 on Preventive Restructuring Frameworks.
[78] Roe (n 75) 850.

failed to negotiate the power of their position in a distributional scheme, tort creditors will rarely find their compensation claims filled in full. [79] However, tort creditors do not have the power to 'bargain for their position nor make a voluntary investment requiring an absolute priority rule to facilitate risk allocation.'[80] It is therefore impossible to treat them *fairly* if they are treated equally to those creditors who had choices, and the power to negotiate and mitigate their risk. A tort claimant's entitlements only arose due to the bad behaviour of the debtor company.[81]

Insolvency processes have also been used to aggregate tort claims and make them more manageable by the debtor company. In the worst (least ethical) cases, insolvency procedures are used to avoid paying out. This can happen when tortfeasors access an insolvency process to take advantage of the collective action and moratorium to avoid individual enforcement claims by those they have wronged: bankruptcy grifters.[82] Corporate tortfeasors will therefore often seek the intervention of the courts through an insolvency process, whereas parties to most corporate insolvencies will prefer to keep negotiations in house as long as possible. While an insolvency process may serve to combine and streamline to some extent, they are also rife with conflict between the interests of tort victims, regular commercial creditors and, of course, the debtor.[83]

This conflict becomes even more acute when a company burdened with a mass tort claim chooses to go through a rescue process instead, which in some jurisdictions may drag on for years. Even when there is a multi-million damages award, tort victims will simply be added to the long list of unsecured creditors holding a claim against the debtor.[84] Commercial creditors will tend to favour rehabilitation where possible, in order to continue their profitable relationships with the company, while tort creditors will simply want to be 'made whole by getting every penny they are owed for the compensation of their sufferings.'[85] As a result, where tort creditors are able to wield power in bankruptcy, the conflict between them and commercial creditors can often turn an insolvency process into 'protracted warfare'.[86]

There is an important distinction to make here before the discussions turn to a feminist theoretical critique providing yet another rationale for adopting a different approach to fairness.

[79] ibid 851-852.
[80] ibid.
[81] ibid 855.
[82] Simon (n 76) 1157-58.
[83] Jason Jia Zi Wu, 'How do "Bankruptcy Grifters" Destroy Value in Mass Tort Settlements? *In tr Purdue Pharma* as a Bargaining Failure' (2024) 32 American Bankruptcy Institute L Rev (forthcoming) 3.
[84] ibid 4
[85] Vincent S J Buccola & Joshua C Macey, 'Claim Durability and Bankruptcy's Tort Problem' (2021) 38 Yale J Regul 766, 798.
[86] Wu (n 83) 4.

The foregoing discusses mass tort creditors who will have class action lawyers behind them, representing them as a collective in an insolvency case. However, where there are individual tort claimants, they will not benefit from the same level of support and will be a lost and forgotten unsecured claimant with little or no voice in their destiny. While true that in many cases insurance may cover part of a claim for the individual who has suffered, where insurance is not available or has refused to cover, tort claimants will simply sit with the other unsecured creditors with doubtful hopes to ever be 'made whole.'[87] Given the foregoing argument regarding involuntariness and innocence, this can surely not be right from an ethical and moral standpoint. It is therefore appropriate to reconsider the debt obligations of such stakeholders from a non-financial perspective owing to the moral debt that is also owed by a company having caused the damage.

The next sections will examine the traditional theoretical approaches that explain the aims and purposes of corporate insolvency and rescue frameworks, including an initial criticism of the Law and Economics approach which has been key to the most accepted normative theory for decades, with a view to providing that rationale for a different approach to fairness.

4. Critique of the Norms of Fairness in Corporate Insolvency and Restructuring

Examples were given in section 3 of the kinds of stakeholders – involuntary, non-adjusting, and undiversified – and in some cases innocent unwilling participants – for whom the current fairness paradigm does not fully work considering the position from which they join an insolvency or restructuring proceeding. The examples are certainly not exhaustive as arguments can be made that tax authorities, small businesses, customers, leaseholders, and any number of other categories could also lack power and privilege in an insolvency process. They are, however, good concrete examples upon which to build an argument aimed at reframing current fairness paradigms. As such, the following discussion will provide a critique of the current state of insolvency theory, reframed within a feminist legal context, with a view to providing a further rationale in as to why it is that a different approach to fairness should be taken by applying Vulnerability Theory[88] (adjusted for the corporate context) in the treatment of stakeholders in processes aimed to resolve financial distress.

4.1. Criticisms of the (Law and) Economic Approach

[87] Alan O Sykes, 'Subrogation and Insolvency' (2001) 30 J Legal Stud 383.
[88] Fineman (n 21).

Given the economic approach of many of the insolvency theories analysed below, an initial criticism will be offered here to place the following discussion in its broader economic and philosophical context. Economic theory is predicated on the assumption that human beings are *rational* actors who will make choices in their *self-interest*, geared toward improving their personal well-being.[89] These are profound assumptions about human beings, providing a specific view that is ingrained in economic theory since the time of Adam Smith.[90] As economic theory has continued to develop, there has been some deviations (behavioural economics),[91] but 'the realism of the chosen conception of man is simply not part of this enquiry.'[92] It remains reliant on a concept of humankind and the motivations for the choices that humans make that can simply not be applied universally and result in realistic predicted outcomes in every circumstance.

Economic theory also assumes that all parties have full information when they make their rational choices, although this is in truth rarely the case.[93] While regulations have been introduced to try to level the playing field in terms of corporate reporting of financial statements, not every party will have the opportunity to do background checks, or indeed, even know that they should. So, while the information is there, the knowledge of the need and the how to find it is not. This has been used as an excuse when arguments have been made about unfairness to less knowledgeable parties: 'the information is there – they have neglected to protect themselves.'[94] The reality is far more complex than this, however, as are the considerations that people will have beyond the rational maximisation of their self-interest.

As noted by Amartya Sen:

> […] between the claims of oneself and the claims of all lie the claims of a variety of groups – for example, families, friends, local communities, peer groups, and economic and social classes. The concepts of family responsibility, business ethics, class consciousness, and so on, relate to these intermediate areas of concern […]. The relevance of some of these considerations to the economics of negotiations and contracts would be difficult to deny.[95]

[89] Cheffins (n 10) 4.
[90] Adam Smitn, *An Enquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, Oxford World Classics 2008).
[91] Herbert A Simon, 'A Behavioral Model of Rational Choice' (1955) 69(1) The Quarterly J Econ 99; Christine Jolls, Cass R Sunstein, and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) Stanford LR 1471.
[92] Amartya K Sen, 'Rational Fools: A Critique of the Behavioural Foundations of Economic Theory' (1977) 6(4) Philosophy & Public Affairs 317, 322.
[93] Cheffins (n 10) 9.
[94] *Salomon v Salomon and Co* [1897] AC 22 per Lord Watson [para 40] and Lord McNaughton [para 53].
[95] Sen (n 92) 318-319.

One can draw a link between the evolution of economic theory, and by extension Law and Economics, to Utilitarianism. Utilitarianism is a moral philosophy that rests on the assumption that if a choice leads to happiness or pleasure, then it must be good. When geared towards social, economic, or political decisions, what is best for the majority of society must be the right thing to do as such a choice would better society as a whole.[96] While it has been argued that Utilitarianism and economic theory are opposing sides of moral philosophy due to the egoistic nature of economic theory,[97] the Law and Economics movement has combined them to some degree by creating a framework through which legal regulation can be designed for the (economic) benefit of the greatest number of people.

Law and Economics is an analytical framework that aims to balance social and commercial interests. Like economic theory generally, the economic approach to legal rules assumes that parties to a legal system will act rationally to maximise their own satisfaction or wealth.[98] In an economic analysis of the law, if two opposing sides of an issue behave rationally, they will find a balance that maximises the benefits/happiness of each side when an outcome is uncertain at the outset.[99] Rational maximisation within a legal system suggests that by putting a conceptual price on legal rights and remedies, it will be possible to create legal rules that maximise effectiveness by finding the perfect balance of economic efficiency between competing aims.[100] A good legal system from the perspective of Law and Economics is one that aligns the profitability of businesses and the welfare of people so that profit also has a public benefit. This reflects to some extent the aims of classical Utilitarianism except that it focuses on maximising social wealth rather than social utility.[101]

Law and Economics as a fairness paradigm, however, has been viewed as free market orientated, capitalistic, and potentially inviting an apology for conservativism. Looking at the issues under examination in this article, it is clear that this approach is inadequate in terms of finding fairness through equity as capitalism does not often integrate those elements of society that are not market or profit oriented. Capitalism as a system also fails, on its own, to redress the imbalances in power between different entities. Typically, particularly in the current climate of increasing income inequality, the more wealth one has, the more likely it is that it

[96] See Jeremy Bentham and John Stuart Mill, with Alan Ryan (ed), *Utilitarianism and other Essays* (revised edn, Penguin Classics 1987).
[97] F Y Edgeworth, *Mathematical Psychics: An Essay on the Application of Mathematics to the Moral Sciences* (London 1991) 52-53 as cited in Amartya K Sen, 'Rational Fools: A Critique of the Behavioural Foundations of Economic Theory' (1977) 6(4) Philosophy & Public Affairs 317, 318.
[98] R A Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8(1) JLS 104.
[99] R A Posner, 'Observation: The Economic Approach to Law' (1974) 53 Tex L Rev 761.
[100] ibid 764.
[101] U Gneezy and A Rustichini, 'A Fine is a Price' (2000) 29(1) JLS 1.

can be increased in a system built on models of pure economic efficiency. [102] Involuntary creditors will certainly fall outside of a framework built on choice, as they, by definition, do not have one.

An economic efficiency approach can only be justified if the uncertainty and inequality of human beings are removed from the choice equation, along with the risk of being involuntary and the lack of parity in information availability which affects those stakeholders who do not have a place of power at the negotiating table. Rather, the reality of a company in financial distress and the impact that can have on human society should include the vulnerable involuntary and non-financial stakeholders. This includes the corporation and the regulation around it, which benefits from legal systems 'perpetuated by the government and the public' and should therefore bear some responsibility and accountability to the human beings upon which the corporation is built. [103] Thus, an economic approach is fundamentally dispassionate and focused on non-human criteria which are not relevant in reality. As will be seen through the discussion of insolvency theories through a feminist legal jurisprudential lens below, this is inherently a masculist approach that will never cater to those who lack the power of choice or negotiation.

4.2. Procedural Theoretical Approaches to Insolvency Law: Creditors' Bargain Theory (CBT)

Traditionally, the aims and purposes of insolvency have been theorised on the basis of maximising returns in terms of wealth to a company's creditors. This approach is proceduralist in nature, whose proponents argue that the core purpose of insolvency should only be to maximise returns to creditors based on pre-insolvency entitlements.[104] The mechanism whereby this is accomplished is through a hypothetical creditors bargain, in which contractual creditors negotiate the fairest approach to their collective rights from behind a Rawlsian style veil of ignorance.[105] The outcome of this bargain aims to ensure that those creditors who are owed by a financially distressed debtor are able to regain a pro-rata distribution according to their pre-insolvency entitlements.[106] This collective distribution, usually accompanied by an

[102] Gant (n 23) 247-249.
[103] E Merrick Dodd Jr, 'For Whom Are the Corporate Manager's Trustees' (1932) 45 Harv L Rev 1145, 1148.
[104] John M Wood, *The Interpretation of Value of Corporate Rescue* (Elgar 2022) 52-53.
[105] Rawls (35).
[106] See T H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986) chapters 1 and 2. See also D Baird and T Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 University of Chicago Law Review 97; D G Baird, 'The Uneasy Case for Corporate Reorganizations' (1986) 15 Journal of Legal Studies 127; D G Baird, 'A World without Bankruptcy' (1987) 50 Law and Contemporary Problems 173; T H Jackson and R E Scott, 'On the Nature of Bankruptcy: An Essay of Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Virginia Law Review 155; B E Adler, 'A World without Debt' (1994) 72 Washington University Law Quarterly 811; B E Adler, 'A Theory of Corporate Insolvency' (1997) 72 New York University Law Review 343; D G Baird and R K Rasmussen, 'The End of Bankruptcy' (2002) 55 Stanford

enforcement moratorium, avoids the free-for-all of debt claims against the company that would otherwise dissipate corporate assets to the detriment of the overall collective of creditors, which may also lead to the ultimate survival of the debtor.[107] These approaches focus on a 'common pool' problem that is created when creditors assert their rights against the common pool of the debtors' assets.[108]

A strict economic approach that includes only stakeholders with pre-insolvency legal entitlements, however, does not cater for the wider issues connected to a company's financial distress.[109] While original creditors' bargain proponents would argue that non-creditor interests and even rescuing the company should not be one of the aims of an insolvency law framework due to what they view should be purely procedural in nature,[110] the broader array of choices now available to companies in financial distress which are no longer purely debt collection and asset distribution processes have led theorists to consider stakeholders beyond those who have willingly entered into a contractual relationship with the debtor. Rather, it has been recognised that the strict creditors' bargain view fails to recognise the legitimate interests of many others who do not fall into this the traditional category of 'creditor'.[111] In addition, the creditors' bargain cannot, without adjustment, account for the lack of resilience of stakeholders affected by a company's financial distress and the decisions taken on how to resolve it.

The insolvency policy shift towards a rescue culture[112] and a regulatory emphasis on the rehabilitation of viable companies has been justified by many eminent academics, usually with a focus on not only the financial benefit of preserving asset value, but also the social benefits associated with continuation of a corporate life. Given the overall approach is geared towards the broad economic and social benefits of the preservation of viable corporate entities, it is also surely appropriate to consider these as stakeholder deserving of consideration in any collective process that might be undertaken to rescue that entity or its business. [113] Thus, theorists building on the original ideas of Thomas Jackson and Douglas Baird[114] have come to acknowledge to some extent the fact that the power positions of other stakeholders should also enter into the distributional decision-making process.

Law Review 751; B E Adler, 'The Creditors' Bargain Revisited' (2018) 166 University of Pennsylvania Law Review 1853; and T H Jackson, 'A Retrospective Look at Bankruptcy's New Frontiers' (2018) 166 University of Pennsylvania Law Review 1867.
[107] V Finch, 'The Measures of Insolvency Law' (1997) 17 Oxford Journal of Legal Studies 227, 231.
[108] Jackson (n 106) *Logic and Limits* 17.
[109] For a discussion on the weaknesses of the economic approach to fairness, see Sen (n 92).
[110] Finch (n 107) 231.
[111] See for example the works of E Warren and K Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Washington University Law Quarterly 1031.
[112] See section 1.3.
[113] Gant (n 48) 174-176.
[114] See (n 75).

4.3. Contractarian or Value Based Approaches

Shifts toward a less linear approach began from within the Jackson & Baird paradigm with the original theorists acknowledging the existence of non-contractual, involuntary, and non-adjusting creditors and their lack of power and input in an insolvency distribution.[115] These categories of stakeholders have little opportunity to participate in or consult with the collective of creditors and the debtor to protect their interests, and their position in the distribution is low ranking. While later publications acknowledged and promoted some level of participation in an insolvency,[116] an approach that is still based on the creditors' bargain does not adequately account for the multilayered socio-legal, moral, and ethical issues connected to these stakeholders. Given the corporation's separate legal personality and fictive personhood, there is an argument that like natural persons, companies should also be obliged to repay the moral debts they owe to society. Developments within insolvency theory have, for decades, continued to draw from this original creditors' bargain premise, however, which has limited how fairness could reasonably be achieved in financial distress resolution processes.

Donald Korobkin[117] takes a contractarian approach that again relies on a Rawlsian style paradigm.[118] Korobkin's hypothetical bargain includes more than just the contractual creditors, however. He includes representatives of all stakeholders who might potentially be affected by a company's financial distress, such as employees, managers, owners, tort claimants, and members of the community.[119] In this framework, the stakeholders referred to share one commonality: they do not assume the risk of a company's financial distress[120] and all are invited to participate in the negotiation behind the Rawlsian veil of ignorance.

Korobkin argues that those behind the veil of ignorance would introduce a 'principle of inclusion' first, which would provide opportunities to participate to all affected stakeholders and to protect their interests to a greater degree. Secondly, Korobkin argues that there would be a principle of 'rational planning', which would serve to determine the extent to which stakeholders would be able to enforce their legal rights and exert leverage over the process. [121] The result would be a maximisation of aims rather than wealth maximisation, differentiating it

[115] See for example Robert E Scott, 'Through Bankruptcy with the Creditors' Bargain Heuristic' (1986) 53 U Chi L rev 690 and Thomas H Jackson and Robert E Scott, 'On the Nature of Bankruptcy: An Essay of Bankruptcy Sharing and the Creditors' Bargain' (1989) 75(2) Virginia L Rev 155.
[116] Jackson & Scott (n 115).
[117] See Donald R Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91(4) Columbia L Rev 717; 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas L Rev 541; 'Vulnerability, Survival, and the Problem of Small Business Bankruptcy' (1994) 23 Cap U L Rev 413; and 'Employee Interests in Bankruptcy' (1996) 4 Am Bankr Inst L Rev 5.
[118] Rawls (n 35).
[119] Finch (n 107) 234.
[120] D Korobkin, 'Employee Interests in Bankruptcy' (1996) 4 American Bankruptcy Institute Law Review 4, 6.
[121] D Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas Law Review 541. 575-589.

from the sought outcome of the creditors' bargain. The maximisation of aims includes long term rational planning aimed to realise the best interests of the company and all affected stakeholders, which tends to be excluded in a creditors' bargain approach.

While Korobkin's approach introduces a fairly robust method through which a fair insolvency system could be devised, it does not provide measurable tests to assess the least powerful or resilient stakeholders with a view to placing them in a more equitable position.[122] In addition, although Korobkin's approach clearly diverges from the CBT insofar as the concept of 'contract' goes beyond legal to consider social contract issues,[123] the core premise still begins from a consideration of pre-contract entitlements, which does not go far enough to reframe fairness in this area. These issues are also present in the communitarian or traditionalist visions; however, if one adds a feminist legal lens to the way these issues are considered, it may be possible to build a theory that provides a means of redistributing priority based on relative resilience as it relates to the lack of power and choice and the presence of fragility and exposure, while introducing the potential to achieve more equitable outcomes in true fairness.

4.4. Building on Elizbeth Warren's Multi-Value Eclecticism

4.4.1. Feminism in Legal Theory

Before turning to examine how a feminist approach can benefit conceptions of fairness in the corporate and insolvency sphere, there are certain misconceptions that should be dispelled for the reader. Feminism is not about women. Feminism is a different approach – a different lens through which to view the world and construct fair institutions. Instead of separating and categorising, it aims to unite and take individual approaches to resolving problems, rather than relying on stratified rule-based approaches which, when applied 'equally', will not always result in fair and equitable outcomes. There are many male feminist thinkers and female anti-feminist thinkers. This distinction should be held firmly in mind during the discussion that follows and despite the associations that some terminology may raise.

Many feminist scholars have chosen the term 'masculist' to refer to non-feminist ways of thinking, ostensibly to provide a term that is not explicitly male in the gendered sense. It is vital to understand that feminist and 'masculist' are terms that do not strictly refer to women and men as different gendered human beings. They both refer to ways of thinking rather than physical characteristics. Masculist 'can more easily be seen to refer to anyone who resists

[122] Finch (n 107) 236.
[123] Korobkin (n 121) 575-589.

feminist analysis and remains committed to "malestream" ideas, including women.'[124] As feminist legal thought is very much about breaking through hierarchies, classifications, and the characterisations that separate and divide, a masculist approach can essentially be described non-feminist. 'Masculist' therefore does not refer to the work and theories done by men specifically, but rather thinking that is underpinned by a non-feminist approach.

Hilaire Bennet explains concisely the dangers of taking purely masculist approaches to law and legal reasoning:

> Conventional (male) legal reasoning, like language, is characterised by abstraction, objectivity, rationality, and deductive logic. Legal reasoning is also cast in a binary mould: right and wrong, lawful and unlawful, just and unjust. Rules of law, while they have a 'core of certainty and a penumbra of doubt,'[125] and may be more or less specific, have certain definable boundaries. If applied in a mechanical fashion – irrespective of, or ignoring the individual subject of law – laws can operate harshly or unjustly. No form of legal reasoning takes place in a vacuum and the application of law must be placed in its wider context.[126]

A feminist approach to legal systems and reasoning would likely influence the adversarial process that characterises these systems globally. It would tend to soften the hard, cold logic of male reasoning and incorporate concerns for fairness and relationships. Legal processes may become more conciliatory, and cooperative were they to be viewed through the lens of legal feminism.[127] Professor (and Senator) Elizabeth Warren's nuanced approach to fairness and considering diverse stakeholder interests has many attributes that can be found in general feminist legal approaches.[128]

4.4.2. Contrasting Masculist and Feminist Views on Insolvency Theory

Although Elizabeth Warren herself does not claim a feminist approach in her theory and policy discussions,[129] there are clear alignments in her approach to those theories around fairness and equity within the feminist legal jurisprudence arena. The Jackson, Baird, and even Korobkin

[124] K Lahey and S Salter, 'Corporate Law in Legal Theory and Legal Scholarship: from Classicism to Feminism' (1985) 23(4) Osgoode Hall Law Journal 543, (n 1).
[125] H L A Hart, *The Concept of Law* (2nd edn, OUP 191).
[126] Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Ltd 1988) 23.
[127] ibid 26.
[128] See Elizabeth Warren, 'Bankruptcy Policy' (1987) 54(3) U Chi L Rev 775; 'Bankruptcy Policy Making in an Imperfect World' (1993) 92(2) Michigan L Rev 336; and 'Searching for Reorganisation Realities' (1994) 72 Washington U L Quarterly 1257.
[129] Discussed in greater detail in section 4.4.4.

approaches adopt what has been described as a 'masculist' view given their entitlement focused nature. Furthermore, masculist views:

> Often promote fragmentation, classification, and hierarchy that isolate individuals, depersonalise them, and place them in competition often resulting in oppression. 'Masculist' approaches to organisational issues rely on rules, rights, and entitlements, often turning a blind eye to compassion.[130]

The CBT, and contractarianism generally, exhibit many of these 'masculist' characteristics in their core approach to solving corporate financial distress. They focus on rights and entitlements rather than considering the relative power position of stakeholders with compassion. They are hierarchical in ranking, fragmented in terms of separation and classification of parties based on pre-insolvency contractual rights, which results in a lack of participation and resultant ineffectual involvement of many other involuntary or non-contractual parties.[131] In contrast, a feminist approach would highlight inclusion and connectedness, rather than isolation, emphasising similarities, sharing, and compassion. In addition, '[a] feminist approach to corporation advocates for increased participation by all stakeholders; flattening of hierarchies; and some feminist views promote wider social justice.'[132] This is clearly in stark contrast to traditional theoretical approaches within the insolvency paradigm.

Most feminist legal theorists, for example, eschew the Rawlsian approach that is so often referred to in insolvency theory for a number of reasons. First, the hypothetical social contract is among a representative sample of individuals who may possess any number of characteristics common in society, without knowing what they are during the negotiation.[133] It is presumed in feminist legal literature that these representatives would comprise 'heads of households', which implies a gendered male.[134] Furthermore, it has been argued that the abstraction of Rawls' theory is unhelpful and clouds our vision:

> What we really need to do is move forward through Rawls' veil of ignorance, losing knowledge of existing abstractions. We need to return to concrete realities, to look at our world, rethink possibilities, and fight it out on this side of the veil, however indelicate that may be. By ignoring alternative visions of human nature, and by limiting the sphere

[130] Lezelle Jacobs, 'Insolvency Law and the Feminist Movement' in Emilie Ghio, John Wood, and Jennifer L L Gant (eds), *Re-Examining Insolvency Law and Theory: Perspectives for the 20th Century* (Elgar 2023) 48.
[131] ibid 49.
[132] ibid 50.
[133] Rawls (n 35) 139.
[134] Barnett (n 126) 113.

> of the possible, Rawls creates a gridlock in which escape from liberalism is impossible and dreams of the seashore futile.[135]

It has also been argued that Rawls' view of humanity is unrealistic as it over emphasises acquisitiveness, greed, and self-interest. 'It ignores the possible modes of social life in which humour, modesty, conversation, spontaneity, laziness and enjoying the talents and differences of others also feels good.'[136] This biased view of humanity as parties to the social contract negotiated among a representative collective inevitably undermines the principles derived behind Rawls' veil of ignorance as being fairly contrived by a true representation of humans of all inclinations, genders, and social character. From a feminist legal perspective, the Theory of Justice lacks the nuance needed to create true equitable fairness in our legal institutions. If this is the case from a general legal systemic perspective, it must surely apply as well to the more focused application to insolvency and restructuring law.

4.4.3. Team Production Theory: A (Feminist) Halfway House

The Team Production Theory (TPT) does, however, exhibit some feminist ideals, though it also remains contractarian in nature. A discussion of feminism in insolvency norms would be incomplete without a brief discussion of this theory. It demonstrates an evolution in insolvency theory that is different from traditional hierarchical approaches. The TPT's social contract is more inclusive in nature than other traditional contractarian approaches. It acknowledges that many parties in addition to shareholders contribute to the production process of a company. These include trade suppliers and the workforce, upon which a company relies in order to succeed and be profitable. Essentially, all who make firm-specific investments should be accorded rights that should be catered to in a collective proceeding.[137]

The TPT also supports some re-distributional goals, which reflects the feminist attribute of sharing, participation, the flattening of hierarchies, as well as the importance of emphasising similarities over differences. This inclusivity is characteristic of communitarianism, which aims to balance the interests of a broad array of stakeholders affected by a company's financial distress, including consideration of the community at large.[138] The TPT acknowledges that all team members contribute to a company's success and stand to lose when a company encounters

[135] M Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: a Feminist Critique of Rawls' *A Theory of Justice*' (1986) 16 New Mexico Law Review 613.
[136] ibid (n 74).
[137] Lynn M LoPucki, 'A Team Production Theory of Bankruptcy Reorganisation' (2004) 57(3) Vanderbilt L Rev 741, 749
[138] Pete Walton, 'When is Pre-packaged Administration Appropriate? – A Theoretical Consideration (2011) 20(1) Nottingham L J 1, 7; D Millon, 'New Directions in Corporate Law Communitarians, Contractarians, and the Crisis in Corporate Law' (1993) 50(4) Washington and Lee L Rev 1373, 1379.

financial distress.[139] It fits within the 'traditionalist' paradigm of insolvency theorists, to which Warren also belongs. Traditionalists agree that insolvency law should exist for more than simply creditor wealth maximisation and should be inclusive in nature.[140] As such, there is a closer connection between the TPT with feminist ideals due to the element of social justice and connectedness that it embraces.[141] However, as essentially another contractarian theory, a number of criticisms can be made from a feminist legal perspective.[142]

4.4.4. Feminist Critique of Social Contract Theory

Social contract theory in general has been criticised as obscuring the issue of gender due to its insistence on the spheres of liberty and individual rights. It glosses over the original 'sexual contract', which explains the creation of the patriarchal social order in the first place. The patriarchal order continues to manifest in public and private life and the general contractarian approach ignores this because in order to operate, it must ignore it. The traditional roles of the woman are implicitly deemed in classic social contract theories as being unimportant to civic freedoms and human rights.[143] Leaving out sexual difference, therefore, fails to acknowledge an important aspect of political difference:

> Women are not party to the original contract through which men transform their natural freedom into the security of civil freedom. Women are the subjects of the contract. The (sexual) contract is the vehicle through which men transform their natural right over women into the security of civil patriarchal right.[144]

As such, from a feminist legal perspective, the social contract itself is an unfair and inequitable starting point to introduce fairness into a system, whether that is institutions, legal regulation generally, or an insolvency framework.

4.4.5. Is Warren's Eclectic / Value Approach Feminist in Nature?

Warren's eclectic value-focused approach does not adopt a contractarian model, but it does embrace a similar broad range of stakeholder interests while calling for some redistribution of value so that less powerful stakeholders can be provided a more equitable position.[145] Warren's approach focuses on fair distribution of *insolvency risk* considering the relative power among stakeholders, rather than the traditional focus on a fair distribution of wealth as a result of a

[139] Jacobs (n 130) 50-51.
[140] Wood (104) 55; Vaccari & Van Ho (n 11) 200-201.
[141] Jacobs n 130) 51.
[142] Barnett (n 126) 114.
[143] Carole Pateman, *The Sexual Contract* (Polity 1988) 1.
[144] ibid 6.
[145] E Warren, 'Bankruptcy Policy' (1987) 54 University of Chicago Law Review 775.

process.[146] Warren's approach, unlike Korobkin and certainly in contrast to Jackson and Baird, specifically takes into account the types of stakeholders that are of the most concern in this article. These include non-entity stakeholders such as the costs of environmental damage and the impact on a community of a company's financial distress should they be unable to rectify those damages.

In Warren's vision, this issue would be resolved by prioritising less powerful involuntary creditors by redistributing the costs of environmental damage to be shared among the debtor and its contractual creditors. Although this is accomplished through a redistribution of value, reducing the collective value available to distribute to contractual creditors, such a redistribution is not seen as an aberration from the protection of creditors rights. Rather, it is seen as a core function of insolvency law on the basis that it should be 'a scheme designed to distribute costs among those at risk.' [147] Rather, 'no one value dominates, so that bankruptcy policy becomes a composite of factors that bear on a better answer to the question: "How shall the losses be distributed?"' [148]

Warren's approach is also a clear supporter of the rescue culture as it encourages the survival of viable companies to the benefit of all, but in particular the most vulnerable (least powerful) stakeholders, allowing them to recuperate their costs to a higher degree.[149] Such stakeholders will include those who are not necessarily creditors, but have an interest in the continuation of the business, which may include older employees; customers depending on supply from the company; suppliers who may have a limited number of customers; nearby property owners who may experience devaluation; and governments who would lose out on taxation. Rescue options, which are supported by Warren's approach, fundamentally acknowledge the potential losses of those who rely on a company by redistributing some risks of corporate financial distress.[150] These goals clearly fit within the equitable nature of the feminist legal paradigm.

While Warren's vision acknowledges the social interests associated with the resolution of corporate financial distress, it lacks the focus that is present in Jackson and Baird, and Korobkin or Lo Pucki's approach. She admits that her offering is a 'dirty, complex, elastic and interconnected' view of insolvency law from which outcomes cannot be predicted nor are all

[146] ibid 777. See D Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Columbia Law Review 717 for an analysis of Warren's and Baird's argument between the creditors' bargain and a communitarian approach with detailed discussion of the strengths and weaknesses of both.
[147] Warren (n 145) 790.
[148] ibid 777.
[149] Finch (n 107) 237.
[150] Warren (n 145) 788.

the factors relevant to a decision on policy fully articulated.[151] However, a value-based approach built on Warren's more socially conscious if philosophically cloudy approach veers toward the creation of a measurable test that could be applied to actualise fairness in stakeholder treatment in processes aimed to resolve corporate financial distress.[152] In addition, Warren's approach exhibits key characteristics of feminist legal jurisprudence in the importance it places on inclusivity, social justice, connectedness, redistribution, empowerment, equity, and most importantly for this article, an approach to fairness centred on the human condition, rather than depersonalising and commoditising all stakeholders affected by a company's financial distress. This must inherently include those stakeholders who are non-adjusting, involuntary, and undiversified with interests that have no other protection than from within a financial distress resolution process, whether that is formal or otherwise.[153]

While policy arguments and value-based approaches do not dictate answers to the core question as to how interests should be assessed outside of pre-insolvency contractual entitlements, a feminist legal approach such as that described at the beginning of this section may serve to reframe how equity can be achieved for those stakeholders who are unwilling participants in a process that aims to resolve corporate financial distress. Given the previous examples described in section 3, it is not difficult to surmise that an approach that considers people involved in a corporation from a compassionate perspective in light of the mechanisms of their involvement would be derived easily from a feminist approach. A theoretical framework based in feminist legal theory could work to provide a more equitable approach to fairness in this area for those stakeholders who lack power and choice and are less resilient to the impact of a company's financial distress.

5. A Socio-Legal Approach Embracing Feminist Legal Jurisprudence

Elizabeth Warren introduced a theory of sorts that encouraged policy makers to consider the wider social and community implications of corporate financial distress. She focuses on values – not necessarily the kind one can find on a balance sheet – to advocate for the less powerful and voiceless stakeholders to an insolvency proceeding. Her approach is inherently feminist in nature, even if she herself does not acknowledge this in her writing. The problem is that she has provided no specific answers in relation to a set of testable criteria through which fairness can be allocated from a position of compassion and acknowledgement of accountability and

[151] B S Schermer, 'Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy' (1994) 72 Washington University Law Quarterly 1049, 1051.
[152] Gant (n 51).
[153] Warren (n 145) 788.

the human suffering that can be caused by the failure of a company.[154] However, a socio-legal approach that embraces Vulnerability Theory[155] as a foundation based on the relative resilience of stakeholders predicated to some degree on their dependence on the company, including their level of choice and power in negotiation, exposure to the impact, and fragility in terms of recovery, offers a framework within which it may be possible to develop revised principles basing fairness within this new paradigm in order to redesign priority distribution and stakeholder treatment generally and during and insolvency or rescue process.[156]

5.1. A Socio-Legal Approach Embracing Feminist Legal Jurisprudence

Fineman's approach does not adopt the traditional positivist or isolated concept of the law as an institution concerned only with the technical and prescriptive, but integrates the more explanatory, inclusive, and descriptive characteristics of sociology. Although this approach does tend to be less clear than the hierarchical, categorised, and rule-based characteristics of previous approaches, it does provide a realistic consideration of the law and legal reform that accommodates itself to the social relationships which the law should serve. Legal relationships are not solely economic in nature, nor are they fully understood in purely economic terms,[157] but the social issues associated with the various processes available that aim to resolve corporate financial distress have entered into the thinking of most insolvency law theorists, though there has been no definitive way developed to fully compensate stakeholders whose choice to be involved was not theirs.[158]

Adopting a socio-legal perspective will invite a socially focused analysis of current legal structures, permitting a focus on vulnerable stakeholders.[159] These stakeholders will typically be less resilient (more fragile and exposed) to the financial impact of a company's financial distress, due to the socioeconomic dependencies associated with the debtor. A paradigm that adopts resilience and equity as principles underpinning fair treatment during financial distress resolution will help to balance the social and moral issues that are present in such processes.

5.2. What is Vulnerability Theory?

Martha Fineman developed the concept of vulnerability in legal theory as a tool to 'argue for a more responsive state and a more egalitarian society'.[160] Rather than trying to redress discrimination and inequality by conferring rights on selected groups (a categorisation that

[154] Finch (n 107) 241.
[155] Fineman (n 21).
[156] Gant (n 48) 180.
[157] R Cotterrell, *The Sociology of Law: An Introduction* (Butterworths 1992) 5.
[158] Gant (n 48) 172-173.
[159] D Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 Modern Law Review 287, 287.
[160] M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1, 1.

would be considered masculist), the theory is concerned with 'privilege and favour conferred on limited segments of the population by the state and broader society through their institutions.'[161] Vulnerability challenges the dominant conception, common as well to economic approaches, of a universal legal subject that is an autonomous, independent, and fully-functioning adult. This static figure, as noted in the criticism above of economic theory generally, is not a realistic representation of humans who are socially and materially dynamic with resilience that varies from person to person (or stakeholder to stakeholder) for a variety of reasons.[162]

Fineman recommends that the political and legal systems should cater to the fact that humans exist in a fragile, changeable physical and social environment. Resilience to vulnerability, a universal constant, varies over time. The inequality of human resilience should force the attention of policy makers and legislators to examine society and social institutions, which should operate to protect or support it. Privilege and power also underpin resilience, which in the current system tend to be defined and reinforced by the legal institutions in operation and the way fairness is defined and applied. [163]

Institutions of law and political power have a responsibility to protect the society that has conferred power upon them through the social contract, thus should bear some responsibility to ensure those institutions are functioning fairly for all. The traditional neoliberal approach to law and society emphasises human autonomy and personal responsibility, which assumes independence, the possibility of choice, and non-discriminatory access to opportunity, whereas the reality differs considerably given the limitations that affect the human condition. Vulnerability Theory confronts traditional neoliberalism by recognising the many ways in which social relationships are shaped, reinforced, and modified by the law, arguing that the state is in reality always responsible for the allocation, preservation, or maintenance of privilege and disadvantage. States should therefore be obligated to ensure that such institutional disadvantages and/or perpetuation of privilege should be rectified through an approach to fairness in the drafting and enforcement of law based on a position based firmly in equity.[164]

Institutions are also vulnerable insofar as they can be corrupted, captured, decline, and perish. They can cause harm to the humans they are intended to support and protect and can be responsible for circumstances that exacerbate or exploit human vulnerability. The foregoing

[161] ibid.
[162] M Fineman, 'Rights, Resilience, and Responsibility' (2022) 71(7) Emory LJ 1435.
[163] See M Fineman, 'The Social Foundations of Law' (2005) 54 Emory Law Journal 201.
[164] ibid 225.

discussions have highlighted how certain stakeholders affected by a company's financial distress are less resilient (involuntary, non-adjusting, undiversified). An insolvency framework and connected rescue procedures that accounts for these less resilient stakeholders may serve to mediate, compensate, and mitigate the exposure and fragility of some stakeholders who suffer as a result of the impact or outcomes of processes aimed to collectively resolve a company's financial distress.

In addition, unforeseen global, social, or economic crises can cause difficulties for institutions intended to protect human society, which may even fail in their obligations entirely in the 'wake of market fluctuations, changing international policies, institutional and political compromises, or human prejudices.'[165] Returning to the introductory discussion around the human centred purpose of law, corporations, and government, it is incontestable that these institutions should serve to support human resilience, particularly where the damage requiring compensation is caused by the company itself. If the things humanity creates to serve it are not used to serve fully the needs of humanity, what is the point of having them at all?

5.3. Equity vs Equality in Fairness Assessments

Vulnerability Theory is advocated as an alternative to traditional equal protection analysis. While traditional approaches to equality are often associated with the liberal subject described by John Locke, which is based on the memorable epithet that humans are 'by their nature free and endowed with the same inalienable rights,'[166] these rights are not immediately available to every human as a result of differing circumstances and privilege. As a result, equal treatment does not always result in equal access to those inalienable rights and freedoms because some individuals, due to historic inequal treatment, patriarchal society, or institutional discrimination start at a point in rights accessibility behind more privileged groups of individuals. These disadvantaged humans are required to worker harder and longer to achieve a level of socioeconomic parity with other more privileged groups. Such privilege, whether incidental or intentional, makes it difficult for individuals to escape a disadvantaged original position without outside assistance or support. This paradigm of privilege and disadvantage can be applied to the stakeholders who find themselves affected by a company's financial distress out of no choice of their own.

[165] Fineman (n 160) 12-15.
[166] ibid 2.

One of the key underlying principles of collective insolvency procedures, is that of equal treatment (*pari passu*) in distribution.[167] However, this equal treatment is based on categorisation and hierarchies that are masculist in nature. Fineman observes that where equality is 'reduced to sameness of treatment or a prohibition on discrimination, this has proved an inadequate tool to resist or upset persistent forms of subordination or domination.'[168] Furthermore,

> [t]his version of equality is similarly weak in its ability to address and correct the disparities in economic and social wellbeing among various groups in our society. Formal equality leaves undisturbed - and may even serve to validate – existing institutional arrangements that privilege some and disadvantage others.[169]

Equal treatment of all stakeholders, including those with no choice in their connection with the company in financial distress and who may also have suffered harm from that company's actions, is not necessarily fair treatment. There is a moral dimension based on accountability in relation to the aforementioned social, environmental, and tortious creditors that is not catered for in the current paradigm. Nor does it cater for the varying degrees of power, fragility, and exposure that the many non-traditional stakeholders will have in a process aimed to resolve financial distress, as well as the potential impact that financial failure can have on the wider community, and economy. Many carveouts already exist to the fundamental approach of *pari passu*, such as ascribing certain levels of employee claims as preferential, to redress to some extent the power imbalances inherent in the corporation to stakeholder relationships due to the reduced resilience of less powerful stakeholders.

6. Redefining Fairness through Relative Power, Choice, Fragility, and Exposure

Martha Fineman created her Vulnerability Theory with the social and cultural human inequalities and dependencies in mind that lead to intentional or unintentional discrimination against less-privileged individuals, which has not yet been mitigated by the current civil rights models of equal protection. Her criticism is geared toward the institutions of government, which has failed to redress the inequality created by the prejudices perpetrated by their own socio economic and legal institutions. Fineman observes that the term 'vulnerable' can be used to describe:

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[167] See A Keay and P Walton, 'The Preferential Debts Regime in Liquidation Law: In the Public Interest' (1999) CfiLR 84, 85; as cited in RK Mokal, 'Priority as Pathology: the Pari Passu Principle' (2001) 60(3) CLJ 581.
[168] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1, 3.
[169] M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1, 3.

> …a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility. Vulnerability thus freed from its limited and negative associations is a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality than is currently afforded under the equal protection model.[170]

It provides a new perspective on how involuntary, non-adjusting, and undiversified stakeholders should be treated by integrating the broader social implications of their role in society, the impact that a company's financial distress may have, and the challenges they face in exercising what rights they may have as against more powerful stakeholders who have bargained for their position. These questions are inherently value laden. It is a difficult balance between contractual obligations bargained for and the moral obligations to redress imbalances and unfairness in situations of corporate financial distress. Although many insolvency and restructuring scholars have preferred to avoid considerations of social values or morality in a corporate or commercial context, it cannot be denied that these issues remain and should therefore be considered in the context of achieving fairness in the balance between social and business interests.[171]

The values at play cannot always be easily monetised and while modern law has evolved somewhat toward incorporating some non-economic values, such adjustments tend to be reactive in nature. Rather, 'values may provide some of law's content but are typically subordinated to the formal rational qualities that dominate it'[172] Insolvency and restructuring processes do a good job of ensuring that contractual obligations for the repayment of debts due are met at least proportionally, however, the nature of those debts are different from the nature of the obligations owed to unwilling participants to a company's financial distress resolution process.

Given the lack of measures or frameworks provided to date that do not categorise, rely on hierarchy, or hypothetical social contracts, Vulnerability Theory is a foundation upon which a theoretical approach geared toward the corporate sphere can be created. Such an approach would eventually provide measures of fairness that may compensate for the imbalances in power and exposure among the broad range of stakeholder affected by a corporation's financial distress and the choices made to resolve it. In fact, Fineman explains that 'the concept of

[170] M Fineman (n 160) 8-9.
[171] Gant (n 23) 244.
[172] R Cotterrell, 'Theory and Values in Socio-legal Studies' (2017) 44(S1) Journal of Law and Society 19, 26.

vulnerability can act as a heuristic device, pulling us back to examine hidden assumptions and biases that shaped its original social and cultural meanings.'[173] Considerations of relative resilience provides a valuable context in which critical perspectives on the political, social, and legal institutions can be constructed with a view to redress those imbalances. [174] A focus on vulnerability goes beyond the normative claims for equality generally, whether formal or substantive, and suggests the interrogation of what may be 'just and appropriate mechanisms to structure the terms and practices of inequality'[175]

Considering the identified inequities inherent among the broad range of potential stakeholders in a corporation, a focus on the relative resilience or lack of power and choice of those stakeholders provides a new lens through which to assess and create a better approach to fairness when a company is faced with financial distress. Like traditional social institutions, in situations where corporate entities affect less resilient (fragile/more exposed) stakeholders and leave them with little choice or power over their destinies, equality may also be an unjust measure when applied to 'situations of inescapable or inevitable inequality where differing levels of authority and power are appropriate.'[176] An approach that considers the fragility and exposure of stakeholders as impacted by their relative power and choice in a situation of corporate financial distress, it can serve to recalibrate fairness in the imbalanced power structure that tends to disadvantage those who are involuntary, non-adjusting, undiversified and often unwilling participants in a rescue or restructuring process.

Fineman observes wisely that 'law should recognise, respond to, and, perhaps, redirect unjustified inequality, the critical issue must be whether the balance of power struck by the law was warranted.'[177] Placing humans at the centre of institutions means approaching fairness from a position of compassion that goes beyond the categories created to make decision-making easier. Just because something is easier, does not mean it is better. A feminist approach would consider the circumstances causing a stakeholder to be connected to a company and the relative power, choice, exposure and fragility that a stakeholder has when it comes to recovering from the impact of a company's financial distress. This certainly would not be easy to legislate, and further research and development is required to reframe priorities within this fairness paradigm, but it is an important goal if true fairness is to be achieved that considers the human condition more realistically. If the law is to succeed in its goals of ensuring true

[173] Fineman (n 160) 9.
[174] ibid 9.
[175] M Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133, 134.
[176] ibid 135.
[177] ibid 142.

equality, then there must surely be an obligation to reconsider how the human condition is accommodated in the corporate sphere, as well as in those social institutions more easily defined as geared toward redressing the inequalities that continue to be present in our society.

In conclusion, the next step in this process of theoretical development and reframing aimed at supporting the goals of sustainability and social fairness and equity, is to create measures that can be used practically to apply fairness criteria that accounts for the social issues activated when a company is in financial distress and incorporate that into the insolvency law frameworks and principles currently regulating financial distress resolution. Vulnerability Theory provides a starting point for the development of such a measure. The most challenging question will be how to assess a stakeholders relative power and choice and their resilience to a company's financial distress in order to find a more equitable approach that considers the human issues that financial distress creates in today's insolvency and restructuring frameworks.