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IN CRITIQUE OF A REDUCTIVIST CONCEPTION AND EXAMINATION OF "THE JUST ORGANIZATION"

CHARLES D. WATTS, JR.*

I. INTRODUCTION

The constructed theory and simulation contributed by Dean Karen Newman's article, entitled *The Just Organization: Creating and Maintaining Justice in Work Environments*, provides some basis for optimism.¹ Certainly, one must be hopeful for the broader achievement of the results alleged to flow from the creation of more "just organizations." These benefits include greater employee commitment to the organization and its goals. Indeed, many of the participants in this symposium have taken positions that resonate strongly with Dean Newman's final inference from her empirical study.² In her conclusion, Dean Newman delineates the organizational benefits of explicitly stated corporate goals that address and consider a wider set of objectives than merely stockholder wealth maximization.³ Thus, this research provides an empirical basis for challenging the myopic foundationism generally attributed to law and economic scholars.

Undeniably, the power of economic analysis in corporate law has been its focus upon shareholder welfare and its attempts to provide an objectified basis for monitoring management performance.⁴ This approach to the basic

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1. Karen L. Newman, *The Just Organization: Creating and Maintaining Justice in Work Environments*, 50 WASH. & LEE L. REV. 1489 (1993).

2. William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991) and ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* (1991)); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201; Lawrence E. Mitchell, *Private Law, Public Interest?: The ALI Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 871 (1993); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993); Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681 (1993); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992).

3. Newman, *supra* note 1, at 1511-13.

4. In review of FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991), many of the participants in this conference have conceded that the economic, contractualist analysis of these and other law and economic scholars has been powerful. William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 184 (1992) ("... the nexus-of-contracts assertion taught the lesson that the models have a valid bearing on legal corporate governance") (book review); Johnson, *supra* note 2, at 2217 ("I will leave it to others to sing the praises of Easterbrook

fiduciary problem of corporate law is helpful to some extent. My concern with a focus on shareholder wealth maximization as the stick against which all regulation must be measured is that such measurements do not include in their calculus other important aspects of corporate existence and other ways in which corporate entities affect society. I generally share the often stated reductivist critique of economic analysis in the law.⁵ The analysis is powerful, but the scope of the examination is too narrow. The economic focus upon individual, rational decisionmakers ignores the reality that humans are social beings and that their tendencies and behavior patterns are significantly affected by their social experience. Dean Newman's theory of the effects of a just work environment upon workers supports the idea that individuals, particularly in a group setting, are affected by their social milieu.

An anthropomorphic analogy illustrates the issue raised by a too narrowly focused analysis: an individual may be doing quite well financially but living an unethical life. Such ethical failures may portend ultimate disaster, but the myopic focus upon strictly financial issues may allow such shortcomings to be ignored. Occasionally, we have seen this sort of precipitous collapse of organizations with exemplary financial stability. Examples include such colossal failures as Equity Funding,⁶ Drexel Burnham Lambert,⁷ and a list of probably a thousand savings and loan companies across the country. However, the unrecognized costs or missed opportunity that might result from an organization's failure to achieve and maintain ethical work environments, under Dean Newman's analysis, is principally sub-optimal organizational performance. The general critique that I have for the theory expressed and the conclusions drawn from this study is that, while quite helpful, Dean Newman's study may suffer from a scope problem. In brief, the narrowness of the theory, the rhetoric, and the nature of the empirical study, as well as the pool of participants used for it, ultimately raise questions about the application of these results to broader society.

II. PUTTING THE STUDY IN CONTEXT

As an initial matter, it is important to situate Dean Newman's study within broader trends affecting organizations and the study of their man-

and Fischel's book. I take for granted (and so will not argue for) the usefulness of economic analysis for corporate law . . .); Lawrence E. Mitchell, *The Cult of Efficiency*, 71 TEX. L. REV. 217, 220 (1992) (in discussing basic economic model Mitchell notes that "[i]t is the special genius of this model, and the corporate form, to permit the specialization of each of the production factors. This specialization leads to corporate efficiency . . .") (book review).

5. See, e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 43-54 (1989) (discussing impact of sociological factors on economic analysis of law); Amartya Sen, *Rational Fools: A Critique of the Behavioural Foundations of Economic Theory*, in SCIENTIFIC MODELS AND MAN 1 (Henry Harris ed., 1979). Some have suggested that this sort of work may create the basis for a new field called "Socio-Economics." See, e.g., David O. Sears, *Socio-Economics: Challenge to the Neoclassical Economic Paradigm*, 2 PSYCHOL. SCI. 12, 13 (1991).

6. RONALD L. SOBLE & ROBERT E. DALLOS, *THE IMPOSSIBLE DREAM* (1973).

7. DAN G. STONE, *APRIL FOOLS: AN INSIDER'S ACCOUNT OF THE RISE AND COLLAPSE OF DREXEL BURNHAM* (1990).

agement. American industry is generally in the process of conversion from a predominantly Taylorist⁸ or Fordist⁹ hierarchical model of management to a post-hierarchical model. The hierarchical model involved an image of management as science in which human capital was applied to specific tasks and functions within a very confined job description with layers of close supervision.¹⁰ This sort of orientation worked well with the mass production economy. Performance was easily measured and effectively monitored. Cost reduction and efficiency were the goals of such management. Because relatively simplistic mechanisms were on the cutting edge of technology, mistakes and errors were easily overcome by volume production.

In today's post-hierarchical environment, it is clear that service and knowledge-oriented employment will dominate the world's economy. Particularly in American labor markets, the premium will be upon producing higher quality, technically sophisticated goods tailored for specific uses.¹¹ Effectiveness in satisfying consumer demand will take precedence over simply reducing the cost of production. In the global market place, the American competitive advantage will lie in productivity, not low wage labor. This reality will tend to render management schemes built on narrow job descriptions and multi-tiered monitoring obsolete.

Significant challenges await future management in attempting to employ and motivate workers effectively in such work environments. In this sort of environment, however, motivation and commitment become more and more important as organizations flatten out and jobs become more broadly defined.¹² It is not that mass production or assembly line work will disappear,

8. CHARLES D. WREGE & RONALD G. GREENWOOD, *FREDERICK W. TAYLOR, FATHER OF SCIENTIFIC MANAGEMENT: MYTH AND REALITY* (1991). Taylor's insight has been widely thought of as primarily the use of "time and motion" sorts "efficiency expert" work, but he maintained that scientific management involved broader issues of management-labor relations.

9. See RALPH HENRY GRAVES, *THE TRIUMPH OF AN IDEA, THE STORY OF HENRY FORD* (1934).

10. See WREGE & GREENWOOD, *supra* note 8.

11. For further discussion of the changing nature of production processes, see generally PETER B. DOERINGER, *TURBULENCE IN THE AMERICAN WORK PLACE* (1991); THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986); ROBERT B. REICH, *THE NEXT AMERICAN FRONTIER* (1983); Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 *YALE L.J.* 1803, 1803-13 (1993); Paul Weiler & Guy Mundlak, *New Directions For The Law Of The Workplace*, 102 *YALE L.J.* 1907 (1993).

12. See O'Connor, *supra* note 2, at 901 ("Firms are responding to international market demands by moving away from hierarchical production processes that involve narrow job assignments and close supervision. Firms have implemented participatory work programs that encourage workers to engage in problem-solving and dialogue concerning production inefficiencies. Industrial relations experts maintain that these innovative shopfloor practices usually improve employee attitudes . . ." Professor O'Connor proceeds to consider the role of fiduciary obligations in maintaining a cooperative work place.); Andrew A. Lipsky, *Participatory Management Schemes, The Law, and Workers' Rights: A Proposed Framework of Analysis*, 39 *AM. U. L. REV.* 667, 670-75 (1990) (delineating scientific management and participatory management techniques).

but the nature of such work will change. In this post-hierarchical environment, employers have begun to expect employees not to simply make a specific number of widgets, but also to think while they work and to be willing to stop the assembly line if they perceive a problem.¹³ Employees are expected to inform management if they think of a better way to utilize corporate resources to produce these widgets.¹⁴ Although this has generally been characterized as the "participatory management technique," other schools of thought, such as European ideas of co-determination, have also been employed to humanize the work place and to empower workers.

These different and developing roles for employees raise new, broader management concerns. Therefore, empirical studies designed to address the promotion of commitment and motivation among employees in this post-hierarchical economy are increasingly important as measures of performance necessarily become less finite and less discernible. Dean Newman's paper and her previous work contribute directly to these cutting edge issues facing management in America during the late twentieth and early twenty-first century.¹⁵

III. CRITIQUE

The basic thesis of Dean Newman's paper is that treating employees in a way that they perceive to be fair and to be inclusive of their voice or perspective will redound to the benefit of the enterprise through greater employee commitment and effort.¹⁶ Certainly, if you take seriously economic analysis you would assume that a continuous Darwinian process exists in the market that results in the most profitable structures and strategies being sought out and employed by competitors. Those who fail to comport with or adapt to more profitable approaches will have higher cost and ultimately be forced to exit the market.

Given this, the skepticism that I have with respect to Dean Newman's suggestion derives, in part, from the fact that I do not see the propagation of just or participative organizations that one would expect if these benefits were as significant as her paper suggests. These sorts of management techniques seem to be pursued in earnest primarily by companies facing extreme competitive pressures. The U.S. auto companies come to mind.¹⁷

13. O'Connor, *supra* note 2, at 901.

14. *Id.*

15. Karen N. Gaertner & Stanley D. Nollen, *Career Experience, Perceptions of Employment Practice, and Psychological Commitment to the Organization*, 42 HUM. REL. 975 (1989); Karen N. Gaertner, *Winning and Losing: Understanding Managers' Reactions to Strategic Change*, 42 HUM. REL. 527 (1989); Stanley Nollen & Karen N. Gaertner, *Effects of Skill and Attitudes on Employee Performance and Earnings*, 30 BUS. COLL. 435 (1991).

16. Dean Newman notes that these beneficial effects may or may not result in higher productivity; but clearly, this sort of energized work force provides opportunity for the firm to operate more productively. See Newman, *supra* note 1, at 1508.

17. I do not mean to suggest that participatory management is not the trend within major corporations. It has, in fact, been suggested by some that the General Motor's Saturn

Further, companies seem to use these techniques mainly as tools for co-opting or mollifying otherwise intractable and financially unacceptable labor demands.¹⁸ While documentation and verification are always important, the benefits of perceived ethicality and voice are not really novel ideas. They would seem generally to be as old as the golden rule and as in vogue as the latest popular text on Japanese management techniques. Here, however, Dean Newman has clearly explicated and empirically validated the effects of these techniques on worker behavior, at least within a rather convenient sample of willing subjects. If this approach to management were so well established as both morally correct and, more importantly, profitable, why are they not more widely adopted? Why do companies not operate in this fashion in order to be competitive in the market?

Certainly many potential answers to this question exist. Clearly, Dean Newman's piece represents something of a beginning in the effort to test empirically these rather intuitive conclusions. However, I think it is important to consider why it is that well-known, though previously undocumented, intuitive principles have not become *de rigueur* among American managers. Producing data that establishes the points made in Dean Newman's article is one step toward propagating these ideas, but it seems that the question raised by this paper is not whether this analysis is valid, but whether this analysis is generally applicable to the broader and more diverse reality of management in corporate environments.

In this regard, I am reminded of the economist's analysis of racial discrimination in employment. The traditional Beckerian analysis concludes that the market will, in fact, eliminate racial discrimination in the long run.¹⁹ One only has to state that conclusion in order to raise questions about the analysis itself. Have we not had a long run experience with racial discrimination?²⁰ When will this lengthy intermediate period come to an end? Finally, assuming *arguendo* that this economic analysis is internally consistent, is it possible that the model just fails to reckon with unique aspects of our society as to make its conclusions inappropriate for American society as it exists today?

division represents a major trend in labor law and may render the National Labor Relations Act anachronistic. See, e.g., Lori M. Beranek, Comment, *The Saturnization of American Plants: Infringement or Expansion of Workers' Rights*, 72 MINN. L. REV. 173 (1987). However, all participatory management schemes do not equate to "just organizations" within the meaning outlined by Dean Newman. I would suggest that justice in the workplace is still far from the norm.

18. Lipsky, *supra* note 12, at 675 n.42 ("Some union officials are convinced that companies simply use participative schemes to avoid or dump collective bargaining agreements.").

19. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971) (originally published in 1957).

20. RICHARD A. EFSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (arguing that we have not had such an experience since market forces have not been free to wear down economic discrimination).

I will posit a number of weaknesses in Dean Newman's theory, discussion, and study that make me wonder if the reason that we do not see more evidence of her conclusion in the real world is because that world presents difficulties that are not considered by this theory. I will then suggest some approaches and theories that might be helpful in rethinking this model for broader application.

First, as I have alluded to, both the tenor of the discussion and the description of the simulation's scope ignore certain fundamental societal characteristics that influence organizational behavior. For example, the paper considers as part of its definition of procedural justice a component described as "its referent."²¹ The idea is that "justice is neither easy to accomplish nor universally defined."²² Dean Newman goes on to discuss the "principle of equal access" as a "very western concept, suitable for our *egalitarian* society."²³ The point of her discussion was to demonstrate that the narrow concept of procedural justice may be difficult to consider when the work environment contrasts with the broader social context. This is certainly a valid assertion. However, the assumption that the American social structure matches the American rhetoric on equality is problematic.

Many have argued that our society's rhetorical espousal of egalitarian principals stands in stark contrast to its historic and continued pervasive acceptance of social hierarchy along class, race, gender, or sexual orientation lines, among others. As an example, one could simply focus on race. Several authors have well documented the fact that both racial segregation and racism itself have seemingly become a permanent part of our country's landscape.²⁴ Dean Newman's description of the underlying theory of ethicality in organizations seems to ignore these well-known and pervasive aspects of our society. Additionally, the theory seems to assume that a common ethical backdrop exists to which most, if not all, will respond.

Dean Newman's oversight brings to mind the debate that occurred in the popular press regarding President Clinton's aborted appointment of Lani Guinier as Assistant Attorney General for Civil Rights. Many conservative columnists bemoaned the thought that, if confirmed, Ms. Guinier would enact policies that might serve to "balkanize" America.²⁵ I remember

21. Newman, *supra* note 1, at 1491-92.

22. *Id.* at 1520.

23. *Id.* (emphasis added).

24. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993) (making strong argument for conclusion of its subtitle); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) (providing further evidence that trends of social stratification along racial and class lines may be evolving into permanent part of landscape of our society); DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (documenting fact that in our urban centers segregation or "hyper-segregation" is worse today than it was nearly forty years ago). *But see* PAUL M. SNIDERMAN & THOMAS L. PIAZZA, *THE SCAR OF RACE* (1993) (using opinion poll surveys to demonstrate that stances that people take on issues derive from "more fundamental" concerns regarding government effectiveness or deficit financing).

25. One commentator, Jesse N. Hordes, Washington director of the Jewish Anti-

wondering if these columnists believed we were balkanized already. Dean Newman seems to make assumptions that contradict the relatively uncontroversial perception that our society is deeply structured by certain socially constructed categorizations of people and communities.²⁶

Similarly, the narrowness of Dean Newman's participant pool further reinforced this thought. Dean Newman's "Looking Glass" experiment had the participants review an "in box" of memoranda. Different sets of memoranda went to different groups of participants and contained different questions about the ethical decisionmaking climate of the particular organization. The experiment then had the participants make a set of decisions that were used to gage the dependent variables which reveal the effects of the "in box" memoranda. The participants in the Looking Glass experiment appear to be an extremely elite sample: MBA students, predominantly male (71%) and presumably white, although insufficient demographic data is provided to know this for sure. The inclusion of international students (13%), primarily European and Asian, probably reinforces rather than diversifies the views represented because these international students likely reflect self-selected elites oriented towards assimilation with like Americans. It would seem that the idea of a perceived ethicality which comports with backdrop understandings of ethicality may only be coherent in the sort of non-diverse population reflected in this group. This elite sample would certainly contrast with less professional sorts of employees who may actually desire a narrowly focused job description and thus, less ambiguity as to their own job performance.

In the real world, our various ethical backdrops are diverse, but the dominant backdrop would seem to accept, in large part, the imposition of hierarchy as a norm. This may explain, to some extent, why America seems to retain hierarchical work structures when countries like Sweden, Germany, Japan, and other Pacific rim countries seem to be moving toward more worker-empowering approaches.²⁷ Narrowly defined job descriptions with

Defamation League, was quoted as stating that the issues raised by Lani Guinier "really goes to a core issue of one's conception of American society as a colorblind society. . . . There are concerns about solutions (Guinier has proposed) that may Balkanize and polarize' American society." Ronald Brownstein, *Nomination May Add Race Issue to Democrats' Schism*, L.A. TIMES, May 26, 1993, at A8. Justice O'Connor also used this term to describe the dangers inherent in the racially gerrymandered congressional districts that resulted in the first Black congressperson to represent the state of North Carolina since the very early years of this century. *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993) ("Racial gerry mandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goals of a political system in which race no longer matters . . ."). In both instances, the threat of balkanization was used to retard remedial action and retain a racially divided America

26. Interestingly, the simulation, after establishing a certain ethical climate, poses for the participants an ethical dilemma involving certain gender concepts. Newman, *supra* note 1, at 1504. At no other point, however, does the paper recognize that the social structure of our society can affect individual perceptions of fairness.

27. See, e.g., Getman & Marshall, *supra* note 11, at 1811 ("The Tayloristic organization

heavy layers of oversight would seem to be supportive of and supported by hierarchy in the broader society. In fact, putting our rhetoric and espoused aspirations for equality and egalitarianism to one side, actions within the work place that fail to adequately comport with pre-existing experience about these hierarchical norms will likely be disconcerting to many workers. Traditions of subordination create currents of expectation. To the extent that workplaces are structured under ethical norms that run counter to such expectations, one would anticipate divergent and possibly turbulent responses. For example, those in the various disempowered groups are generally unlikely to perceive benign corporate actions as inclusive of their perspective or voice, unless the employer made specific and obvious efforts to demonstrate an understanding and respect for such perceptions.

Ironically, over the last decade we in legal academia have seen a rather high profile discussion on whether the stories and perspectives of "outsider" scholars should be accepted and valued in academic circles, particularly in respect to the tenure decision. The coincident choice of the term "voice" by both Dean Newman and these legal scholars, largely of color, is interesting even though the meaning is quite different. The difference is that Dean Newman views the concept of voice in the individualistic sense of a person expressing her view about a particular matter and having such an expression included in the decisionmaking process. The debate among the legal scholars of color, while contentious at times, consistently used the term "voice" to depict not merely an individual's perspective but an individual who's very persona is, in the minds of both the speaker and the listener, defined, to some extent, by how the individual is situated with respect to accepted norms of hierarchy.²⁸

of work has difficulty competing with high-performance systems like those being developed in Japan, Europe, and some American companies like Xerox, The Ford Company, and General Motors' Saturn project"); Odawara Ken'ichi, *The Competition Principle in Japanese Companies and Labor Unions*, 31 JAPAN Q. 25, 25-26 (1984) (describing legality of Japanese workers due to work structure and participation); Joseph Mire, *Trade Unions and Worker Participation in Management*, in *THE QUALITY OF WORKING LIFE, VOLUME 1: PROBLEM, PROSPECTS AND THE STATE OF THE ART* 416, 418-33 (Louis E. Davis & Albert B. Cherns eds., 1975) (describing labor management relations in Austria, Denmark, Norway, and Sweden); Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980).

28. Richard Delgado, *Enormous Anomaly? Left-Right Parallels In Recent Writing About Race*, 91 COLUM. L. REV. 1547 (1991) (reviewing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987), STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991), SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990), and PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1990) that finds amazingly comparable proclivity among these scholars from different ends of ideological spectrum to attack traditionally liberal-rights-based legal principles designed to correct past injustices); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991) (demonstrating that at base both "majoritarian heirarchy" scholars of color, primarily Randy Kennedy and Stephen Carter, and "monistic" scholars of color, including among others Derrick Bell, Richard Delgado, Kimberle Crenshaw, Mari Matsuda, and Patricia Williams, address questions involving race from communitarian perspective).

Dean Newman's perception of the term "voice" is classically liberal and rivetted upon the individual as though individuals existed in a vacuum. The voice debate among legal scholars was more communitarian.²⁹ It incorporated the idea that individuals establish an identity by reference to others with whom they associate and identify. In our society, these associations have, since our assembly as a western society on this continent, been based upon and related to race, class, and gender.

This heritage of hierarchy reinforcement, reflected particularly within larger public corporations, may make shared perceptions of ethicality and voice difficult to achieve in the real world of America's multicultural society. This is, it seems to me, illustrated by the racially polarized perceptions of the jury's decision in the trial of Damion Williams and Henry Watson.³⁰ Given the perceived racial or gender identity of traditionally disempowered individuals, divergent interpretations of corporate action that affects others with whom these individuals identify will likely involve this group identity. For persons associated with traditionally empowered communities, the image of self as simply another individual is much more plausible. So, while I intuitively agree with the hypothesis that ethical climates tend to engender greater commitment and harder work by employees, I think that Dean Newman's analysis and empirical data raise new questions that must now be considered in an environment where this issue of hierarchy is included as a component of the study. The theory of justice in organizations must include and be tested in the real world with its history of hierarchy and status-based treatment.

With respect to testing, the Looking Glass simulation could be done with a less homogeneous sample. Certainly, greater diversification of the subjects with respect to race, class, and gender would test the simulation's ability to create these perceptions of ethicality and voice that seem to have been conveyed to this more homogeneous subject sample. It might also be helpful to run the simulation with homogeneous groups of traditionally disempowered persons and attempt to measure the extent to which purportedly ethical climates were perceived as ethical within such communities. However, neither of these suggestions really responds to my concern about the overly individualistic orientation of this study.

29. Johnson, *supra* note 28, at 2050-62 (identifying communitarian themes in both strains of voice of color debate).

30. These teenagers were tried for their brutal attack on Reginald Denny during the melee that followed the acquittal of the group of police officers charged with unlawfully beating Rodney King. See Bernard Grofman, *The Denny Beating Trial: Justice in the Balance*, CHI. TRIB., Nov. 3, 1993, § 1, at 21 (two-thirds of residents of Los Angeles believed that jury's decision in Denny beating trial was wrong, but Black Angeleans were in agreement with verdict by slight margin); Daniel B. Wood, *Denny Trial Splits Opinion Across Racial Lines in L.A.*, CHRIST. SCI. MONITOR, Oct. 28, 1993, at 7 ("The jury's decision to acquit Damion Williams and Henry Watson on most charges in the beating of trucker Denny has produced greater division of opinion across racial lines and within racial groups than the King trial did").

In my view, individuals develop their identity and also their feeling about fairness with reference to groups with which they identify.³¹ In other words, a person's self-perception is derived in part, from his perception of how others perceive him and others like him. Therefore, the empirical approach used in *Looking Glass* strains out an important part of the reality it attempts to measure. It creates a sort of virtual reality where the subjects never see themselves in the organization.³² This would seem to eliminate the group experience and identification necessary for an accurate depiction of justice. Reviewing the series of memoranda that are intended to convey the moral climate of the work place disembodies the individual from the context of that work environment. Without the communal nature of group affiliation necessary for individual assessments regarding fairness, it is difficult to imagine how the real world experience of actually being within the corporate culture could be assessed.

The difficulty, however, in providing evidence as to this hypothesis in a more diverse sample does not necessarily work against the hypothesis. It only suggests difficulty in establishing a statistical basis for the hypothesis and difficulty in replicating or applying the study's conclusions in the real world. This may be part of the answer as to why we do not see more concerted efforts to create ethical work climates in the real world. Success in creating the perception of an ethical work climate may be a very difficult task given the divergent perspectives that might arise in a reasonably diverse population involving any overt step that management might take to create an ethical work place.³³

The scope of Dean Newman's project might also be critiqued for failing to consider, or only tangentially considering, the ethicality of organizations vis-a-vis nonemployees—those other stakeholders or communities affected

31. The framers of our Constitution would seem to illustrate this point. Their "compromise" regarding Africans cannot be reconciled with any view of fairness. However, they were able to countenance the three-fifths rule and the continuation of slavery because they in no way identified with the community of Africans on this continent. In particular, Thomas Jefferson's relatively well-established association with Sally Hemming did not ultimately lead him to identify with the circumstance of her people. See RICHARD K. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON 65-74* (1984) (chronicling Jefferson's views of Africans in America and his internally inconsistent distinction between political equality and social equality).

32. Because of the divergent effects that our heritage of hierarchy has on individuals that identify with traditionally subordinated groups, these disadvantaged individuals may be more likely to be affected by this aspect of the study than those who identify with traditionally empowered communities. See, e.g., Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding The Me In the Legal Academy*, 77 VA. L. REV. 539 (1991).

33. I do not mean to suggest that attempts to create ethical work climates never occur in the real world. There are and have been for sometime, ethically based mutual funds. However, many of these have been based upon easily acquired litmus tests like munitions production, South African divestment, or environmental concerns. Some investment managers have, however, taken the position that ethical companies are good investments and have created investment screens designed to identify such ethical companies. Even so, their ideas of "ethical" and Dean Newman's conception are only related in the broadest sense.

by corporate activities. It would seem that this may have a significant effect on employee commitment.

Again, using the example of race to make the point, the treatment of African-American communities by major corporate entities comes to my mind. Corporate policies quite frequently seem to have a detrimental effect upon such communities. These include redlining,³⁴ environmental racism, the targeting of the youth in such communities for the sale of high potency malt liquor in forty ounce containers explicitly labeled as "one serving," or cigarette advertising inordinately located in such communities.³⁵ Can organizations that actively promote this sort of external exploitation be considered ethical with respect to internal matters? More directly, would such behavior undermine an otherwise ethical and legal work climate? Finally, would these perceptions also diverge along racial lines?

Some of our largest financial institutions and businesses have used exploitive practices. One might assume that this type of treatment of disempowered communities by corporate elites derives from a lack of understanding and empathy for the citizens of such communities. It would also seem logical that where companies have engaged in disparate treatment of traditionally disempowered communities, the task of establishing the perception of internal ethicality necessary to extract the benefits identified in the study would become all the more difficult when some of the workers identify with or live in these communities. This is when a communitarian perspective might provide a productive theoretical basis for the framework of this theory's development.

Dean Newman relies upon Leventhal's research on new approaches to the study of fairness in social relations.³⁶ Leventhal identifies six criteria for judging "objective procedural correctness." Dean Newman, based upon the work of Sheppard, Lewicki, and Minton,³⁷ had categorized the judgment made by employees about procedural fairness into two types of judgments, judgment about "balance" and a judgment about "correctness." As to correctness, Leventhal's six criteria used to evaluate correctness are as

34. For a discussion of such discriminating banking practices and governmental efforts to provide policy responses see Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 298-99 (1993); Anthony Taibi, *Banking, Finance and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights and Substantive Racial Justice*, 107 HARV. L. REV. (forthcoming in 1994) (both articles review the CRA and critique its effects on lending institutions and disadvantaged communities, but reach opposite normative conclusions).

35. See, e.g., Teresa Moore, *Alcohol Act Aim at Minorities—Survey Finds Abundance of Billboards in Some S. F. Neighborhoods*, S.F. CHRONICLE, Apr. 17, 1993, at A17 (reporting San Francisco survey by Center for Race, Poverty and the Environment that found that billboards in minority communities were roughly twice as likely to be selling beer, malt liquor, hard liquor, or cigarettes as billboards in non-minority communities).

36. Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relations*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27-55 (Kenneth J. Geyen et al. eds., 1980).

37. BLAIR H. SHEPPARD, JR. ET AL., ORGANIZATIONAL JUSTICE (1992).

follows: 1) consistent application of procedures across individual; 2) safeguards against bias; 3) use of accurate information; 4) correctable decisions; 5) adequate opportunity to participate for all relevant parties; and 6) conformity to prevailing ethical standards.

Four of the six criteria reflect a classic liberal orientation toward fairness.³⁸ Consistent application across individuals assumes a certain uniformity that may not be appropriate in a diverse environment. For example, gender bias in education, in fact, results from a consistent application of classroom rules. The students that become quickly bored and then misbehave challenge the teacher to help them engage the educational process. Typically, these students are boys and are ultimately rewarded for their inability to conform their behavior to the teacher's consistent set of expectations.³⁹

Other criteria are susceptible to the same sort of challenge. The "safeguard against bias" criteria seems to rely on concepts of formal equality that might also lead to perverse results. A clear tension between bias and understanding or empathy exists. To illustrate, recently the rap group "Two-Live Crew" was charged with obscenity for the lyrics of a particular recording. Expert testimony was introduced on the question of the cultural meaning of the language and the appropriate interpretation of it. The upshot of such testimony was that such language reflected an African-American tradition known as signifying.⁴⁰ The defendants' proof was offered to establish that it was not obscenity, because it was not appreciated in the artist's community for its appeal to the prurient interest. The application of law under this situation required an apparent bias, a fuller understanding of a particular community's culture. The tension here is reflected in the more nuanced understanding of justice as treating similarly situated individuals similarly. Of course, the difficulty is in seeking justice without stooping to the level of moral relativism.

38. By classic liberal orientation, I mean that which derives from the classic liberal tradition of Hobbes, Locke, and Hume. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 400 n.62 (1984) (quoting Professor Karl Klare, *Law-Making as Praxis*, TELOS, Summer 1979, at 123, 132 n.28).

39. Many scholars of color have challenged the idea that consistency across certain cultural barriers results in fairness.

40. See Anne L. Clark, Note, "*As Nasty As They Wanna Be*": *Popular Music On Trial*, 65 N.Y.U. L. REV. 1481, 1504 n.203 (1990) ("Professor Gates testified that 2 Live Crew relies on a traditional African-American art form called signifying, which is characterized by "rhythmic teasing and cajoling, often peppered with lewd or off-color remarks"); Henry Louis Gates, Jr., *2 Live Crew, Decoded*, N.Y. TIMES, June 19, 1990, at A23 (discussing culture-based methods of communication). Gates has been a leader in developing the literary basis for the idea that the specificity and particularity of the black experience in America has created a unique and distinct culture. See generally HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY* (1988). For a discussion of the idea that one must interpret language and behavior within its particular cultural context and the potential misunderstanding when people who lack cultural understanding must make judgments about such behavior, see Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 79 n.54 (1993) (considering instances of cross cultural misunderstanding and their effect on need for greater diversity in jury selection).

The social science work of Leventhal and Newman is certainly reflective of generally held perceptions of justice. Leventhal's sixth criteria explicitly makes reference to this by noting that judgments about the correctness of corporate decisions will depend upon the extent to which such decisions are reached in "conformity to prevailing ethical standards." It is also true that general conceptions of fairness tend toward a liberal individualist orientation. However, much of the work of Critical Race Theorists has been to attack traditional liberal ideology for its failed efforts to bring freedom and justice to traditionally disenfranchised groups.⁴¹

The criteria identified in the Leventhal study masked an inherent orientation about individual justice. The criteria seem to be born of an atomistic individualist orientation toward the concept of fairness. Communitarians focus more directly upon individuals in the context of community. This focus recognizes that individuals conceive of their identity, feelings, and aspirations by reference to the community or communities of which they are a part. Therefore, for example, the backdrop of ethical norms within which the ethicality of a workplace is to be evaluated will not simply be one set of norms. This is true unless one presumes a relatively homogeneous social context. In our society, the cultural and ethical norms that provide this backdrop will be many and diverse. While recognizing the possibility of a conflicting backdrop, communitarians have the normative expectations of dialogue that values each such backdrop.

It seems intuitively sensible that the existence and demonstration of such a "community" dialogue would also promote the perception of an ethical work climate. While this may be implicit in the moral climate that Dean Newman characterized as post-conventional or principled behavior, other aspects of the discussion, as I have noted, leave me more convinced that the entire discussion derives from an individualist orientation. For example, the Victor and Collins' study with which Dean Newman agrees, is described as demonstrating that "the way in which a work organization affects individual behavior is through interaction between the corporate culture and the employee."⁴² A communitarian orientation towards this question would

41. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) (identifying ten themes that authors deem to fall within critical race thought. They note "[m]ost, if not all, CRT writers are discontent with liberalism as a means of addressing the American race problem" in describing the first such theme that they characterize as "Critique of liberalism"); see also T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1990) (criticizing colorblind jurisprudence); Regina Austin & Michael H. Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J. L. & PUB. POL'Y 69 (1991) (challenging mainstream environmental movement and their liberal universal recommendations as contrary or at least unconcerned about the interests of persons of color); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (criticizing Herbert Wechsler's analysis of *Brown* and arguing that concessions to black interests are only allowed when they serve majoritarian interests); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (criticizing liberal suggestion that problems of race and gender are analogous).

42. Newman, *supra* note 1, at 1496.

consider multiple corporate cultures and the communities within which employees identify.

So, my suggestion would be to consider ways to examine the effect of some type of dialogue between and among these communities and cultures within the corporate sphere. Such a dialogue might lead to even greater and more uniform perceptions of ethicality and voice in work environments.