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Lessons From the Financial Meltdown: Global Feminism, Critical Race Theory, and the Struggle for Substantive Justice

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LESSONS FROM THE FINANCIAL MELTDOWN: GLOBAL FEMINISM, CRITICAL RACE THEORY, AND THE STRUGGLE FOR SUBSTANTIVE JUSTICE

GARY MINDA*

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|---|-----|
| I. Introduction | 649 |
| II. Feminist and Critical Race Criticism in the Era of Globalization..... | 654 |
| III. The Relevance of the Financial Crisis of 2008..... | 664 |
| IV. Risk Perception, Corporate Culture, and the Power of Global Finance..... | 667 |
| V. Substantive Justice and Global Finance..... | 675 |
| VI. The Substantive (In)Justice of “Business as Usual”..... | 678 |
| VII. Conclusion: The Turn to Immanent Critique | 681 |

I. INTRODUCTION

With the fall of communism, it was assumed that capitalist ideology had finally triumphed as the dominant socio-economic ideology in the modern era of globalization. The message conveyed by this victory was that capitalism was no longer just a “taken-for-granted,” background assumption of modern society. Instead, modern, neo-liberal theorists accept capitalism as the prevailing analytical frame when explaining the nature of social and economic relations. Communities are viewed as networks of markets and as sources of capital flows and profit maximization. As a result, cultural uniformity is presumed, reinforcing the tendency to remain blind to color and gender differences that have historically been the source of discrimination and inequality. This strain of globalization fosters the values of cultural uniformity as well as color and gender blindness by rewarding only those who traverse the global market, producing what the market requires, rather than what might ensure food

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security and economic equality for those left out of the market due to race and gender discrimination.

Globalization and capitalist ideology have emerged as winners due in part to their successful rationalization of inequality and discrimination vis-à-vis an overriding emphasis on the importance of capital and information flows. Capital and information flows are thought to be inherently blind to color and gender, and thus, even in the face of the cold reality of the race and gender discrimination persistent in all communities, educated theorists say with a straight face that race and gender discrimination is ultimately *immaterial*.¹ As long as capital and information is *free* to flow between communities, neo-liberal theorists find it “difficult to see why communities *in general* suffer a net harm when funds are transferred between them (although some communities may be net importers of credit and others net exporters).”²

This way of thinking ignores the reality of global poverty. Take the case of Bolivia, where trade in natural gas has enriched the nation’s European-descended “white” elite and created indifference to the reality that ninety percent of the rural Amerindian Bolivians live in utter poverty.³ Or take the case of Nicaragua, where globalization has enriched the agro-business community at the expense of the women and children who pick pesticide-laden tobacco, bananas, and vegetables.⁴ Take also the opening of international trade in India in the 1980s, which was said to have been embraced by the Indian government because it would bring about huge gains to a new middle class of prosperous Indians. In fact, these trade policies have worked to entrench economic supply and demand flows that entrap thousands of Indian women and children, forced to work in textile mills with substandard wages and working conditions in order to meet the global demand for inexpensive apparel. These examples of growing inequality are—just some—of the unmentionables of economic development, which often enriches elite groups at the expense of the working poor.

Economic development has become mantra—the reason for excusing

1. See, e.g., Jonathan R. Macey & Geoffery P. Miller, *The Community Investment Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 309-10 (1993) (describing how the redlining practices which create racial ghettos fail to produce a net harm as funds are transferred between communities in a fungible network of production, investment and exchange); see also Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037, 1037 (2000) [hereinafter Iglesias, *Global Markets*].

2. Macey & Miller, *supra* note 1, at 309-10.

3. See AMY CHAU, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREADS ETHNIC HATRED AND GLOBAL INSTABILITY 54-56 (2003); see also BERTA ESPERANZA HERNANDEZ-TRUYOL & STEVEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 2 (2009).

4. HERNANDEZ-TRUYOL & POWELL, *supra* note 3, at 2.

and ignoring discrimination and global poverty. In thinking of the economy in Bangalore, India, one is encouraged to think of the communities in Bangor, Maine. The world is interconnected and community becomes fungible. Communities are conceptualized as transposable networks of economic and information flows. When communities are seen as fungible, it is natural to conceive the social relations within communities as also being fungible. Social relations are reduced to interchangeable networks that facilitate production, investment, and exchange. In this vision of communities and social relations, gender and race are ultimately immaterial. Stimulated by the powerful forces of global trade, economic development operates to overlook the realities of gender and racial discrimination and the global poor.

As globalization took hold and markets “flattened” in the Thomas Friedman sense,⁵ some began to think that capitalism was not just an ideology but rather the natural order of our universe. Even communist China opened its doors to free markets and experimented with a communist version of market capitalism.⁶ Despite these developments, it is apparent that the proclaimed success of global capitalism was premature. Indeed, as global credit and cash flows froze and markets collapsed and failed in 2008, and as a second credit financial crisis unfolded in Greece and is threatening the Euro in 2010, it is becoming apparent that the infallibility of the capitalist system is in serious doubt. What has been “flattened” has been the exuberance of global financiers who have lost their jobs and who now have joined the growing class of debtors who no longer feel guilty for not paying their debts. Once-rich debtors now walk away from homes that are “under water” because the mortgage exceeds the market price of the property.⁷ The disintegration of the debtor/creditor relationship is but one example of the failure of global capitalism; other examples can be found in the growing global unemployment rate and the despair it has caused.

On the one hand, the credit crisis is enormous and pervasive, and it is changing our world in ways we are just coming to realize. On the other, the crisis can seem banal and even invisible, like weather or a chronic illness. People adapt and come to accept the changes wrought by crisis. Wall Street bankers who have been bailed out by the United States

5. *See generally* THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005) (proposing that globalization has leveled economic competition between developed and emerging markets, thus “flattening” the earth).

6. *Id.* at 115-16 (describing how Chinese leader Deng Xiaoping began opening Chinese markets in 1977, eventually leading to China’s joining the WTO in 2001, which signaled that “[China] was now on the capitalist track for good”).

7. *See* James Haggarty & Ruth Simon, *Housing Pain Gauge: Nearly 1 in 6 Owners “Under Water,”* WALL ST. J., Oct. 8, 2008, at A5 (explaining that having more homeowners “under water” will most likely lead to additional foreclosures).

taxpayers have enjoyed one of their most profitable (and bonus-filled) years in 2009.⁸ There is a prevailing mood on Wall Street that the crisis has now passed and that investors can go back to business as before. The streets are still full of people and activity and nothing seems wrong until one notices an empty store or vacant home. In New York, unemployed investment bankers and lawyers seem busy; they are doing what businessmen did during the ten year recession in the 1990s in Japan. They are getting up early everyday, putting on their suits, and taking the train to Starbucks, where they sit all day using the free internet to search for jobs. In the months after 2008, traffic flows to Manhattan were declining and the furniture on the street left piled up by families moving and the memory of that reminds one that something awful has happened.⁹ The dreadful experience of 2008 thus remains in the public consciousness. The question frequently asked is, “Is the recession over? Do you think there will be a second dip in the markets?”¹⁰ Uncertainty becomes the new norm even as life goes on as before.

The dread of economic decline—growing unemployment, empty store fronts, school closings, and so forth—of the current moment is eerily similar to the way that gender and race discrimination persists unseen by neo-liberal theorists, yet remains obvious to everyone affected. The existence of suffering is apparent and discrimination and poverty go on in the face of the very forces that have entrenched and legitimated such inequality. Unemployment and gender and race discrimination remain visible artifacts of global capitalism. Racial and gender segregation and the poverty such segregation creates are just some of the many outputs of global finance and the global monopolies of political and economic power.

What is strange is that the world was shaken to its core in 2008. One would think that there would be great interest in the halls of government and academia to consider how we came to the brink of global disaster. Leading promoters of deregulation policies have moved on, transforming themselves from free markets advocates to Keynesian or Pigouvian economists.¹¹ The “artifacts” of the problem are still there to be studied

8. See, e.g., Stevenson Jacobs, *Goldman Sachs Profits Hit \$4.8 Billion, Pay Up 40% Over 2008*, HUFFINGTON POST, Jan. 21, 2010, http://www.huffingtonpost.com/2010/01/21/goldman-sachs-profits-ban_n_431060.html.

9. Joseph Spector, *Recession, Higher Tolls Thin Traffic on Thruway*, DEMOCRAT AND CHRON., Aug. 20, 2009, <http://www.democratandchronicle.com/apps/pbcs.dll/article?AID=.20090820/NEWS01/90820036/Recession++higher+tolls+thin+traffic+on+Thruway>.

10. See Tim Weber, *How Bad Is the Crisis Going to Get?*, BBC NEWS, Jan. 29, 2009, <http://news.bbc.co.uk/go/pr/fr/-2/hi/business/davos/7859179.stm> (discussing the causes and potential outcomes of the financial crisis).

11. See David Campbell, *The End of Posnerian Law and Economics*, 73 MOD. L. REV. 305, 309 (2010).

and observed—global poverty and gender and race discrimination remain more visible than ever in the aftermath of the financial crisis. What is also true is that there exists a body of critical literature in the feminist and critical race theory movements that is highly relevant to understanding our current predicament.

There are important lessons to be learned from feminist and critical race scholars.¹² Some of the lessons can be found in the struggles for justice that have been waged by feminist activists and critical race theorists who have been contesting the gender and racial injustice of a world governed by global finance and transnational business. Since the fall of communism, international feminists in the United States have been looking to the broader context of transnational spaces such as Europe and more generally to the context of “globalization” for inspiration in maintaining the struggle for gender justice.¹³ Similar outlooks can be found in critical race theory.¹⁴

Critical race theorists who labor to develop LatCrit theory argued long before the financial crisis that markets and investment decisions have worked to segregate communities into “racial spaces” that have been denied the freedom to gain access to the benefits of globalization. Elizabeth M. Iglesias, for example, has deconstructed the neo-liberal ideology and shown how the legal construction of class and race undermine class-based/race-based emancipator movements in Latin America. The objectives of critical race theory as developed by Iglesias look beyond the jurisdictional boundaries of the United States to the racial spaces of Latin America to better understand how globalization and law produce social regimes of racial segregation and discrimination. LatCrit scholars look to the context of transnational business and finance to discover the forces that perpetuate patterns of global race discrimination.

Similarly, as Nancy Fraser has recently explained, feminism has evolved into a transnational politics that is practiced in the emerging spaces of corporate globalization.¹⁵ The history of feminism reveals how women

12. For a review of feminist and critical race theory in law, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 128-35, 167-88 (1995).

13. See NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* 100-15 (2009) [hereinafter FRASER, *SCALES OF JUSTICE*].

14. See, e.g., Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361 (1997) [hereinafter Iglesias, *Human Rights*] (discussing the relevance of LatCrit theory for understanding neo-liberal economic theory); Brian McAllister, *The United Nations Conference on Environment and Development: An Opportunity to Forge a New Unity in the Work of the World Bank Among Human Rights, the Environment, Sustainable Development*, 16 HASTINGS INT’L & COMP. L. REV. 689, 711-13 (1993) (discussing World Bank economic policy and resettlements and the contribution of critical race theory).

15. See FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 102 (contrasting this “‘third phase’ of second wave feminism” with earlier phases in which feminists sought change

have developed their gender consciousness to take into account the broader political questions of our time that impact gender justice but transcend the traditional frame of the territorial borders of the nation state. Global feminists offer a new political practice for challenging gender inequality and for maintaining feminist struggles for justice in the context of the postwar capitalism and post-communist geopolitics currently shaping our world. What is now emerging is a new, global, feminist movement that can simply be called *global feminism*.¹⁶

What needs to be understood are the economic and ideological forces that have prevented the struggle for substantive justice in the era of corporate globalization. Why has it been so easy for intelligent people to ignore for so long the human consequences of global poverty and patterns of discrimination based on gender and race? This is the question this essay seeks to explore. The objective will be to advance the case for discovering the relevance of feminism and critical race theory as essential theories for understanding the lessons of the financial crisis of 2008. The visibility of human suffering laid bare by this crisis creates reason enough for this endeavor.

It is necessary to briefly chronicle the history of the feminist and critical race theory movements and the relevance of these movements in order to critically examine the human consequences of globalization and the financial crisis of 2008. The objective will be to gain a better understanding of how the struggle for global justice has been thwarted by neo-liberal theory and how the criticism from the feminist and critical race theory movements struggles to liberate itself from the opiates of neo-liberal theory. To achieve this objective it will be necessary to explore the connection between global finance, global feminism, and the significance of the financial collapse of 2008. The conclusion will explain how global feminism is working toward a new form of social criticism that Karl Marx would recognize and embrace.

II. FEMINIST AND CRITICAL RACE CRITICISM IN THE ERA OF GLOBALIZATION

In *Scales of Justice: Reimagining Political Space in a Globalizing World*, Nancy Fraser provides an insightful recent history of the feminist movement.¹⁷ She classifies the movement into two distinct waves.¹⁸ The “first wave” of feminism was dominated by white, middle-class,

through new social movements and identity politics).

16. *See id.* at 2, 9, 25, 30, 140, 153 (describing a new form of international feminism).

17. *See id.* at 100-03 (describing the three phases of the second wave of feminism).

18. *Id.*; *see also* MINDA, *supra* note 12, at 128-48.

heterosexual women.¹⁹ During this phase, feminists sought to “engender” the legal and political discourse of the postwar generation.²⁰ Hence, the Warren Court and the welfare state were taken as points of departure and the goal was to extend the egalitarian values of the 1960s, based on class-consciousness, to gender. Liberalism and social democracy were accepted as the baseline for bringing the ethos of equality to gender. This was, however, a phase of feminism that was exclusionary not just to men, but to women of color and poor and working-class women as well.²¹ This important beginning was focused on engendering the social imagination.

While the first wave emphasized the right of women to be treated like men, the second wave of the feminist movement emphasized the need to “recognize difference.”²² Recognition of difference became the basis for identity politics, which had the unfortunate consequence of valorizing difference, sometimes at the expense of equality. Violence against women, gender inequality at the workplace, and other gender issues were frequently argued in the language of recognition.²³ Hence, justice claims were framed in light of arguments about identity of the individual not just in terms of gender, but also color, ethnicity, race, and class.

In translating justice claims into claims of recognition, feminists sought to change culture by challenging forms of male domination rooted in the status order of society. The older progressive struggle for income equality became displaced in feminist discourse with an identity based critique of masculine cultural hierarchy. The tendency was to subordinate social struggles over redistribution to cultural struggles over identity politics of recognition.

Fraser claims that the cultural turn to identity politics in the second wave of feminism had unfortunate political consequences for the feminist movement.²⁴ This was at least in part because the turn to identity politics

19. FRASER, SCALES OF JUSTICE, *supra* note 13, at 100-03 (characterizing the first wave as “exclusionary”).

20. *See id.* at 101 (describing feminists’ attempts to expand narrow political discourse focusing on problems of class distribution to include gender issues and expose male dominance).

21. *See* Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 COLUM. J. GENDER & L. 510, 511 (2003) (calling for recognition that the particularities of “culture, race, nation and other forms of identity” play a crucial role in feminist human rights discourse) [hereinafter Lewis, *Embracing Complexity*]; *see also* Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject to International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 4 (2002) (explaining how Indian feminists have sought to distance themselves from “Western/First World/white” feminism, helping to create a new feminism that is not strictly bound to a particular culture or geography).

22. *See* FRASER, SCALES OF JUSTICE, *supra* note 13, at 135.

23. Kapur, *supra* note 21, at 4 (noting that the women’s rights movement seems to have focused on the violence against and victimization of women).

24. *See* FRASER, SCALES OF JUSTICE, *supra* note 13, at 105-12 (describing the

came into its own just as the political environment became enthralled with the free market ideology of Ronald Reagan. Reagan, following the path of the American conservative movement, wanted to end the welfare state that had come to life during the Roosevelt era.²⁵ While feminists debated essentialism and anti-essentialism of identity politics, Ronald Reagan and Margret Thatcher were establishing the grounds for free market fundamentalism and the deregulation of the welfare state.²⁶ The result was that as feminists turned inward to identity, conservative governments were looking outward to redirect wealth away from welfare recipients and the middle class to those at the top of the income distribution, who had access to the benefits of transnational corporations and global finance.

To better understand the unintended consequences of identity politics in the second wave of the feminist movement, one need only consider Nancy Fraser's explanation of how George W. Bush manipulated public opinion to win the 2004 presidential election. The main election issues were the "war on terror" and "family values."²⁷ Bush effectively manipulated public opinion by using a "gender-coded politics of recognition to hide a regressive politics of redistribution."²⁸ For example, the war on terror was rhetorically explained in terms of "masculine stereotypes" of a Texan President who sought to maintain the image of a wartime president. When the invasion of Iraq culminated in occupation of Baghdad, President Bush dressed up in flight suit and was transported by a military jet.²⁹ The media seized the image of a war president, in a flight suit dressed up like a jet fighter pilot, standing below a banner on a navy ship's deck that proclaimed "Mission Accomplished."³⁰ This image of a warrior president was then used in contrast with the image of John Kerry, who was photographed wind surfing and was characterized as an "effeminate flip-

right's successful characterization of the feminist movement as elite and anti-working class as the U.S. feminist movement suffered from infighting and a preoccupation with culture).

25. See Ronald Reagan, Governor of California, Address on Behalf of Senator Barry Goldwater: A Time for Choosing (Oct. 27, 1964) *available at* <http://www.reaganlibrary.com/reagan/speeches/rendezvous.asp> (characterizing the methods of the welfare state as both expensive and ineffective).

26. See FRASER, SCALES OF JUSTICE, *supra* note 13, at 104 (explaining that while feminists were focusing on identity politics, conservative rule throughout Western Europe and North America combined with the fall of communism to revive free market ideologies in the 1980s).

27. See *id.* at 108-09.

28. *Id.* at 109.

29. *Id.* at 108 (discussing the manipulation of gender imagery as a crucial component of the Bush Campaign's reelection strategy).

30. See *Commander in Chief lands on USS Lincoln*, CNN, May 2, 2003, <http://www.cnn.com/2003/ALLPOLITICS/05/01/bush.carrier.landing/> (describing the infamous moment).

flopper.”³¹ The gender-coded images and rhetoric resonated with Americans on Election Day. What was denied was the fact that George W. Bush dodged the Vietnam War by joining the reserves, while John Kerry fought and was wounded on the battle fields in Vietnam. How ironic.

Even more telling, as Nancy Fraser has also explained, was the way economic policy was explained by President Bush.³² Tax cuts and the elimination of the inheritance tax were defended on the ground that they would strengthen the economy and so the welfare of families, even though the result was the opposite for most Americans. These policies yielded a redistribution of income from the middle class to the rich. A similar dynamic could be seen in the way the “defense of marriage” issue was used in the crucial presidential race in Ohio.³³ Appealing to fundamental Christian voters, the Bush campaign used “defense of marriage” as a thinly-veiled call for voters to stand against gay and lesbian marriage. “Family values” were thus used for advancing conservative policies that worked to make family life difficult, if not impossible, for the working middle class, including gays and lesbians. “Thanks to these and related trends,” Nancy Fraser explains, it became nearly impossible to support a family on one paycheck, and often both parents had to work.³⁴ True family values were placed in jeopardy as income was redistributed from the middle class to the rich. At the same time, what was nominally labeled “family values” were used to deny LGBT people parity in the political community.³⁵ For gays and lesbians, prohibitions against legal marriage made family life economically expensive, palpably unequal, and socially stigmatized. The irony was that the politics of redistribution were turned upside down and were manipulated to promote increased social *injustice*.³⁶

The political gestalt shifted during the 1990s and early 2000s away from egalitarian policies of redistribution and recognition, even as, in name alone, these policies were upheld by the Bush Administration as emblems

31. See FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 109 (citing Republican’s characterization of Kerry as a “girlie man” to illustrate the manipulation of gender perceptions during the 2004 election cycle).

32. See *id.* (contending that Bush skirted discussions of economic policy by focusing on talking points of family values).

33. *Id.* (characterizing this rhetoric as part of an overall strategy to use “family values” as a tool to ensure high turnout among evangelical Christian voters).

34. *Id.* (arguing that policies supporting lower taxes for corporations and wealthy Americans, fewer social welfare programs, less consumer protections, lower wages, and an unstable employment environment made life more difficult for the lower-middle class).

35. *Id.* at 110 (pointing out that right-leaning politicians convinced voters that the real threats to family values were abortion and gay rights, not Republican economic policies).

36. *Id.* at 109 (explaining the effect of Bush economic policies which promoted upward, not downward, redistribution of wealth in the United States).

of his presidency. Compassionate conservatism was held out as a gender-coded policy for advancing regressive policies to deny abortion rights and gay marriage, and tax cutting policies further ensured that upper income groups and business would remain economically dominant. At the same time, in advancing the war on terror, the Bush Administration projected macho values and masculine images of a strong Commander-in-Chief who knew best how to protect Americans from terrorism. “Father knows best” became the gender-coded justification of the unitary executive theory that insulated the President from democratic constraints. When Vice President Cheney was asked by an interviewer about the declining public support for the President in the polls, his answer was: “So?”³⁷ The dismissive manner of his response speaks volumes about how the executive projected conservative ideology with confidence, arrogance, and ego, while concealing an anti-democratic, regressive agenda.

During this time, feminists in the United States were shifting their attention away from egalitarian policies of redistribution (class) to the importance of recognition (identity politics).³⁸ There was irony here too, for the turn to recognition of gender identity actually helped to reinforce the conservative right’s agenda of regressive redistribution policy that favored transnational corporations and the rich. Family life was consequently worsened as more and more women and men were forced to moonlight to support their families.³⁹ Meanwhile, policies against gay marriage and adoption rights rendered gays and lesbians less able to realize the family life they desired. The politics of identity worked to prevent solidarity between different progressive groups. Suspicion and distrust fractionalized the political left at the very time the conservative right was gaining strength as a cohesive political ideology.⁴⁰

The second wave of feminism was thus truly unfortunate. As Nancy Fraser notes: “[t]he relative neglect of political economy by U.S. feminists and other progressive movements ended up playing into the hands of the Right, which reaped the principle benefits of the cultural turn.”⁴¹ The

37. See Stephen Skowronek, *The Conservative Insurgency and the Presidential Power as Development Perspective on the Unitary Executive*, 112 HARV. L. REV. 2070, 2096 (2009) (retelling the anecdote to discuss the new conservative construction of the Constitution).

38. See FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 106, 108 (noting that debates about “difference,” pitting “essentialists” against “anti-essentialists,” occurred simultaneously with the free-marketeer/fundamentalist Christian rise to political power).

39. See *id.* at 110 (stating that seeking other means of supplementing income became necessary for working- and lower-middle-class families and further threatened stability of family life).

40. See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

41. See FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 110 (commenting that while

success of the political right in America was made possible by characterizing feminists as “elite professionals and secular humanists” who had ignored ordinary women, and, in particular, religious and/or working-class women.⁴² The identity politics of the feminist movement were accurate in describing the position of women writing in academia, but that identity failed to recognize the perspective of the vast majority of women who worked, managed families, and who maintained traditional Christian values. Evangelicalism was more attractive to working class women because it spoke to the experience of insecurity in American society, where work was temporary and where economic forces threatened family life.⁴³ Evangelicalism might not be able to provide the economic means needed to support a family, but it could provide a belief system for coping with economic insecurity and a meaningful life in the face of such insecurity.⁴⁴

The irony of American, feminist, identity politics again manifested itself in the 2008 Democratic primary contests between Barack Obama and Hillary Clinton. Again, identity politics worked to the disadvantage of egalitarian values of redistribution, as Obama and Clinton played out rhetorical positions of gender-coded identity. Paradoxically, Hillary Clinton projected a masculine, macho persona on matters of foreign policy (promising to “obliterate Iran”), whereas Obama projected a “softer, androgynous” policy (promising to emphasize diplomacy and the value of discourse).⁴⁵ Policy thus became another ground where identity politics was played out. Obama appealed to academic feminists, younger women, and African-American women.⁴⁶ Clinton, on the other hand, appealed to older, rural, and working-class women who had not been previously active in the feminist movement.⁴⁷ However, both sides ignored the policies of regressive redistribution then being played out in the free markets of globalization. In a globalizing world, gender-coded rhetoric based on the

American feminists were redefining their message, conservatives were altering their own strategy to shift attention away from their economic policies).

42. *See id.* (explaining that, while this characterization is false, feminism has failed to attract some of the same working- and lower-class women who have responded favorably to evangelical Christianity).

43. *See id.* at 111 (highlighting that evangelicalism could be explained in terms of Foucault’s idea of the “care of self” technology of neo-liberalism and its tendency to explain insecurity as the responsibility of the individual, not the state).

44. *See id.* (noting how the Bush Administration utilized Christian fundamentalism to downplay the insecurity caused by the tax cuts and supply-side economic policy which came to characterize the Administration’s economic policy).

45. *See id.* at 190-91 n.13 (describing, in some ways, a policy reaction to an age of declining security).

46. *See id.* (demonstrating how ideological feminist support for Obama reflected a serious, decades-long grappling with the intersection of gender and race in U.S. history).

47. *See id.* (identifying in Clinton a woman both perpetually embattled and gritty, a survivor, and a fighter).

politics of identity played out in the Democratic primaries, but the debate failed to come to grips with the policies that were at work to deny gender justice in a globalizing world.

According to Fraser, feminism is now in its third phase: global feminism.⁴⁸ It is global in orientation because international feminists have joined those who struggle against the injustices of globalization and because feminism is becoming more sensitive to gender injustices that overflow political borders. Global feminism argues that feminism is no longer a gender-specific issue, but is rather a human rights issue involving forms of political representation that transcend territorial borders.⁴⁹ This third wave feminist movement is more inclusive, appealing to all people who experience injustice: male, female, gay, or lesbian, regardless of ethnicity, class, and color.⁵⁰ Nancy Fraser proclaims that global feminists recognize that “decisions taken in one territorial state often impact the lives of women outside it[,] as do the actions of supranational and international organizations, both governmental and non-governmental.”⁵¹ Global feminists consequently have “a new appreciation of the role of transnational forces in maintaining gender injustice.”⁵²

The slogan “women’s rights are human rights” structures the third phase of global feminist politics.⁵³ The slogan is important, for it signifies how the feminist movement has shifted from an inherently exclusionary political position made up of professional, white women to a new, inclusionary position made up of all people who have suffered indignities.⁵⁴ In this third wave of feminism, now dominant in Europe, the injustices of transnational

48. *See id.* at 112 (describing global feminism as a reintegration of the politics of redistribution and the politics of recognition, two key dimensions of feminist politics which were not adequately balanced in phase two).

49. *See id.* at 113 (claiming that the state/territorial framing of political claims-making is a major vehicle of injustice, as it prevents many women from confronting the forces that oppress them).

50. *See* Lewis, *Embracing Complexity*, *supra* note 21, at 517 (arguing that the success of this third wave depends on the willingness to engage the full participation of marginalized groups in redefining and elaborating human rights standards).

51. *See* FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 112 (noting that feminists cannot adequately challenge gender injustice if they remain within the previously accepted, modern territorial state).

52. *Id.* at 113 (believing that women’s chances for living good lives depend at least as much on the processes that extend beyond the borders of territorial states as on those contained within them).

53. *See* Bret Thiele, *Prosecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN’S L.J. 221, 221 (2000) (noting how gender inequality appears to be a social system of subjugation and disadvantage, which is itself at odds with human rights norms and ideals).

54. *See* FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 110 (finding that in the failed second phase of feminism, the right had some success in portraying U.S. feminists as elite professionals and secular humanists with nothing but contempt for ordinary women, especially religious and working-class women).

social structures and institutions are the main focus. European feminists thus “target the economic policies and structures of the European Union, while feminist currents among the anti-World Trade Organization protestors are challenging the governance structures of the global economy.”⁵⁵

While it is far from clear whether this third wave will take hold in America, it does seem apparent that U.S. feminists are looking beyond identity politics and the narrow frame of the nation state. What is clear is the masculine imagination mapping out a totalizing, political critique that integrates the old, political goals of redistribution and recognition with ideas about political representation.⁵⁶ The third wave of feminists reacts to this by advancing new critiques of the how masculine attitudes take hold of global issues and map them on the terrain of masculine values and ideology.

Critical race theory has followed a similar path. In its early stage of development, critical race theory developed as racial-minorities within the legal academy developed an explicit “*race conscious*” form of legal criticism.⁵⁷ Just as second wave feminists emphasized gender identity, critical race theorists emphasized the importance of understanding how racial identity is ignored in the way the law constructs and regulates social relations. The color white became an explanation of how racial hierarchy created forms of justice that failed to bring about racial justice in the law. While this form of scholarship was, and continues to be, an important source of critical race criticism, it also brought about the same unintended consequences as did gender identity politics in feminism. Critical race theory became the exclusive realm of minority scholars, who asserted the sole authority to speak on behalf of people of color. The exclusionary turn in critical race theory made it difficult for the theory to foster a viable emancipator movement.

Initially, critical race theory failed to explore more fully the importance of class and economic forces. More recently, however, critical race scholars, and especially those working in the related field of the LatCrit movement,⁵⁸ have sought to bring class and global trade into focus. The

55. *See id.* at 113 (noting how third wave feminists look increasingly beyond the territorial state to empower feminist claims on redistribution and recognition).

56. *See id.* at 9 (describing how this critique reconstructs the history of feminism and globalization to reveal the contours of an emergent feminist ideology).

57. *See, e.g.,* Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1864 (1990).

58. The LatCrit movement arises from critical race theory as applied to racial critiques used to explain discrimination impacting Latinas/os. *See, e.g.,* Elizabeth M. Iglesias, *Foreword: International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997) (discussing the effects of white supremacy as it impacts Latina/os).

leading scholar advancing this critical move is Elizabeth M. Iglesias, who has worked more than any other to bring a class-consciousness to critical race theory.⁵⁹ In developing her work on the role of critical race theory in the struggle for community control of investments, for example, Iglesias has drawn from the work of the Peruvian economist Hernando de Soto and his famous book, *The Other Path*,⁶⁰ to bring to critical race theory an institutional class analysis of race discrimination and poverty.⁶¹ The claim that de Soto and Iglesias make is that poverty and racial segregation are facilitated by a legal system “which condemns the vast majority of people to the instability, uncertainty and vulnerability of illegality by making legality inaccessible to all but the wealthy.”⁶² In de Soto’s analytical framework, poverty and racial discrimination are a function of the domestic legal system which is seen as dividing “those who obtain advantages and privileges from the state from the competitive majority.”⁶³ Iglesias advances the insights of de Soto’s “institutional-class analysis” to argue that the existence of racial segregation (what Iglesias has called “racial spaces”) can be explained by the way the law operates to “allocate differential power among competing groups across many institutional contexts.”⁶⁴ Instead of emphasizing de Soto’s claim that racial segregation is produced by the way law provides advantages to the rich per se, Iglesias argues that it is the “institutionalization” of class structures—especially the way global institutions control investment and finance—that is the agent responsible for producing racial segregation and subordinating the global poor.⁶⁵ In particular, Iglesias shows how the Community Reinvestment Act of 1977, its various amendments, and World Bank lending policies reproduce the poverty and subordination that produce the racial spaces that entrench discrimination.

Critical race theory as advanced by Iglesias seeks to uncover the economic and cultural obstacles posed by corporate globalization. For

59. See generally Elizabeth M. Iglesias & Francisco Valdes, *Expanding Parameters: Culture and Nation in LatCrit Imagination*, 5 MICH. J. RACE & L. 203 (2000); Iglesias, *Global Markets*, *supra* note 1, at 1037; Iglesias, *Human Rights*, *supra* note 14.

60. HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989).

61. Iglesias, *Global Markets*, *supra* note 1, at 1039-41, 1043-48.

62. *Id.* at 1039-40, citing DE SOTO, *supra* note 60, at 191-99 (discussing the instability of the Peruvian legal and economic system resulting from informal communities and poverty.)

63. See DE SOTO, *supra* note 60, at 198-99 (describing how individuals with wealth benefit from law and how those without wealth are ignored).

64. See Iglesias, *Global Markets*, *supra* note 1, at 1040 (describing how institutional class structures can be used to replace Marxist class categories with a critical analysis of how relations of privilege are constructed in modern institutional structures of globalization).

65. *Id.* at 1040-41.

example, the effort to gain greater recognition for racial minorities and women will fail without a critical understanding of how the institutional-class structures of globalization operate to legitimate poverty and reproduce the hierarchy of power that has historically denied minorities a participatory role in society. Her effort is directly relevant to the ongoing debate over the contributions that critical race theory, “*understood specifically as a practice in the production of legal theory*, can and should be making to the social justice struggles of various and variously subordinated groups.”⁶⁶ Iglesias’s effort is similar in substance and tone to the effort of Nancy Fraser: both struggle within their respective critical race and feminist movements to determine how best to understand and resist race and gender subordination in the era of global finance. The efforts of these scholars represent the shift in critical communities to a new institutional and economic analysis for uncovering what lies submerged in the neo-liberal rhetoric about globalization. What these scholars seek to do is nothing short of a theoretical re-imagination of power and subordination.

As Iglesias has explained:

[j]ust as neo-liberal institutional class structures are organized through the articulation of neo-liberal theories in legal doctrine, the institutionalization of a new order of power and knowledge will depend, at least in part, on further dissemination of the kinds of ideas RaceCrit and LatCrit scholars have only just begun to address.⁶⁷

Critique must therefore begin to focus on the “institutional dimensions of racial subordination, the centrality of poverty in the subordination of peoples of color throughout the world, the role of law in dis/organizing the intra- and inter-group solidarities that are so central to effective collective action in any institutional context.”⁶⁸

While economic development through international trade creates wealth, it also renders invisible the voices of the global poor.⁶⁹ Since the territorial state has become irrelevant to their position, the global poor are deprived of a domestic political arena and rendered powerless in their effort to struggle against the injustices they face in their localities. The injustices caused by transnational economic forces that exploit women, children, and racial minorities with substandard working conditions and wages are regarded as natural consequences of the new world order. Any effort to redistribute resources or to recognize the rights of global poor is seen as an impediment

66. *Id.* at 1041 (emphasis in original).

67. *See id.* at 1043 (arguing that visions of social justice emerge from analysis of the international dimensions of racial subordination).

68. *Id.*

69. *See CHAU, supra* note 2, at 21 (2003) (showing that while globalization has benefited a minority of individuals, it has also hurt many others, breeding envy and hatred among the impoverished majorities around them).

to the natural forces of globalization.⁷⁰ Until recently, the global economy hindered redistribution and recognition by representing injustice as justice. This injustice remained misunderstood and unseen by neo-liberals until global markets crashed in late 2008. Now, in this post-crisis era, the problems of injustice and inequality, as well as gender and racial segregation, have been exposed for all to see.

III. THE RELEVANCE OF THE FINANCIAL CRISIS OF 2008

We used to say that our world changed on September 11, 2001, and the horrific terrorist attacks that day did seem to change our world. But as it turned out, the world remained pretty much the same in striking ways. President Bush encouraged Americans to continue shopping, and we did. Investment bankers on Wall Street went on a speculation spree, finding new ways to securitize and sell subprime mortgages as credit debt obligations, financed by credit swaps. These swaps in turn were then leveraged beyond any reasonable measure of the risk. The global market continued on its merry way for much of the decade as credit debt obligations were sold and distributed throughout the world to spread risk. Global traders did a good job of spreading the risk and were avid risk takers themselves.

The global economy continued to heat up until the housing bubble finally burst in the fall of 2008. The worldwide financial markets froze, seizing global cash and credit flows and threatening a worldwide depression.⁷¹ When the financial markets froze, so did the funding of global economic development, including economic and humanitarian aid to the most vulnerable people of the world. The result has been growing poverty, hunger, and death.⁷² This is the story of global injustice of a risk culture, created and marketed by defective investment products, sold and distributed globally by American investors with the aid of U.S. law.

Before the collapse, the power of global finance was almost invisible, even though the realities and the consequences of leaving its power undisturbed and unregulated created a profound disconnect between human

70. *See id.* at 8-9 (stating that the prevailing view among globalization's supporters is that free markets and democracy are a kind of universal prescription for the multiple ills of underdevelopment which will gradually transform the world into a community).

71. *See* RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* 1-3 (2009) (defining a global depression as a combination of the gravity of the economic downturn, the radicalism of the government's responses, and the pervading sense of crisis surrounding the economy).

72. *See* Laura MacInnis, *U.N. Reports Record Humanitarian Aid Shortfall*, REUTERS, July 21, 2009, available at <http://www.alertnet.org/thenews/newsdesk/LL621015.htm/> (reporting that the UN has received less than half of the \$9.5 billion it sought for humanitarian aid work this year to support 43 million people, which could lead to distress migration, malnutrition, and social unrest).

rights, justice, and gender rights. The role of global finance remained hidden from view as it was allowed to evolve in the shadows of corporate boardrooms, investment banks, hedge funds, and private equity investment groups. By representing itself as a powerful force for reducing poverty by creating wealth, Wall Street's trading activity justified the existence of poverty. Thus, India's historic opening of "freer international trade in the 1980s brought huge gains to a middle class that did not exist" previously.⁷³ But, what became invisible were the thousands of women and children working in textile sweat shops to meet worldwide demand. Corporate globalization and global finance became the political frame for the circuits of power in a globalizing world. The power of global finance is considerable.⁷⁴ A hedge fund could decide which industries would survive or die and which cities would thrive or diminish by an effortless transfer of funds from one investment project to another. Global finance literally created its own power, its own discursive justification through wealth and economic development: money for nothing. At least, that is how it seemed until the fall of 2008 when the housing bubble finally burst.

We are just now realizing that decisions taken in one territorial state often impact the lives of those outside it, and that transnational corporations, international currency speculators, and large institutional investors exercise governing power. This power affects the life chances of people by determining if they work or not, or even live or not. The *Westphalia* frame of the nation-state could no longer contain a globalizing world, including the phenomena of spillover activities of transnational currency speculators and the transnational impact of domestic actions by institutional investors.⁷⁵ "The result is a new sense of vulnerability to transnational forces."⁷⁶ What is also important to realize is that the financial crisis of 2008 has given us an opportunity for reframing the debate about global justice.

The current financial crisis exposes the nature of the "justice" we now

73. See CHAU, *supra* note 2, at 253-54 (describing how India's pro-market government jump-started economic activity through privatization and foreign investment).

74. See Lewis, *Embracing Complexity*, *supra* note 21, at 519 (stating that many transnational corporations have more economic resources at their disposal than the entire budget available to some developing countries and can exert influence that approximates that of a state in some circumstances).

75. See FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 160-61 n.1 (describing *Westphalia* as a political imagining that both mapped the world as a system of mutually recognizing, sovereign, territorial states, and informed the postwar framing of debates about justice in the First World, even as the beginnings of a post-Westphalian human rights regime emerged).

76. See *id.* at 13-14 (noting that this heightened awareness to external forces is due to post-Cold War geopolitical instabilities and the growing salience of supranational and international organizations, both governmental and nongovernmental).

face: a global system that is incapable of responding to the injustice caused by non-state actors and transnational institutions of globalization. A grammar of justice built on the premise of the legal responsibility of territorial states falls short of doing justice in a globalizing world. The forces of injustice present in a globalized world are strengthened by doing business in the normal way. These forces impact populations through financial markets, currency speculators, offshore factories, carbon emissions, disease, and arms dealing, all in the name of business and development. These forces can therefore determine who will live long, and who will die young.⁷⁷

When the financial bubble burst and global credit markets froze, it was not just a market failure; it was rather a failure of global corporate governance structured by the ideology of capitalism. The transnational political spaces of corporate globalization could no longer claim to rule once capital stopped flowing. To be sure, the potential for capital flow remains and it may flow again freely to regain control and breathe new life into free market ideology. Yet the financial crisis of 2008 was not just an American-induced phenomenon, but rather the latest development in the global cultural transformation that had been going on since the fall of communism. On the other hand, it is also apparent that the financial crisis of 2008 was more than just an economic crisis, for it has disrupted cultural and social practices that have depended on the global marketplace.⁷⁸ In this disruption, a global crisis is emerging which engages the mind as much as it affects economic conditions.

The global financial crisis disrupted the debtor-creditor relationship which has been the glue of corporate global society.⁷⁹ The widespread defaults on credit obligations and the resultant freeze in credit flow has disrupted not only a type of legal relationship, but also an older, deep-seated tradition that is at the heart of social relationships. Creditors encouraged debtors to renegotiate for better terms and to pay reduced balances on credit cards and loans. In the case of home mortgages that exceed the market value of the property, there is an incentive for debtors to simply walk away from their obligations, thereby leaving the property to

77. See Hope Lewis, *Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women*, 50 ME. L. REV. 309, 311 (1998) [hereinafter Lewis, *Global Intersections*].

78. See Nick Paumgarten, *The Death of Kings: Notes from a Meltdown*, NEW YORKER, May 18, 2009, at 46 (detailing how the global financial meltdown evolved beyond a financial crisis to an ongoing, history-altering, persistent state that affects people, their friends, their social fabric, and the way they do business).

79. See PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* 184-85 (2009) (describing how the credit squeeze resulted from reduced trust in, and decimated capital at, financial institutions, which led to a disruption in the issuance of letters of credit, the key financing method for world trade).

the mortgagor, i.e., the bank.⁸⁰ These are feminist concerns as much as they are economic concerns for they implicate the stability and safety of the family. The disintegration of the glue of societal obligations adversely impacts the stability of human relations, as much as it undermines credit obligations.

The financial crisis thus creates a crisis of morality, for it broke the psychological basis of the moral superiority possessed by the creditor-investor class.⁸¹ Once debtors no longer blame themselves for default, but instead direct their resentment at their creditors as the reason for their condition, it becomes easier to question and challenge the normative basis for the debtor-creditor relationship. Once the relationship fails, so does the moral superiority of those who seek to hold debtors blameworthy for their default. The debtor/creditor relationship is a feminist concern as financial insecurity and default threaten family relationships and families are typically the first to suffer in an economic downturn.⁸² This particular vulnerability of women raises the question of whether there are gender differences when it comes to attitudes on risk.

IV. RISK PERCEPTION, CORPORATE CULTURE, AND THE POWER OF GLOBAL FINANCE

For some, the lesson we “are learning from [the crisis is] that we need a more active and intelligent government to keep our model of a capitalist economy from running off the rails.”⁸³ For global feminists, however, the crucial lesson is that family survival depends upon the actions of transnational corporations, international currency speculators, and large investment banks, who were providing the credit and opportunity in the global economy.⁸⁴ Women and men who are disadvantaged at the hands of globalization thus lack a basis for making a justice claim because globalization has shielded from the reach of justice the inequalities and

80. See POSNER, *supra* note 71, at 20-24 (detailing how the thought processes and actions of both the citizen borrowers and the lender banks led to the current residential mortgage crisis and forecasting what the implications are for banks if the housing market should further deteriorate).

81. See Paumgarten, *supra* note 78, at 49-50 (noting how the credit-investor class allocated the blame for the crisis on other main actors, such as individual firms, ignorant politicians, and Washington).

82. See Lewis, *Embracing Complexity*, *supra* note 21, at 518 (arguing that the financial crisis and the structural adjustments enacted to fix the system disproportionately impact the economic and social rights of women and their families).

83. POSNER, *supra* note 71, at xii (emphasizing that the movement to deregulate the financial industry went too far by exaggerating the resilience of laissez-faire capitalism).

84. See Saskia Sassen, *Towards a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7, 29 (1997) (arguing that any new feminist analytics must take into account the current global unbinding of territoriality and sovereignty to facilitate the ascendance of women as power brokers in the new economy).

injustices caused by predatory lenders, currency speculators, and transnational corporations and investors.⁸⁵ A woman who dies in Chicago for lack of health insurance because her husband was laid off shares solidarity with the woman who dies chained to a textile loom in India. Both are victims of globalization, and both lack representation in the political space of global politics that determines their fate. This is what Hannah Arendt has called the injustice of the loss of “the right to have rights,” and people do die in the course of the “political death” of their rights as subjects of justice.⁸⁶

The struggle for gender justice can no longer be effective if it is limited to issues of identity. This is not to say, however, that identity politics is not practiced or practical today. There is, for example, a growing body of social science studies that have discovered that factors such as gender, race, and political world view are strongly correlated with risk assessments.⁸⁷ Paul Slovic has noted that several dozen studies document the finding that men tend to judge risks as smaller as and less problematic than do women.⁸⁸ It may be that the gender differences of risk perception contributed to speculation and super-charged leveraging by male investors, who generally see less risk in activities which they control and profit from.⁸⁹ Women, on the other hand, tend to be risk averse since they feel more vulnerable in light of child care obligations and a violent world where other risks sensitize them.⁹⁰ The chauvinism of male-dominated global corporate institutions that discriminate against women may also create forms of systemic risk taking that can bring down a global economy.

In one 2008 study, for example, scientists analyzed samples of

85. See Lewis, *Global Intersections*, *supra* note 77, at 325 (stating that human rights scholars could hold accountable the transnational, non-state actors by making use, for example, of the growing body of sociological data by Third World feminists about the oppressive impact of high foreign debt and structural adjustment policies on women).

86. See FRASER, SCALES OF JUSTICE, *supra* note 13, at 19-20 (citing HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 269-84 (1973)) (claiming those who suffer from “political death” may become objects of charity or benevolence, but are deprived of the possibility of authoring first-order claims, essentially becoming non-persons with respect to justice).

87. See Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield*, 19 RISK ANALYSIS 689, 692 (1999) (stating that it is equally important that race and gender differences influence the judgments of experts as well as judgments of laypersons).

88. See *id.* at 693 (positing that social, psychological, and political factors are more likely to cause these gender differences than biological or educational factors).

89. See Nancy Ammon Jianakoplos & Alexandra Bernasek, *Are Women More Risk Averse?*, 36 ECON. INQUIRY 620, 620-30 (1998) (indicating that according to a 1989 survey of 3,143 respondents, roughly 60% of women interviewed were not willing to accept any risk, while only 40% of the men said they were unwilling to take risks).

90. See Slovic, *supra* note 87, at 692 (finding that these social and biological experiences are the source of a “different voice” that is distinct to women).

testosterone levels from seventeen male traders on a typical London trading floor.⁹¹ The study revealed that the male traders had significantly higher testosterone levels on days when they made more than their daily one-month average profit and that higher levels of testosterone also led to greater profitability through more risk taking. The authors of the study conclude that if raised testosterone were to persist for several weeks, the elevated appetite for risk taking might have cognitive implications in that the receptors of testosterone in the brain would contribute to risky behavior in making financial decisions.⁹² These preliminary results are sufficient to raise the need for more study in this area, with larger sample sizes.

What is certain is that Wall Street traders were inclined to speculate and leverage risk because they believed that the financial institutions where they worked would never fail and that the underlying asset, real estate, would continue to rise in value as it had for a decade.⁹³ Competition in trading rewarded those who followed the rising real estate prices, compounding the pressure to take even greater risks. Preconceptions based on the belief in ever-rising real estate prices undoubtedly contributed to risk taking.⁹⁴ This raises the interesting question of whether the financial crisis would have occurred if more women and racial minorities were working in the field. In 1997, Paul Slovic observed that “white males see less risk in the world because they create, manage, control, and benefit from . . . [its] many technologies and activities.”⁹⁵ On the other hand, women and nonwhite men “see the world as more dangerous because in many ways they are more vulnerable, because they benefit less from many of its technologies and institutions, and because they have less power and control over what happens in their communities and lives.”⁹⁶

Risky behavior may have been at least tempered if there had been more women and racial minorities on Wall Street who were more sensitive to the dangers and consequences of risk taking. It is not outlandish to think that

91. See J. M. Coates & J. Herbert, *Endogenous Steroids and Financial Risk Taking on a London Trading Floor*, 105 PROC. NAT’L ACAD. SCIENCES OF THE U.S.A. 6167, 6167-72 (2008) (describing the authors’ hypothesis that testosterone would rise on days when traders made an above average gain, as testosterone had been linked to winning and losing in previous studies).

92. See *id.* at 6168-70 (describing the study results, and noting that if certain brain regions are over-activated, investors display the irrational behavior often observed in the market).

93. See Paumgarten, *supra* note 78, at 43-44 (discussing the ignorance of those involved in the markets to the potential risks implicit in their trading activities).

94. See POSNER, *supra* note 71, at 134-35 (believing that free market ideology helped to impede the discovery of the problem because reliance on preconceived notions about the free market hindered the government’s ability to see the warning signs of market failure).

95. Paul Slovic, *supra* note 87, at 76.

96. *Id.*

better risk management might have prevented the financial crisis from morphing into a deep recession. If the scholarship above is seriously considered, one is led to the view that gender and racial diversity may be necessary to ensure that risk behavior in the financial industry is moderated.⁹⁷

Of course, there is also the possibility that the macho culture of Wall Street would influence traders to take risk, regardless of their gender. Cheap credit and the rewards of leveraging could stimulate even a risk averse person to take risk if the rewards were great enough and if everyone around them was earning huge sums of money by investing in otherwise risky securities. The distance created between the risk positions of originators and purchasers also contributed to traders' risk-taking behaviors. For example, once home and commercial mortgages were securitized, the risk would be sliced into different risk/return combinations. In effect "shares" in each risk category, or "tranche," would be sold.⁹⁸ Mortgage originators could therefore pass the risk to special purpose vehicles, and ultimately to institutional purchasers of the asset-backed securities, who would have great difficulty assessing the risk of the instruments, which by design were packaged to fetch favorable credit ratings.⁹⁹

Cultural factors and preconceptions inherent in free market ideology may be influenced by gender, suggesting that gender differences, or what second wave feminists call the 'politics of identity,' would be relevant to an analysis of risk taking. Yet the culture of Wall Street may be an even more important factor.

One might posit that Fraser and Iglesias could argue that testosterone and whiteness cannot be the only reasons for risky behavior in the financial industry. The financial matrix which connects lower Manhattan to global traders in the U.K., Asia, and everywhere else is more important, as it created the system for "cashing out" highly leveraged and risky investments.¹⁰⁰ An investment banker in lower Manhattan working at Lehman Brothers could put together a subprime mortgage security, and then sell it to a bank in Hong Kong as part of credit debt obligation

97. See, e.g., *id.* at 68.

98. See POSNER, *supra* note 71, at 50 (describing how the mortgage-backed securities were generally bonds, secured by fractional shares of mortgages, which themselves were collateralized by groups of homes).

99. See Laura Kodres, *A Crisis of Confidence . . . and a Lot More*, 45 FIN. & DEV. 9, 12 (2008) (explaining that "at the peak of the cycle, originators of loans were able to pass them on to others without having to hold the loan risks themselves").

100. See *id.* at 10 (describing the demand for AAA-rated securities that drove issuers of structured credit products; "these highly-rated, higher yielding securities were easily marketed to many insurance companies, pension funds, and other smaller banks scattered across the globe").

contracts backed up by a credit swap, giving the Hong Kong bank the risk. The fact that the trade would be under the regulatory radar meant that inflated and ephemeral value could be created and sold. The ability to cash out quickly and get rich was a powerful incentive that encouraged Wall Street to leverage as much risk as it could by creating sophisticated financial products such as derivatives in the form of options and swaps. A race in financial products was soon detected, as banks and non-banks became “glorified hedge funds, trading things for themselves.”¹⁰¹ The evolution of financial activity in Lower Manhattan had created its own designer drug, an alternative to testosterone, and it was called the asset-backed security.

For the last two decades, investment banking attracted some of the best minds in America away from law, medicine, and engineering.¹⁰² Oliver Stone’s 1987 movie “Wall Street” captured the mood of this culture, personified by Wall Street trader Gordon Gekko, who famously uttered the mantra: “greed . . . is good.”¹⁰³ The so-called “bear market” was populated by aggressive males who, like Gordon Gekko, were the “kings” of global finance. Women within this culture were also shaped and influenced by the same values. Angelo Mozilo, the former C.E.O. of Countrywide Financial Corporation who built one of the largest financial corporations of the “bubble” by selling risky subprime mortgages, is the real-life poster boy of this culture today.¹⁰⁴ The recent civil complaint filed by the Securities and Exchange Commission against Mozilo alleging securities fraud and insider trading portrays him as the villain at the center of the financial collapse.¹⁰⁵ The fact that a mortgage salesman, the son of an Italian butcher from the Bronx, would be regarded as the “face of the financial crisis” is an ironic, postmodern twist to the “rags to riches” story frequently told about American opportunity, and it speaks volumes about the power of the financial culture to shape character and behavior.

Meanwhile, Oliver Stone has completed filming his sequel to “Wall Street,” which tells the story of how investment banking in New York ruled the world and how its governance, or lack thereof, led to the crisis of 2008. Indeed, new stories need to be told about the power of global finance in the era of globalization. One could think of the silent power of global finance much in the same way Hernando de Soto described the power of the informal economy in Peru. As De Soto explained, black marketeers or

101. Paumgarten, *supra* note 78, at 46.

102. *See id.* at 50.

103. WALL STREET (20th Century Fox 1987).

104. *See* Connie Bruck, *Angelo’s Ashes: The Man Who Became the Face of the Financial Crisis*, NEW YORKER, June 29, 2009, at 46-47 (describing the rise of Countrywide as one of the largest subprime lenders that eventually collapsed).

105. *See id.* at 48.

what he called “*informals*” in Peru were among the most dynamic agents of economic and social power.¹⁰⁶ Upon reflection, one could easily understand Jamie Diamond and Henry Paulson at Goldman Sachs as entrepreneurs who worked outside the legal system of state regulation, performing a power function in directing world governance based on the development of free trade and finance. Unlike the “*informals*” in Peru who worked in the streets to establish fragmented informal economies in the cities, investment bankers work on Wall Street coordinating the decentralized flows of capital investment that represents the silent government of global finance. De Soto examined how financiers were reluctant to deal with “*informals*” without charging high interest rates thus preventing the “*informals*” from having access to the system of finance.

Andrew Ross Sorkin’s book, *Too Big To Fail*, provides insight into the shadow government of finance in his reporting of how the key players on Wall Street secretly met with Washington officials from the Federal Reserve and Treasury Department (themselves former investment bankers from Wall Street) to save the global financial system and themselves from the financial disaster they helped to create.¹⁰⁷ What is significant about the human drama told by Sorkin is that he sheds light into the corridors of power on Wall Street and onto those banks which exercised the real power to decide the fate of the global economy. It is these institutional structures of global finance that silently produced and reinforced the economic structure of discrimination and global poverty by entrenching those who have access to global finance.

One might think that Wall Street players lost their moral bearings, as Bernard Madoff’s Ponzi scheme vividly illustrated.¹⁰⁸ Richard Posner, one of the founding fathers of the law and economics movement and once the advocate of the “law is efficient” thesis, is skeptical of this explanation. He argues that risky behavior is rational when there is a bubble, which is a steep rise in value of some asset, like houses, that cannot be explained on the basis of economic fundamentals like supply and demand.¹⁰⁹ “No one

106. See DE SOTO, *supra* note 60, at 59-92 (discussing how he and his organization, the Institute of Liberty and Democracy, studied the emergence of informal trade in Lima and elsewhere in Peru.)

107. See ANDREW ROSS SORKIN, *TOO BIG TO FAIL* 173-78, 351-52 (2009) (reporting an important Goldman Sachs board meeting in Russia with the Secretary of Treasury on the eve of the financial crisis and a meeting of investment bankers at the Fed to discuss the fate of Lehman Brothers in 2008).

108. See POSNER, *supra* note 71, at 243-47 (describing how Madoff promised investors a high return on their investments and paid them as promised, but out of their own initial principal amounts or those of other investors who similarly invested with him; Madoff eventually absconded with their funds).

109. See *id.* at 10-11 (explaining the various depressions and recessions that occur and in particular, that a bubble is created by a belief that turns out to be mistaken: primarily that fundamentals are changing or that a market, or maybe the entire economy, is entering a new era of growth because of technological advances).

knows when a market has peaked; until that happens prices are rising, and even in a bubble (but one is never certain it *is* a bubble), it is a fair guess that they will continue to rise for a time.”¹¹⁰ Within the bubble, risk taking seems rational. The line between rational and irrational behavior in the “new era” of bubbles (housing and credit) creates the perception of economic prosperity, even when there should be reason for concern. What the Madoff scandal does teach is that government regulation can fail when status and class dominate the imagination of the regulators and influence how they evaluate risk.¹¹¹ Bernie Madoff was an insider and as such he was regarded as a person beyond reproach—he was, after all, “one of them.”

Madoff was successful because the institutional class structures of securities law never suspected that someone so well respected, politically connected, and widely regarded within his privileged class would engage in a blatant Ponzi scheme on such a large scale. Madoff was an insider, he was a member of the governing class, and thus, beyond suspicion. The class bias within the institutions of regulation created a blinder that prevented regulators from seeing blatant corruption in those they regulated. The institutional class structures of agency regulation enabled Madoff to carry out his scheme, right up to the moment the market crashed and his own son had to turn him in.

In the era of bubbles, it is easy to forget that markets can fail and that people might be engaging in nefarious schemes to scam investors. “Markets were believed to be self-regulating, so the Securities and Exchange Commission could go to sleep.”¹¹² This act of going to sleep

110. *Id.* at 82.

111. *See id.* at 248 (asserting that a belief in a self-regulating market ideology blinded the government to the problems that eventually turned into the crisis).

112. *Id.* The reality of the world of corporate governance and finance regulated by the SEC, as the 2001 Enron scandal and other corporate governance failures has revealed, is a world of complexity, uncertainty, and risk involving different interest groups that follow their own adaptive strategies and responses to regulation. Even when legislation is enacted to bring about good corporate governance, institutional interests can undermine the effort. Hence, in the aftermath of the Enron scandal, the Sarbanes-Oxley Act was passed, but the response has led to a backlash against criminal enforcement. As Curtis J. Milhaupt and Katharina Pistor recently noted:

Federal prosecutors, the SEC, the Delaware courts, and state attorneys general, among others, all responded to the signals sent by the law, at least as they perceive them. In the process, the legal environment for corporate governance in the United States became even more complex and decentralized. Calls are now being made to once again reverse the trend—to coordinate, to simplify.

CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* 66 (2008). For example, critics continue to claim that Sarbanes-Oxley in the post-Enron regulatory environment threatens the competitiveness of the United States in world markets. *See* David A. Skeel, Jr., *Governance in the Ruins*, 122 HARV. L. REV. 696, 704 (2008) (reviewing MILHAUPT & PISTOR, *supra*). Milhaupt and Pistor concluded in 2008 that they could not “predict whether future reforms will be enacted

was endemic; much of the world went to sleep as income inequality widened and as the plight of the global poor was ignored. Why worry about the global poor when positive economic growth and development seems rosy and the price of some investment asset is skyrocketing? For example, in Bolivia, the value of natural gas skyrocketed, creating a different kind of asset bubble, which promised to enrich the country's European-descended, white elite, even as ninety percent of rural, predominantly Amerindian Bolivians lived in utter poverty.¹¹³ In America, the housing bubble enabled policy makers in Washington to ignore the potential pitfalls of subprime and predatory lending to the poor. Indeed, Countrywide Finance opened new offices in the inner-city areas and loosened lending standards, in its effort to sell more subprime mortgages and gain a larger market share.¹¹⁴ As a consequence, lower-income groups and racial minorities were locked into impossible credit obligations as interest rates in subprime mortgages reset at higher rates. The injustice of this practice transcends the gender of the people involved in the financial decisions that brought about the collapse of global credit. Mozilo of Countrywide amassed a personal fortune by selling subprime mortgages to racial minorities and the working poor, and when the bubble burst, he walked away as a multimillionaire who continued to pontificate about his benevolent motives. Meanwhile, thousands were dispossessed of their Countrywide-mortgaged homes in foreclosure proceedings.¹¹⁵

The power of finance in the era of globalization should not be underestimated. A hedge fund can decide which industries would prosper, and hence, which cities and communities would grow or contract, by making micro-level decisions about investment within the nation-state context. On the global level, countries were evaluated by investment bankers in terms of whether they were "good" or "bad" investment opportunities.¹¹⁶ Global finance thus shifted political power from nation-

or precisely how the pendulum will continue to swing in the debates about U.S. regulatory policy." MILHAUPT & PISTOR, *supra* at 65. Hence, even after the Enron and WorldCom corporate scandals and after the enactment of regulatory reform measures such as Sarbanes-Oxley, regulators go to sleep as interest groups demand retrenchment and a return to the status quo of free markets. *Id.* at 47-67.

113. HERNÁNDEZ-TRUYOL & POWELL, *supra* note 3, at 2 (detailing the consequences of the mines on local inhabitants: pollution, lack of education, dangerous work conditions, and unsanitary living conditions).

114. *See* Bruck, *supra* note 104, at 49 (describing that by lowering standards the company allowed lending to borrowers who had poor credit history and were likely unable to meet their new obligations).

115. *See id.* at 46-47.

116. *See* STEVEN DROBNY, *INSIDE THE HOUSE OF MONEY: TOP HEDGE FUND TRADERS ON PROFITING IN THE GLOBAL MARKETS* 32-34 (2006) (discussing how hedge fund traders performed a combination of a broad, top-down country analysis combined with a bottom-up micro-analysis of companies across every asset category, on a global basis).

states to transnational currency and investment traders whose decisions took on the global force of the nation-state in determining the life chances of people living in various geographic areas. In this new political space, justice is framed not by the law of nation-states but rather by the financial decisions of traders and investors. The question of how justice is framed in a globalizing world needs to account for how best to regulate global finance. In considering the frame of justice one needs to ask, who counts? What counts? And how do we frame justice?¹¹⁷ These questions remain unaddressed today because until recently, world justice has been understood merely in terms of portfolios and investment opportunities. As Iglesias observes, “[w]hat is new is that the globalization of capital markets enables the law of greed to go global.”¹¹⁸

V. SUBSTANTIVE JUSTICE AND GLOBAL FINANCE

Substantive justice is ignored in the global economy because the pursuit of economic self-interest and the maximization of profit (“business as usual”) is the frame used to define justice.¹¹⁹ Nancy Fraser argues that justice needs to be framed differently in terms of the principle of equal moral worth, which would permit all affected to be recognized as subjects of justice.¹²⁰ According to Fraser, this should be the feminist concept of justice; it is a concept that demands recognition of the justice claims of all people affected by the social institutions and structures of globalization. The global feminist slogan “women’s rights are human rights” captures the meaning of substantive justice and it is a concept that should transcend gender. The feminist substantive justice inquiry explores how justice is framed and shifts the analysis to what is inherently a political question. Global feminists would thus encourage analysis of how global finance creates the grammar for frame-setting of justice claims. Iglesias makes a similar point in calling for an institutional-class analysis of how community investment of capital maintains poverty and subordination of minority classes within communities.¹²¹

The global financial system was undoubtedly a creature of politics. It was, in part, the offspring of the political and economic consensus which justified war and facilitated the deregulatory policies during the George W.

117. See FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 20.

118. Iglesias, *Global Markets*, *supra* note 1, at 1054.

119. See POSNER, *supra* note 71, at 235 (articulating that bankers and consumers were acting within their own rational self-interest despite the many mistakes that were made).

120. See FRASER, *SCALES OF JUSTICE*, *supra* note 13, at 24 (describing the principle which holds that all those affected by a given social structure or institution have moral standing as subjects of justice in relation to it).

121. Iglesias, *Global Markets*, *supra* note 1, at 1073.

Bush and Tony Blair administrations in the U.S. and U.K.¹²² The international space of global markets became a free zone for corporate interests to develop and exploit for the benefit of investors. In this international space, a new, unbounded (free of territorial restraints) form of politics was practiced by transnational corporate actors. In this space, the fate of the global poor would be decided and justice would be framed to meet the needs of capital.

For example, the banking industry in the U.S. was extensively deregulated by American law.¹²³ Financial intermediaries, such as broker-dealers, hedge funds, and money-market funds, the so-called “shadow banks,” were permitted to offer close substitutes for services provided by commercial banks, and restrictions on banking were loosened so that the banks could fight back against their new competitors. In 1999, Congress completed the U.S.’s deregulation program when it repealed the 1933 Glass-Steagall Act, which until then had separated investment banking from commercial banking.¹²⁴ This laxity, along with the Federal Reserve’s mistake in depressing interest rates in the early 2000s, contributed to precipitating the credit freeze and resulted in an American-induced financial global crisis.¹²⁵

The American-induced global financial crisis, however, was also the culmination of a long period of conservative governance in Western Europe and Northern America following the fall of communism.¹²⁶ Keynesian economic thinking was out, as globalization made it possible to think economic development would make the need for welfare distribution a thing of the past. Corporate globalization became a new ideology and it seemingly made redistribution irrelevant; poverty reduction would come about as transnational business created wealth through international trade. And, yet as a World Bank study warned in 2001, globalization was increasing inequality, shifting power, and leading to cultural uniformity.¹²⁷ By 2008, the shift in power from nation-states to corporate global entities was nearly complete.

Justice was framed by the financial interest of market-dominant minorities, and what was denied were the interests of democratic

122. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN READJUSTMENT: HOW MUCH HAS HAPPENED 5* (1989) (setting forth economic policy to be used for developing countries in crisis).

123. See POSNER, *supra* note 71, at 235-37 (explaining the deregulation that took place for American financial institutions up to the crisis).

124. See Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 101, 113 Stat. 1338 (1999) (codified at 12 U.S.C. § 1811 *et seq.* (2006)).

125. Cf. POSNER, *supra* note 71, at 236-37.

126. CHAU, *supra* note 2, at 20-21.

127. See generally PAUL COLLIER & DAVID DOLLAR, *GLOBALIZATION, GROWTH, AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY* (2001).

majorities. The Bank of England along with Bank of America, Exxon, and British Petroleum continue to be governing forces in the world. In the U.K., Tony Blair and Gordon Brown were important cheerleaders for the policy of free and unregulated financial markets in the European community and elsewhere, but so were the leaders of India, China, Bolivia, and most other developed and developing nations. The point is that a new governing force was already in existence by the 1990s which could no longer be regarded as belonging to any particular nation-state, nor was it confined within its territorial bounds. Corporate globalization is the new global governing force that created its own political space, shaping how questions of justice are decided. Global finance in the unbounded political space of globalization becomes the new frame for understanding global injustice.¹²⁸

By partitioning the question of justice into the limited space of a job, an industry, or even a nation-state, one cannot appreciate how the representational process creates the political conditions of injustice for women, and more generally, the global poor. This meta-level of political injustice, or the partitioning of the political system into bounded political communities, is the focus of global feminists such as Nancy Fraser in the third phase of feminism.¹²⁹ One can thus think of risk taking on Wall Street as an external cost that was distributed to people with no voice in decisions affecting their life chances much in the same way pollution imposes externalities on third parties.¹³⁰ The injustice of over-leveraged risk taking on Wall Street that ultimately determines who works for a wage and who does not, who is included in the decision-making network and who is not, and who lives long and who dies young, is framed as justice, even though the frame itself is a source of injustice. In but one of the many examples of the injustice in this self-perpetuating system, executive compensation is not tied to performance, and thus the risk of mismanagement is shifted to absentee shareholders. Risk takers therefore lack the incentive to be more cautious with shareholders' investments and are rewarded in spite of the wisdom, or ultimate outcome, of the deals they make.

As long as the harm of risk taking is shifted and the political space is

128. See CHAU, *supra* note 2, at 6 (describing market-dominant minorities as the Achilles' heel of free market democracy, becoming an engine of potentially catastrophic ethno-nationalism).

129. See, e.g., Kate Nash & Vikki Bell, *The Politics of Framing: An Interview with Nancy Fraser*, in FRASER, *SCALES OF JUSTICE*, *supra* note 13, 146-47 (expressing concern that the structure of political power among states often locks the poor in weak states where they cannot successfully use the instruments of state power to challenge the transnational forces that operate within their polities).

130. See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

partitioned so that the consequence of business risk is regarded as an “act of God” or an unavoidable consequence of “business as usual,” then the substantive unjustness of the structures of global finance will continue unseen. When the global financial system collapsed in 2008, world economies were suppressed, and people all over the world became vulnerable. Market-dominant minorities in the financial community thus determine the fate of global majorities, who lack a voice in the decision-making process. Women working on textile looms in India are thrown out of work, and their families suffer as a result.¹³¹ Bolivian women who were already living in poverty starve.¹³² The voices of these and thousands of other women and men are never heard, and they have no vote in the risk assessment decisions that ultimately determine their life chances.

VI. THE SUBSTANTIVE (IN)JUSTICE OF “BUSINESS AS USUAL”

Some argue that the financial crisis is merely a deep recession and that as has been the case in other recessions, the economy will recover.¹³³ The claim is that recessionary downturns are, in fact, a necessary, corrective force in capital markets. However “[t]he current economic emergency . . . started in housing but [it] eventually engulfed the financial industry.”¹³⁴ The emergency has impacted the global financial economy and continues to spread to other areas of the global economy.

The housing market collapse endangered the banks and other financial institutions, which was then followed by the default rate on bank loans secured by other assets.¹³⁵ The cascading effects of bursting bubbles of investment, first in housing, then in other lending, have since threatened commercial real estate, credit cards, and main street retail establishments. The interconnected nature of global markets has made the crisis worse. One could think of the consequences of the bursting housing bubble in the U.S. as a huge wave which then swept over Western Europe and Asia only to create a second wave of falling demand for American exports. This second wave then led to more unemployment in the United States and

131. Cf. CHAU, *supra* note 2, at 253-54 (chronicling how economic liberalization has given powerful multinational businesses increased influence in developing nations, such as India, despite popular protests).

132. Cf. *id.* at 50-51, 55-56 (discussing how globalization and Bolivia’s adherence to World Bank and IMF “dictates” have increased the relative power of the white, minority elite and left the indigenous majority impoverished).

133. *Compare Economic Indicators and Survey Show Recession Easing*, USA TODAY, April 20, 2009, http://www.usatoday.com/money/economy/2009-04-20-leading-indicators_N.htm (calling the downturn a “recession” and suggesting that the losses sustained by the economy are slowing), with POSNER, *supra* note 71, at 14-18 (arguing that 2008 statistics and economic theory suggest that the economy is facing a depression, not merely a recession).

134. POSNER, *supra* note 71, at 13.

135. *See id.* at 13-14.

caused commercial real estate construction to halt and loans to default, which sent yet another wave of destruction back to Europe and Asia, and so on and so forth. Instead of being limited to one huge wave and its aftermath, the economic crisis of 2008 is in effect a series of tsunamis that are destroying the global economy.

Selling securities akin to deceptive insurance contracts, racking up credit ratings from entities that are funded by the very institutions whose products they rate, and other obtuse conditions make it impossible for purchasers to comprehend risks involved. Selling financial products in such a way is like selling a defective product. One would think that there would be a legal remedy available, especially when the systemic risk threatens the world economy. Richard Posner claims that *laissez faire* capitalism has failed and that investment bubbles are the normal course of events in a free market economy.¹³⁶ Bankers and consumers alike act rationally, in accordance with their economic self-interest. In such a world, things just happen; bubbles burst, and people may starve. “Business as usual” thus means that one’s life chances are left to the uncertainty of business cycles and investment bubbles.

Business as usual is never defined, because it is a phrase that appeals to the rightness of a deeply-felt idea of justice. Consider a recent case brought by victims of apartheid in South Africa against the transnational businesses that helped to finance the brutal apartheid regime. In denying most of the claims of the plaintiffs under the Alien Tort Claims Act, a federal judge in the Southern District of New York concluded that a contrary result would be unjust because it would deny the freedom to maximize profits of global investment.¹³⁷ That transnational finance would aid others in the commission of crimes against minorities is something that must be tolerated, because encouraging capital flows to South Africa is necessary to foster economic development. Any interference with the protection of the apartheid regime was judicially regarded as legal injustice.¹³⁸

This is what global feminists have called the transformative politics of *framing*.¹³⁹ Justice is transformed by the frame of global business culture.

136. See *id.* at 105-06 (noting that recessions are a normal response to “cheap credit,” but that lack of consumer savings and banks with large leverage ratios aggravated the 2008 crisis into a depression); *id.* at 235-37 (suggesting that the U.S. government might have better mitigated the damage).

137. See *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2000).

138. See STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 127 (3d ed. 2009) (noting how few national prosecutions were brought under the apartheid convention and the refusal of some states to recognize apartheid as a war crime).

139. See, e.g., Nancy Fraser, *Reframing Justice In A Globalizing World*, 36 NEW LEFT REV. 69, 81 (2005).

The South African victims of human rights abuses did not have standing to prevent global traders from continuing to prop up the brutal regime of Apartheid, because otherwise, there would be injustice done to the global traders who acted without the specific intent to harm anyone. The recent decision of the district court in New York, dismissing the majority of the plaintiffs' tort claims against the transnational corporations that financed the Apartheid regime in South Africa, was ironically labeled "a major advancement in international human rights law" because recovery would be recognized if global corporate activities were proven to be "intimately involved" with torture and human rights violations.¹⁴⁰ Why the decision should be heralded as a "major advancement" is curious, given that the decision did not address the liability of global corporate finance in providing the money that was used by the South African Defense Force to torture and kill. If this is "business as usual," then legal justice has been transformed into substantive injustice.

Global feminists point out that there is an ironic consequence to the transformation of the frame of legal justice. In this case, imposing liability becomes itself injustice, even though it is admitted that torture and killing and other human rights abuses committed by the Apartheid regime in South Africa would normally constitute a crime or tort under the Alien Tort Claims Act. Thus, what would seem to be a clear basis for a claim of injustice—and hence liability—is no longer a valid claim. This is the real lesson of the decision in *In re South Africa Apartheid Litigation*. In the district court's frame of justice, justice is "business as usual." Holding global business responsible for the injustice it finances would itself be injustice. Hence, "doing justice" becomes a way of inflicting and perpetuating injustice.

The global structures of technology and media operate concurrently with global finance structures to reinforce this disturbing frame of justice. Global business interests thus harness gender injustice and create the grounds for subordination through global finance. Critical race theorists and global feminists attempt to reframe justice so that the subjects of justice are represented in the institutions and structures that determine their life chances. This could mean a claim for democratic accountability in a globalizing world, where the nation-state no longer decides substantive justice. Political power in the transnational sphere is no longer just a matter of the state, but rather the organizations and institutions of transnational business that are increasingly exercising the power of the

140. See Mark Hamblett, *Judge Narrows Claims in Apartheid Torts Case Against Multinational Corporations*, N.Y. L.J., Apr. 9, 2009, at 1, col. 2, 4, 6 (quoting the plaintiffs' lawyer who praised the judge for setting progressive standards for future cases).

state.¹⁴¹ In shifting their attention from identity politics to the politics of globalization, global feminists and critical race theorists seek to compete with the power now exercised by a dominant minority in control of the institutions of global finance and transnational business. In a perfect example of the global and real-time nature of the justice struggles these theorists advocate for, in 2009, the First World watched videos on YouTube, saw images on Facebook, and read messages on Twitter displaying the injustices done to Iranian demonstrators. This vividly illustrates the political possibilities of the global network and the reach of globalization.¹⁴² The boundaries of the political community can no longer be a limit on justice in an increasingly interconnected global community.

VII. CONCLUSION: THE TURN TO IMMANENT CRITIQUE

Before the financial crisis, when globalization was hot and money was flowing freely, it was difficult to argue against the status quo of corporate globalization and the boundaries of the political community. One might complain about income inequality and the plight of children in sweat shops in India or Asia, but the market-dominant discourse of a rising middle class in emerging economies would trump any discussion. Injustice in India would be an Indian responsibility. The success of transnational business would make the appeal to redistributive justice a hard sell. The story corporate globalists told was that globalization was a force for reducing poverty through investment and development. In America, homes were purchased as investments and credit was freely given regardless of risk. Society was built on leveraged risk and speculation. The financial community no longer performed the social function of accepting the responsibility of risky investments, but instead packaged risk in investment products and sold the product under credit debt obligations that had defective insurance coverage to buyers all over the world.

What is more, the territorial frame of the nation-state no longer matters in a risk society. Hence, mortgage-backed securities were assumed to be safe investments, and credit swaps, tranching, and “pooling” among many investors globally insured against any risk of default. The investments were so removed from the actual factors of risk that no one could really determine the true nature of the risk involved. Consequently, risk was free

141. See CHAU, *supra* note 2, at 6 (describing “market-dominant minorities” who control most of the resources of a state and cause ethnic tension); FRASER, SCALES OF JUSTICE, *supra* note 13, at 13 (listing global influences that can undermine a state’s power, such as transnational corporations, currency speculators, and investors).

142. Cf. Interview with Evgeny Morozov, Blogger for Foreign Policy Magazine and Open Institute Fellow, *Iran Elections: A Twitter Revolution*, WASH. POST, June 17, 2009, <http://www.washingtonpost.com/wpdyn/content/discussion/2009/06/17/DI2009061702232.html> (discussing how Twitter had become an important source for evading state-imposed restrictions on coverage of the demonstrations).

and unregulated.

The democratic institutions of the nation-state pale in comparison with the power of transnational corporations. Wedded to the nation-state context, the grammar of justice, is out of sync with the causes of injustices in a globalizing world. The forces that perpetuate injustice in the global context belong, as Nancy Fraser has put it, not to the “space of the places,” but rather to the “space of flows.”¹⁴³ In the space of capital flows, injustice also flows. What has been ignored until now is that the exportation of risk can bring about global poverty and human misery and the injustices of investment decisions can determine who lives long and who will die young. The injustices of global finance decisions follow capital flows but they are never really considered when the investment decision is made on Wall Street or in other investment capitals of the world.

Casino capitalism is a phrase now used to describe the nature of risk taking by bankers. They essentially make bets that housing values would continue to increase indefinitely. These wagers were invented by Wall Street whizzes, who bundled mortgages into securities, which were sold as credit debt obligations and which were treated like any other favorable investment opportunity. The difference, however, was that the consequences impacted investors globally. Human bias favored the possible gains from trades and ignored the low probability events, for example, that housing prices would stagnate, or even decline. The contradiction of social reality (the housing bubble) and the idealized understanding of credit markets (over-leveraging) created a crisis that Karl Marx would have understood as establishing the relevance of his *immanent critique* of capitalism.¹⁴⁴ The contradiction of the reality of bourgeois society based on easy credit creates a crisis that can be regarded as a failure of capitalism.

Just as the Great Depression has become relevant again, so have forms of totalizing critique. For example, Hannah Arendt, the “great [feminist] theorist of the mid-twentieth-century,” sought to uncover the meaning of the “crisis of the nation-state” that “produced intense national and pan-national chauvinisms,” depriving minorities of rights and political status, by creating a mass consciousness portrayed as an “anti-political way of seeing.”¹⁴⁵ Arendt’s theories have thus become relevant against to the current feminist critique of globalization; global feminists and critical race

143. FRASER, SCALES OF JUSTICE, *supra* note 13, at 23 (citing MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 440-60 (1996)) (arguing that because some injustices evade the jurisdiction of a particular state, a transnational approach must be used instead).

144. See Karl Marx, *The German Ideology*, in THE MARX AND ENGELS READER 136-37 (Robert C. Tucker ed., 1972).

145. FRASER, SCALES OF JUSTICE, *supra* note 13, at 131-32.

theorists are following her example by exposing the injustices of the governing structures of global finance that have replaced those of the nation-state and have established the network of institutional class structures which reproduce racial and gender discrimination and global poverty. Critical theorists now turn to the task of understanding systemic risk and the failures of capitalism in the postmodern era. Hence, they turn to immanent critique produced from the flows of life and the systems of economy rather than the system of law to locate the contradictions of substantive justice in the historical conditions of cultural and economic production. If Karl Marx were alive today, he would be smiling, but for those who remain under the thumb of globalization and capitalist ideology, there is little reason to smile.