

**MEMO ON BINARY ECONOMICS TO
ATTORNEYS FOR WOMEN AND PEOPLE OF
COLOR RE: WHAT *ELSE* CAN PUBLIC
CORPORATIONS DO FOR YOUR CLIENTS?**

ROBERT ASHFORD[†]

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INTRODUCTION

What *else* can public corporations do for women and people of color? What *else* can attorneys for women and people of color do to serve those clients better? Many goals have been suggested

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[†] Professor of Law, Syracuse University College of Law, Syracuse, New York 13244; Tel (315) 677-4680; Fax (315) 443-4141; rhashford@aol.com.

and advanced including (1) equal pay for equal work, (2) equal opportunity, (3) special consideration in light of history, biology, and special circumstances, (4) various forms of affirmative action, and (5) reparations for past wrongs, to mention a few. Many of these have been advanced not only as moral or ethical propositions, but as “win-win” opportunities not only for women and people of color, but also for corporations and shareholders as well. The italicized “*else*” in the two introductory questions set forth above seeks to identify *additional* opportunities rarely advanced or considered.

One of the most important duties of lawyers is to assist clients in identifying and securing their essential rights, responsibilities, and opportunities. One of the purposes of legal education is to assist lawyers, clients, and society in identifying and securing essential rights, responsibilities, and opportunities.

In the light of this duty and purpose, this Article describes one opportunity rarely suggested by counsel that may offer to people of color, women, public corporations, and their shareholders benefits far beyond the conventional wisdom and far greater than can be expected based on the mainstream economic theories (classical, neoclassical, and Keynesian) generally relied upon in formulating and evaluating plans and opportunities.

The opportunity is to secure for growing numbers, and eventually all women and people of color, *the right to acquire capital with the earnings of capital*.¹ This is a right presently enjoyed by all well-capitalized people, which, of course, includes some women and people of color, but only a small minority of them.

To understand why this right, which is called “the binary property right,” may be of singular importance to women and people of color, and also to essentially all poor and working people, and why its realization may also be in the interest of public corporations and most, if not all, of their shareholders, it is necessary for counsel for women and people of color to learn some

¹ As used in binary theory, capital refers to all non-human factors of production that can be owned. Thus it includes land, animals, tools, machines, structures, patents, copyrights, and other intangibles—anything capable of being owned and producing wealth and therefore income. Capital does not include what is sometimes called “financial capital,” which binary economics analyzes as a participation in the earnings of capital (i.e., a property right in capital). Furthermore, capital does not include “human capital,” which binary economics analyzes as a function of labor.

basic principles of a little-understood theory of economics called “binary economics.” Binary economics offers a conception of economics that is foundationally distinct from the economic theories presently employed by government, private enterprise, charitable foundations, policy institutes, individuals, and their counsel to formulate and evaluate economic policy.²

As explained more fully below, according to binary economics, instituting the binary property right is beneficial to women and people of color because it will over time greatly enhance their earning power and autonomy by supplementing their labor income and/or welfare benefits increasingly with their earnings from capital ownership. Instituting the binary property right will also benefit public corporations and their shareholders because it will provide a stable, growing, broadening, production-based consumer demand that will enable public corporations to

² Binary Economics was first advanced by the corporate finance attorney, investment banker, and philosopher, Louis Kelso. See generally LOUIS O. KELSO & MORTIMER J. ADLER, *THE CAPITALIST MANIFESTO* (1958); LOUIS O. KELSO & PATRICIA H. KELSO, *DEMOCRACY AND ECONOMIC POWER: EXTENDING THE ESOP REVOLUTION* (1986); LOUIS O. KELSO & MORTIMER J. ADLER, *THE NEW CAPITALISTS: A PROPOSAL TO FREE ECONOMIC GROWTH FROM THE SLAVERY OF SAVINGS* (1961); LOUIS O. KELSO & PATRICIA HETTER, *TWO-FACTOR THEORY: THE ECONOMICS OF REALITY* (1967). The authoritative and most complete source of writings by Louis Kelso can be found on the website of The Kelso Institute. The Kelso Institute, <http://www.kelsoinstitute.org> (last visited Oct. 26, 2005).

In recent years, binary economics has become a subject of inquiry within the socio-economic approach to law-related economic issues championed by the Section on Socio-Economics of the Association of American Law Schools at its Annual Meeting Programs. See *The Journal of Law and Socio-Economics*, <http://www.journaloflawandsocioeconomics.com> (last visited Oct. 26, 2005).

The author has published other works discussing binary economics as a distinct paradigm. See generally ROBERT ASHFORD & RODNEY SHAKESPEARE, *BINARY ECONOMICS: THE NEW PARADIGM* (1999); Robert Ashford, *The Binary Economics of Louis Kelso: A Democratic Private Property System for Growth and Justice*, in *CURING WORLD POVERTY: THE NEW ROLE OF PROPERTY* 99–100 (John H. Miller ed., 1994), available at <http://www.cesj.org/binaryeconomics/binary-cwp1ed.pdf>; Robert Ashford, *The Binary Economics of Louis Kelso: The Promise of Universal Capitalism*, 22 RUTGERS L.J. 3 (1990) [hereinafter Ashford, *The Promise of Universal Capitalism*]; Robert Ashford, *Louis Kelso's Binary Economy*, 25 J. SOCIO-ECONOMICS 1 (1996) [hereinafter Ashford, *Louis Kelso's Binary Economy*]; Robert Ashford, *A New Market Paradigm for Sustainable Growth: Financing Broader Capital Ownership with Louis Kelso's Binary Economics*, 14 PRAXIS: FLETCHER J. DEV. STUD. 25 (1998); Robert Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility: Comprehending Corporate Wealth Maximization and Distribution for Stockholders, Stakeholders, and Society*, 76 TUL. L. REV. 1531 (2002) [hereinafter Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility*].

employ their existing productive capacity more fully and profitably as well as invest more profitably to achieve greater growth.

To acquire capital with the earnings of capital, well-capitalized people use: (1) the pre-tax earnings of capital, (2) collateral, (3) credit, (4) insurance and markets to diversify and reduce risk, and (5) a monetary policy intended to protect private property. The same institutions and practices that work profitably for well-capitalized people can also work profitably for all people. Moreover, in an economy operating at less than full capacity, if capital can competitively pay for its acquisition costs out of its future earnings primarily for existing owners, it can do so even more profitably if all people are included in the capital acquisition process.

Binary economic analysis combines the salient principles of the following: (1) the Homestead Acts, which were intended to broaden land ownership, (2) the employee stock ownership plan ("ESOP") technique of corporate finance, which uses tax exempt limited liability trusts, as fiduciary agents for employees, to acquire shares of employer stock with non-recourse credit, (3) a market for capital credit insurance, such as that profitably provided by the Federal Housing Administration, and (4) a return of the Federal Reserve to its original Congressional mandate under Section 13 of the Federal Reserve Act to broaden access to capital credit by discounting of eligible productive private credit.

Binary economic analysis offers an entirely voluntary means that would enable major prime credit-worthy companies to meet any portion of their capital requirements while simultaneously enabling their employees, customers, neighbors, and others to acquire shares in participating corporations with non-recourse credit, and pay for those shares with the earnings of the capital acquired. The acquired shares would be full-dividend shares of the participating companies. The shares would distribute their full return (net of reserves for depreciation, research, and development to maintain the competitive productive capacity of the capital) first to pay the cost of capital acquisition and then to provide a capital source of income to supplement wages and welfare benefits.

When representing women and people of color regarding their economic interests, counsel should not limit the scope of

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their representation to exclude advocacy of the right to acquire capital with the earnings of capital without their clients' informed consent.

I. A BRIEF CONSIDERATION OF CORPORATE WEALTH AND CORPORATE SOCIAL RESPONSIBILITY

Before presenting an overview of binary economics and how it may be used to persuade corporations to act to realize for women and people of color the binary property right to acquire capital with the earnings of capital, it would be appropriate to consider briefly corporate wealth, fiduciary duties, and social responsibility.

As a creature of the state, with strong persona status, the public corporation has special advantages for profitably organizing the mix of input factors necessary for wealth creation and distribution on a massive scale. Indeed, the development of corporate law is both a response to, and facilitation of, modern economic enterprise. It reflects and shapes economic behavior.

Major corporations dominate the emerging global economy and the economy of virtually every nation. In terms of productive capacity, capital ownership, jobs, and environmental impact, major corporations tell much of the story regarding economic activity. America's three thousand largest corporations, for example, own over ninety percent of the investable assets in the United States (excluding residential real estate).³

But not all people are able to participate effectively in the ownership and capital acquisition of those corporations. The New York Stock Exchange ("NYSE") reports that its listed securities are owned directly or indirectly by over fifty million shareholders, but the median shareholder is forty-three years old with a portfolio of less than \$15,000 in value.⁴ Thus, the distribution of common share ownership is a bit like the river that is two miles wide but mostly a few inches deep. In the United States, for example, in approximate terms, 1% of the people through their direct and indirect share holdings own 40–

³ Robert Ashford, *The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 TUL. L. REV. 1187, 1197 (2002).

⁴ NEW YORK STOCK EXCHANGE FACT BOOK ONLINE, HIGHLIGHTS OF NYSE SHAREOWNER CENSUS REPORTS (1952–1990), <http://www.nysedata.com/factbook> (follow "The Investing Public" hyperlink; then follow "Highlights of NYSE shareowner census reports (1952–1990)" hyperlink) (last visited Oct. 26, 2005).

50% of the marketable securities; 10% of the people own 90%; the remaining 90% of the people own the remaining 10% of marketable securities; and of that 90%, over half the people own none.⁵

At the same time: almost all capital is owned by major corporations; almost all capital owned by those corporations is acquired with the earnings of capital; much of it is acquired with borrowed money; and all is acquired with the indispensable foundation consisting of a stable property, monetary, credit, and market system dependent on government regulation, maintenance, protection, and enforcement. In the case of major prime credit-worthy companies in the United States, the sources of funds for capital acquisition, in approximate terms, are as follows: 70% with retained earnings, 23% with debt, and 7% with direct issuance of shares of stock.⁶ Relatively little capital is acquired with the earnings of labor. The vast majority of people in every nation have little or no participation in the capital acquisition of the world's major corporations.

The primary purpose of corporate finance is to enable corporations to acquire capital *before* they have earned the money to pay for it. Under the prevailing system of corporate finance, as corporate assets grow and are continually used to buy additional assets with their earnings, they benefit people primarily in proportion to existing wealth. Under this approach, the rich benefit the most, the middle class benefit less, and the poor ("the least of these") benefit least of all. Looking at the economy as a whole, the system offers (1) growing capital ownership and most of the best jobs to the well-capitalized, (2) the remaining jobs and welfare to others, and (3) goods and services to anyone with money or credit to buy them, while the negative effects of corporate production are "externalized" so that they are borne, to the extent possible, by persons other than the corporation and perhaps its privileged investors and employees. Those who own little or nothing are offered jobs, welfare, and

⁵ See EDWARD N. WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA 11–12 (1995) [hereinafter WOLFF, TOP HEAVY]; Edward N. Wolff, *How the Pie is Sliced: America's Growing Concentration of Wealth*, AM. PROSPECT, Summer 1995, at 58 [hereinafter Wolff, *How the Pie is Sliced*].

⁶ See RICHARD BREALEY & STEWART MYERS, PRINCIPLES OF CORPORATE FINANCE (2d ed. 1984); Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 648 (1988).

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cheaper products as their participation in economic growth, but they are effectively denied the governmental policies that assist well-capitalized owners in acquiring additional capital with the earnings of capital.

According to many, the advantages of doing business in the corporate form, the sheer size and impact of large corporations on society, and the attendant concentration of wealth and power call for a corporate social responsibility toward those affected by the corporation that may, in particular contexts, override the fiduciary responsibility to the corporation's existing shareholders.

Clearly governments can and do create opportunities for, and impose obligations on, corporations that have distributional and redistributive consequences. Beyond obligations specified by law and regulation, what is required of corporations and corporate fiduciaries? In terms relevant to corporate social responsibility, the question can be expressed as follows: in setting the wealth maximization and distribution goals of the corporation, what other interest(s), beyond the interests of the residual claimants, who are usually common shareholders, that relate to other stakeholders—employees, customers, suppliers, neighbors, and others including flora, fauna, and the environment—may, should, or must corporate fiduciaries take into account? Thus, the debate regarding the existence and scope of corporate social responsibility can be cast as a debate regarding duties of corporate fiduciaries with respect to the maximization and distribution of wealth owned by the corporation and the opportunities available to the corporation.

II. OVERVIEW OF BINARY ECONOMICS

Binary economics can be distinguished from other economic schools by three related propositions:

- (1) Labor and capital are “independent” or “binary” factors of production; or in other words, they are “independently productive”;
- (2) Technology makes capital much more productive than labor; and
- (3) Capital has a strong, positive distributive relationship to growth such that the more broadly capital is acquired, (a) the more it can be profitably employed to increase output, and (b) the more an economy (and major corporations within the economy) will profitably grow.

According to the binary view of production, although labor and capital may cooperate, just as people may cooperate, to do work, each factor, the human and the non-human, provides its own "independent productiveness." In this context, it is important to distinguish between "productivity," which is the ratio of the output of all factors of production, divided by the input of one factor, usually labor, and "productiveness," which retrospectively means "work done" and prospectively means "productive capacity."

According to Adam Smith, the primary role of capital is to increase labor productivity.⁷ Karl Marx, Alfred Marshall (widely credited for neoclassical economics), and J.M. Keynes did not disagree.⁸ Indeed, in his *General Theory*, Keynes distilled the economy to three fundamental variables—time, money, and labor—and treated capital as a dependent variable.⁹ In binary economics, (1) capital and labor are equally fundamental, independent (i.e., binary) variables and (2) the primary role of capital is to replace and vastly supplement the work of labor ("labor productiveness") with the work of capital ("capital productiveness").

The "independent productiveness" of labor and capital can be illustrated by considering the work of digging holes and hauling sacks. A person can dig a hole in four hours by hand and in one hour with a shovel (capital). According to mainstream economic analysis, with a shovel, labor productivity increases by a factor of four. But from a binary perspective, per hole, with the shovel, labor is contributing only twenty-five percent of its former productiveness, and the shovel is contributing seventy-five percent. The independent productiveness of capital is more clearly revealed in the work of hauling sacks: a person can haul one sack, one mile, in one hour and is exhausted. In the same time, with a horse, ten sacks can be hauled four times as far, yielding a forty-fold increase in output, and with a truck, five hundred sacks can be hauled forty times as far, yielding a twenty thousand-fold increase in output. The horse and truck are doing

⁷ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 332 (photo. reprint 1981) (Oxford Univ. Press 1976) (1776).

⁸ See JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 213–17 (Harcourt Brace Jovanovich 1964) (1936); KARL MARX, CAPITAL 188 (Friedrich Engels ed., Encyclopedia Britannica, Inc. 1952) (1887).

⁹ See KEYNES, *supra* note 8, at 213–14.

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essentially all of the extra work.

Based on its independent productiveness, capital has six powers that are important to production and growth. Capital can:

- (1) replace labor by doing what was formerly done by labor;
- (2) vastly supplement the work of labor by performing much more of the kind of work that humans can do;
- (3) do work that labor alone can never do (e.g., elevators lift tons thousands of feet in the air; airplanes fly; scientific instruments unleash forces that create computer chips that cannot be made by hand; fruit trees make fruit while all farmers can do is assist in the process);
- (4) work without labor, as in the case of washing machines, windmills, automatic tellers, robots, and fruit trees;
- (5) pay for itself out of its future earnings (the basic rule of business investment); and
- (6) distribute the income necessary to purchase its output (the logic of double-entry book-keeping).

The first four powers concern what might be considered the “real economy” powers of capital; the latter two are powers that are most clearly revealed in a private property, market economy with a stable credit system protected by a reliable legal system.

Each of these powers of capital contributes to the growth, including mere labor replacement, which produces the same physical output while liberating the time of workers for other activity including leisure. However, only the first power directly involves the mere substitution of capital for labor. Thus, although some economists, teachers of law and (neoclassical) economics, and policy advocates use the marginal efficiency theory of neoclassical economics as the foundation for a general theory of growth,¹⁰ the capital/labor substitution process is only one component of growth, operating *after* the creation of greatly

¹⁰ See e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 252 (6th ed. 2003). “What Adam Smith referred to as a nation’s wealth, what this book refers to as efficiency, and what a layman might call the size of the pie, has always been an important value . . .” For a critique of this approach on positive and ethical grounds, see Robert Ashford, *Socioeconomics and Professional Responsibilities in Teaching Law-Related Economic Issues*, 41 *SAN DIEGO L. REV.* 133, 150-52 (2004); see also James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 *LAW AND HISTORY REV.* 275 (1997).

increased productive capacity. Moreover, from the binary perspective, the wealth enhancing contribution to efficient pricing and resource allocation is severely limited so long as the distribution of capital acquisition remains narrow.¹¹

When analyzing how production and productive capacity have grown since the publication of Smith's *Wealth of Nations* in 1776, mainstream market economics interprets the role of capital as merely facilitative: capital increases human productivity, thereby allowing for a rise in output per unit of labor input, higher wages, and the employment of more labor. According to binary economics, in contributing to economic growth, capital does much more than increase the productivity of the humans who work with it. Increasingly, capital is doing a growing portion of the total work. Thus, economic growth is primarily the result of increasing capital productiveness rather than increasing labor productivity. The economic imperative is generally to produce more with more productive capital and less labor. Therefore, although capital may be seen to concentrate higher productivity into fewer workers, as the general rule, per unit of output and in the aggregate, the primary effect of technological advance is to make capital more productive than labor and thereby to replace and vastly supplement the productiveness of labor with ever greater capital productiveness.

Moreover, capital works on both sides of the production-consumption economic equation by providing vastly increasing productive capacity and production, and capacity to distribute income and leisure. According to binary economists, in a private property, market economy, it is the capacity of capital to do much

¹¹ Frequently, neoclassical economists stress that prices determine distribution, but less frequently teach that distribution also determines prices. So long as most people own little or no capital, most consumer goods and services will be worth the work people are willing to do by their labor to acquire them. This is (1) how Adam Smith and John Maynard Keynes saw it, (2) the foundation of price theory, and (3) in an economy in which capital ownership is highly concentrated, empirically the "labor theory of value" in practice. However, in an economy in which ownership is much more broadly distributed, the value of goods and services is not limited to the work people are willing and able to do by way of their labor, but also includes the work they are willing and able to let their capital do. Based on human effort alone, few sacks are "worth hauling" before the hauler becomes exhausted. With a horse, many more sacks are worth hauling; and the economy of sack-hauling will grow as horse (and truck) ownership becomes more broadly distributed. Thus, people express value not only by the work they do but also by the work they let their capital do. This is another expression of the principle of binary growth. See generally ASHFORD & SHAKESPEARE, *supra* note 2.

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more work and to distribute much more income and leisure that explains how the broader distribution of its ownership has a positive impact on the fuller employment of productive capacity, capital accumulation, and growth.

III. THE QUESTION OF UNUTILIZED PRODUCTIVE CAPACITY

When assisting clients to identify and secure their essential rights, responsibilities, and opportunities, it is important for lawyers to identify relevant issues helpful to clients that have been left out of the discussion. From a binary perspective, with regard to the interests of women and people of color, one of the most important issues generally left out of the discussions on corporate governance, fiduciary duties, and social responsibility is the question of unutilized productive capacity (“UPC”).

The recognition that an economy has (or may have) a substantial amount of UPC significantly alters the moral and practical content of the debate on economic policy. If people languish in deprivation in a context where there is no unused capacity to produce more, then apart from charity, the moral question is whether it is right to compel the redistribution from the richer Peter to support the poorer Paul; and the practical question is whether such compulsory redistribution will positively or negatively affect the amount of future production available to Peter and Paul. But if people languish in deprivation, when the capacity to produce more *does* exist, then as a practical matter, Paul can at least in theory be enriched without compulsory redistribution from Peter; and it is incumbent on counsel, other fiduciaries, and all people of good will to question the adequacy of existing economic approaches to productive capacity and to look for better approaches to economic policy related to productive capacity. Thus, binary economists believe that by focusing attention on the question of UPC, attorneys for economically disadvantaged people will be better able to serve their clients.

There are, of course, different definitions of unutilized productive capacity depending upon the purpose of economic inquiry, and lawyers must carefully consider which definition or definitions will best serve the interests of their clients. Mainstream economic analysis generally employs a narrow and frequently documented “static” approach to UPC that focuses primarily on existing assets and available labor at a given wage.

The presently unemployed portion of each existing or available factor is the "static UPC" for that factor.

In considering the question of UPC, however, a corporate fiduciary cannot think merely in terms of existing capital and available labor. A definition of unutilized capacity which looks only to existing assets and available labor is a limited conception that ignores the competitive and wealth-enhancing implications of advancing technology, major capital investment, changes in skills, preferences, and environmental factors and a broader pattern of capital acquisition over time. This broader timeframe—in which technology, major capital investment, skills, preferences, environmental factors, and ownership distribution are variable—is an essential foundation for much of the corporate planning required of corporate fiduciaries.¹² Such a timeframe is certainly not the exclusive domain of neoclassical economic analysis, which generally holds technology, skills, preferences, environmental factors, and major capital investment constant and ignores the distribution of ownership.

Thus, from the perspective of corporations and corporate fiduciaries, a central question is: What business strategy should be pursued to most profitably acquire, employ, and dispose of corporate assets over time? With respect to those assets, if any substantial amount of unutilized productive capacity exists and could be profitably employed, corporate profits and shareholder wealth would increase accordingly.

The question of unutilized capacity is also a central issue for people concerned about the welfare of economically disadvantaged people and for government policymakers vested with a responsibility in matters of economic welfare. When there is unutilized productive capacity of an economy's major corporations, there is a capacity to provide more basic necessities, such as food, clothing, shelter, transportation, and healthcare, and simple comforts and conveniences by way of greener and more socially responsible industrial processes and practices.¹³ The ever-present threat of plant closings, downsizing, and layoffs can be understood as a reflection of unutilized productive capacity. Many economic assaults on the environment resulting

¹² *Paramount Comm'ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989).

¹³ See Ashford, *supra* note 3, at 1203; Robert Ashford, *Binary Economics and the Case for Broader Ownership* 4, available at http://www.globaljusticemovement.org/subpages_online_library/ashford1.pdf (July 20, 2003).

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from destructive production technologies (that continue despite the know-how to ameliorate or replace them with greener technologies that people cannot afford), can be understood as reflections of unutilized productive capacity.

As in the case of corporate fiduciaries acting in the corporate interest, it is in the interest of women and people of color (and the duty of their attorneys, other advocates, and advisors) to focus on the question of unutilized productive capacity in the broader, what could be called “holistic,” sense that reflects the real potential to produce and distribute goods and services on a sustainable basis over time. Thus, in the remainder of this Article, unless otherwise specifically noted, “unutilized productive capacity” includes static UPC and also the broader holistic, fiduciary understanding of UPC.

To some people, the question of the existence of unutilized productive capacity, in the broader, holistic sense of the term, may be simply a matter of opinion. But in law, like the question of valuing a company, it is also a question of fact.

Taking the assumed perfect efficiency or approximate perfect efficiency of markets as the best starting point for economic analysis, some people believe that a major economy like that of the United States and major prime credit-worthy companies within the economy have little or no unutilized productive capacity. “If there were an appreciable amount of unutilized productive capacity,” they argue “it would surely be employed. This is what rational people acting with a profit motive do, and if people refuse to act rationally in this way they will be driven out of business by others who do.” But in my experience, many more people do not believe that markets are that efficient and instead believe that there is substantial and growing unutilized productive capacity.

On this point, a simple thought experiment might be illuminating. Suppose you were king or queen of the world and could ordain any economic policy as the law of the world, and your goal were to feed, clothe, and shelter the world, and provide people with the resources to develop themselves to their highest good. Although you might fall short of your desired goal, would it be easier to approach your goal now than one hundred, two hundred, or three hundred years ago? And, to change the hypothetical, if you were still the king or queen of the world and (just as the Pharaohs loved pyramids) you love unutilized

productive capacity. It is not enough for you to have two closed manufacturing plants in a particular locale (with the lost jobs gone to manufacturers overseas where wages do not internalize such factors as health and retirement benefits, safety and environmental standards, military costs, and infrastructural benefits of the United States); instead, you prefer to have seven more such plants. Would it be easier to build seven such unutilized plants today than one, two, or three hundred years ago?

Thus, if asked to determine the facts with due diligence, I predict that the general counsel of most prime credit-worthy companies would, after consulting with all appropriate experts, conclude that their companies, even as they determine the need to effect major downsizings, plant closings, and lay-offs, owned the productive capacity with available capital assets and labor to profitably increase output by perhaps 10–20%, or more, at lower unit costs if there were only the customers with money to buy what could be readily produced. This would apply not only to consumer goods but also to producer goods, *so that within existing unutilized productive capacity, there is the capacity to create even more unutilized productive capacity.*

Of course, not everyone would agree with my prediction, which is based on experience and anecdotal evidence but no scientific validation. Nevertheless, a lesson from economic history and the history of economic thought may be instructive. In the Great Depression of the 1930s, society was faced with a major anomaly that politically could not be ignored: the anomaly of vast unutilized productive capacity, even in the limited static sense, alongside widespread need and want among willing and able, but unemployed people.¹⁴ It was a time when passenger trains rolled by with few passengers able to pay the fares, and freight trains rolled by empty of freight, but carrying people who were traveling the country looking for work. The persistence of unutilized productive capacity at that time, and the failure of classical and neoclassical theory to provide government and society with a satisfactory theoretical explanation or practical solution for the anomaly provided the political foundation for the recognition of Keynesian economics as a mainstream school of

¹⁴ Ashford, *supra* note 13, at 2.

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thought.¹⁵

Unlike the 1930s, presently unutilized productive capacity is not explicitly a major focus of mainstream economic and political analysis. Generally, people do not get funding, prizes, or much recognition for addressing the question of unutilized productive capacity. As a policy issue, UPC rarely enters the mainstream discussion. Yet in ways important to corporate profitability, more unutilized productive capacity seems to exist now than in the 1930s. In my experience, most people believe that the western-style capitalist economies could more nearly feed, clothe, and shelter all the world's people today than in 1935, despite substantial population growth since then. Although today's percentages of static UPC may be far smaller than the percentages that prevailed in 1935, most people I know believe that in the fuller, holistic sense of the term, the unutilized productive capacity of major corporations today is far greater than it was during the Great Depression of the 1930s. Despite neoclassical assumptions of rising costs and diminishing returns, much of the unused productive capacity is generally marked by diminishing unit costs and increasing economies of production made unprofitable only by insufficient consumer demand even at discount prices.

Again learning from history, comparing the political climate during the 1930s to the political climate today, it seems most reasonable to conclude that when the existence of substantial unutilized productive capacity is undeniable, the interests of the economically disadvantaged become matters of much greater concern to the government, private foundations, major economic players in the economy, and the electorate.

So if the question of unutilized productive capacity is of importance to economically disadvantaged people, and also to the interests of major corporations, attorneys for economically disadvantaged people should ask: (1) "Why is unutilized productive capacity not a major part of the present discussion?" and (2) "How can unutilized productive capacity be included in the discussion in a way that works for the benefit of economically disadvantaged people?"

¹⁵ See Bill Gerrard, *Keynes, The Keynesian and the Classics: A Suggested Interpretation*, 105 *ECON. J.* 445, 449 (1995) (characterizing the central theoretical task of Keynesian economics as explaining the outcome of persistent underemployment).

Unfortunately, mainstream economics has no coherent position on unutilized productive capacity in the holistic sense. Rather than consensus, it provides controversy. It is not even clear that mainstream economics has a non-controversial way of measuring holistic unutilized productive capacity. Thus, on the authority of economic theory, there is no sound basis to dismiss the controversy regarding unutilized productive capacity merely by arguing that reformers have the burden of proving the existence of unutilized productive capacity in the holistic sense of the term.

In fact, mainstream economics fragments into different schools on the existence, extent, and significance of unutilized productive capacity and what to do about it. These schools offer different guidance to private corporations and public policymakers. Neoclassical economics assumes perfect competition and efficiency as the starting point of analysis.¹⁶ In the world of perfect neoclassical efficiency, unutilized capacity, beyond the need for peaks in market demand and an insurance for emergencies beyond the predictable, is an anomaly that should not persist for long. In efficient markets, unproductive assets are sold, even at salvage if necessary. Even before they become partially or totally unutilized, assets not earning competitive returns for their owners are sold to those whose rate of return can be enhanced by the acquisition.¹⁷ Moreover, according to neoclassical economics, "as markets become more competitive, unutilized productive capacity should decrease, not increase."¹⁸ For those who believe that this logic describes the ongoing reality experienced in a national economy, there is little or no sustained unutilized capacity beyond the amount that is efficient to maintain.¹⁹ Plant closings, downsizings, and lay-offs are signs of greater, not less, efficiency. For those who believe

¹⁶ See Charles R.P. Pouncy, *Contemporary Financial Innovation: Orthodoxy and Alternatives*, 51 SMU L. REV. 505, 540–41 (1998) (describing the perfect competition model of neoclassical economics). See generally Joan Robinson, *What is Perfect Competition?*, 49 Q. J. ECON. 104 (1934).

¹⁷ Ashford, *supra* note 3, at 1202.

¹⁸ *Id.*

¹⁹ The history that gave rise to the antitrust laws reveals, however, that vast unutilized capacity can also be of great value to a rational, self-interested monopolist because it discourages potential competitors from investing the resources to compete. Those enjoying monopoly profits are of course benefited if the existence of unutilized capacity never enters the discussions of economic policy.

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markets are efficient or nearly efficient, there is little or no unutilized productive capacity (including little or no involuntary labor unemployment) that exists by reason of the market's failure to distribute sufficient demand for goods and service.

But to most observers, these conclusions are belied by experience. From many people, I have heard claims that today there is a growing technological capacity to feed, clothe, and shelter the world if there were only sufficient income to buy what can be readily produced. However close to the truth such a claim is in the year 2005, it was less true in 1905, and still less true in 1805.

Based on a conception that confuses a neoclassical theory of marginal efficiency with an unnamed theory of growth,²⁰ so-called free market reforms have been initiated on the national and international level supposedly to make markets more efficient. Nevertheless, as markets have globalized and allegedly become more efficient, unutilized productive capacity of the world's major corporations has, in the eyes of many people, paradoxically increased rather than decreased. The neoclassical, generic solution of simply "deregulating" markets, without regard for the remaining regulated, protected, institutional advantages of private property that enrich some while excluding others, is, therefore, suspect in this context.

According to Keynesian analysis, there is indeed persistent unutilized productive capacity that belies the neoclassical assumptions of near-perfect efficiency. Untapped growth potential and underemployment of labor and capital persist despite classical and neoclassical economic theory to the contrary.²¹ Markets are far from perfectly competitive, and their operation results in a persistent shortfall in "effective demand."²² "The result is an endemic underutilization of people and resources that can, at least, be partially corrected by government action."²³ But, in addressing unutilized productive capacity, the

²⁰ See *supra* note 10 and accompanying text.

²¹ See PAUL DAVIDSON, *POST KEYNESIAN MACROECONOMIC THEORY: A FOUNDATION FOR SUCCESSFUL ECONOMIC POLICIES FOR THE TWENTY-FIRST CENTURY* 6–8 (1994) (observing that Keynes argued that neoclassical economic theories could not account for the persistent unemployment rates of the Great Depression).

²² See generally KEYNES, *supra* note 8, 23–34 (defining "effective demand").

²³ Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility*, *supra* note 2, at 1565.

Keynesian analysis attaches no special significance to the distribution of capital ownership. Indeed, Keynes specifically says that in understanding his approach,

It is preferable to regard labour, including, of course, the personal services of the entrepreneur and his assistants, as the sole factor of production, operating in a given environment of technique, natural resources, capital equipment and effective demand. This partly explains why we have been able to take the unit of labour as the sole physical unit which we require in our economic system, apart from units of money and of time.²⁴

Accordingly, Keynesian analysis attaches no fundamental significance to the distribution of capital ownership because in Keynes's model, capital earns no independent income and has no value apart from labor. (Consequently, Keynesian analysis attaches no fundamental importance to extending to all people the competitive right to acquire capital with the earnings of capital.) Further, the Keynesian analysis makes no fundamental distinction between the distribution and redistribution of income and capital. In light of the law of private property, however, lawyers should be skeptical of an analysis that makes no distinction between the distribution and redistribution of capital and income.²⁵

Moreover, although Keynesian strategies remain a central element in the workings of every major economy (witness, for example the vast public expenditures in the United States), many if not most people would say that unutilized productive capacity persists and is apparently growing in the United States and most industrial economies. Thus, although Keynesian economics is intended to address and remedy the problem of unutilized productive capacity, there is reason to doubt its efficacy with regard to holistic UPC.

For those who recognize its existence, unutilized productive capacity is an important economic phenomenon that mainstream economic theory has failed to adequately explain or remedy. Theoretically, the persistence of unutilized capacity challenges

²⁴ KEYNES, *supra* note 8, at 213–14. See generally JOHN FENDER, UNDERSTANDING KEYNES: AN ANALYSIS OF 'THE GENERAL THEORY' (1981).

²⁵ Note that the Keynesian approach is not in harmony with the law of private property, which sees capital and labor as independent earners, and which necessarily distinguishes between the distribution and redistribution of income and capital. See Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility*, *supra* note 2, at 1541.

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the foundation of mainstream economics. A major aspect of the political, social, and moral debate in Western societies regarding economic policy is related to the employment of productive capacity, both utilized and unutilized. The economic and political prospects for greater and more broadly shared prosperity for women, people of color, and poor and working people are limited by mainstream understanding of policies related to utilized and unutilized productive capacity. It would serve the interest of economically disadvantaged people if they and their counsel could discover and advance an approach to unutilized productive capacity that better serves their interests.

When accepted mainstream theories fail to adequately explain or remedy an important phenomenon, one scientific and lawyerly way to discover better theories is to identify and suspend one or more of the assumptions that those theories share in common and then to explore the counter assumptions and their implications. Although they differ in many respects, all mainstream approaches to unutilized productive capacity share two basic assumptions: (1) the primary role of capital is to make labor more productive and (2) there is no substantial, fundamental, positive relationship between the distribution of capital acquisition and the employment of unutilized capacity and growth. By suspending these mainstream economic assumptions, one is led to two basic premises of binary economics.

IV. THE BINARY HYPOTHESIS REGARDING UNUTILIZED PRODUCTIVE CAPACITY

Binary economics provides a new understanding and suggests new strategies regarding the persistence of vast, and many would say growing, unutilized productive capacity in markets that are supposedly becoming more competitive and efficient. Particularly noteworthy is the unutilized productive capacity of the assets owned by major prime credit-worthy public corporations. As a matter of policy, this is where an enlightened approach to corporate economic policy can have its greatest beneficial impact on industry, corporate and shareholder wealth, people of color, women, and generally people who own little or no capital.

As previously noted, looking at the question holistically over a period of time required of fiduciaries, binary economists

maintain that unutilized capacity is not merely a static ratio of existing unutilized capital and labor divided by available capital and labor, but also includes the unutilized capacity to create even more unutilized productive capacity. Noting that present demand for capital investment is dependent on demand for consumer goods in a future period,²⁶ binary economists reason that a voluntary pattern of steadily broadening ownership promises more production-based consumer demand in future years and, therefore, more demand for capital investment in earlier years. Thus, a broader distribution of capital acquisition, ownership, and income strengthens the promise of capital to pay for itself out of its future earnings, increases the rate of capital cost recovery, and makes profitable the employment of more, and increasingly more productive, capital along with the labor necessary to build, deliver, install, and operate it.

Thus, by relaxing the unproven assumption of mainstream economics (that a broader pattern of capital acquisition has no potent, positive, distributive relationship to the profitable employment of unutilized capacity and the promotion of growth), the contrary binary assumption (that a broader pattern of capital acquisition has a potent, positive, distributive relationship to the profitable employment of unutilized capacity and the promotion of growth) provides an alternative explanation for much unutilized productive capacity.

In other words, the binary hypothesis is that much unutilized productive capacity is the consequence of concentrated capital ownership. Concentrated capital ownership fails to distribute broadly the consumer demand necessary to purchase the output of increasingly capital-intensive production. Concentrated ownership in turn is the consequence of faulty market institutions and practices that:

- (1) effectively exclude most people from the process of acquiring capital with the earnings of capital, and
- (2) thereby monopolize and suppress the true productive capacity of capital, by preventing capital from
 - (a) being acquired more broadly and rapidly, and
 - (b) thereafter distributing to consumers the income to purchase what can increasingly be produced by capital.

²⁶ See generally HAROLD G. MOULTON, THE FORMATION OF CAPITAL 37-48 (1935).

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According to binary theory, if markets were structured to diffuse ownership voluntarily by enabling all people to acquire capital with the earnings of capital, then within the timeframe of capital investment projections of major U.S. corporations (usually five years) increasing consumer demand (more widely distributed through the broader acquisition of productive capital with the earnings of capital) will profitably employ more unutilized productive capacity and produce more growth.

For example, within a period of perhaps five to fourteen years, if members of the poor and middle classes are enabled to compete with existing owners for the acquisition of corporate shares representing the capital requirements of companies worthy of prime credit, these poor and middle class people would bring to the corporate finance bargaining table a chip not possessed by existing owners: a pent up appetite for more of the necessities and simple luxuries of life that richer people enjoy. After the capital has paid for itself, the earnings of capital acquired by members of the poor and middle class, if paid to them, will distribute more consumer demand than if that capital had been acquired by the wealthy. If that capital had been acquired by existing owners, its income would have been courted for additional investment, but in the context of less consumer demand. Compared to the investment opportunities that would have existed without the prospect of a broader pattern of capital acquisition, the broader market distribution of capital acquisition and income generated in a binary economy will create greater investment opportunities for existing owners as well as for the new binary owners.

Therefore, mainstream economic theory can be enhanced by considering the return on capital not only as a function of its scarcity, the wage rate, and the interest rate, but also as a function of the increasing productiveness of capital and the distribution of its ownership. The resultant distribution-based (binary) growth is not caused by increased human productivity, capital deepening, or accelerated technological advance. It is specifically the result of the broader distribution of capital acquisition. This distribution-based relationship to the rate of return on capital and growth is not revealed by classical and neoclassical analyses which assume that the return on capital is a function of only its scarcity and labor productivity. Likewise, Keynesian analysis, which reduces the operation of the economy

to time, money, and labor, cannot yield a conclusion that growth and the return on capital are independent functions of the productiveness capital and the distribution of its ownership.

With its labor-based, productivity analysis, mainstream economic strategies rely on policies that facilitate capital acquisition primarily for well-capitalized people and jobs and welfare for everyone else. But binary analysis indicates that jobs and welfare alone cannot distribute sufficient consumer income to employ existing unutilized capacity and promote sustainable growth without the additional consumer income which would naturally result from the increased productiveness of capital and a broader pattern of capital acquisition.

V. APPLYING BINARY PRINCIPLES TO THE UNITED STATES ECONOMY

The logic underlying the principle of binary growth (i.e., capital-ownership distribution-based growth) can be understood and implemented by considering the three thousand largest companies in the United States, and then focusing on a subset comprised of prime credit-worthy companies. Most of these companies exhibit the frustrating essence of unutilized productive capacity. At diminishing unit costs, they can produce much more of the goods and services people dearly need and want. However, the consumer spending power to render more production profitable even at diminishing unit costs is lacking.

As noted above, presently, almost all new capital is acquired with the earnings of capital, and much of it is acquired with borrowed money. The ownership of this corporate wealth is highly concentrated so that approximately 1% of the people own 40–50% of the wealth and 10% own 90% of the wealth, leaving 90% of people owning little or none. Thus, capital returns its value at a rate reflective of its long-term (suppressed) earning capacity as it buys itself for a small minority of the population.²⁷

If the techniques presently used to enable existing owners to acquire capital with earnings of capital were opened competitively to all people, then in an economy with underutilized productive capacity, the demand for capital investment would increase as its income is increasingly

²⁷ Wolff, *How the Pie Is Sliced*, *supra* note 5. See generally WOLFF, TOP HEAVY, *supra* note 5 (discussing the disparate increase in wealth along class lines).

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distributed to would-be consumers with unsatisfied needs and wants. The binary growth potential in this situation can be understood as a manifestation of the law of supply and demand within a “binary timeframe”—the time expected for well-managed capital to pay for its acquisition costs (a period usually no longer than five to seven years) and then to begin earning a net income for its owners. This is a time period in which technology, capital investment, and the distribution of ownership are variable rather than fixed. Because demand for capital goods is dependent on anticipated demand for consumer goods in a future period, the broader pattern of capital acquisition in a binary economy will structure more production-based consumer demand in the future period, and will therefore provide market incentive for more capital investment in the earlier period. Admittedly, there would be a gestation period (a period somewhat shorter than the capital cost recovery period and determined by the horizon for capital investment planning) before the distributional growth effects would become noticeable, but as will be explained, their cumulative effect over time may be remarkably significant.

As previously noted, to acquire capital with the earnings of capital, well-capitalized people use: (1) the pre-tax earnings of capital, (2) collateral, (3) credit, (4) market and insurance mechanisms to diversify and reduce risk, and (5) a monetary policy intended to protect private property. The same institutions and practices that work profitably for well-capitalized people can also work profitably for all people. In an economy operating at less than full capacity, if capital can competitively pay for its acquisition costs out of its future earnings primarily for existing owners, it can do so even more profitably if all people are included in the acquisition process.

Accordingly, to enable all people and major prime credit-worthy corporations to capitalize on the potent distributive relationship between voluntary ownership-broadening capital acquisition and growth, a binary economy requires only modest reforms to open the market infrastructure governing corporate finance so that all people, not merely a minority of the people, are vested with competitive capital acquisition rights to acquire capital with the earnings of capital.

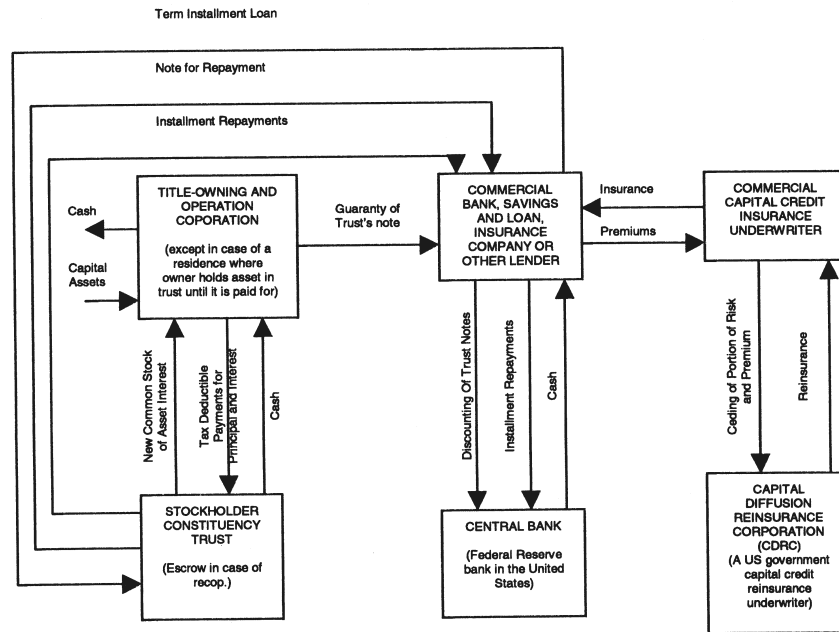
A. A Model of a Binary Economy

The dynamic operation of a binary economy can be modeled with six basic institutions: (1) Prime Credit-Worthy Corporations, (2) Capital Ownership-Broadening Trusts, (3) Banks, (4) Private Capital Credit Insurers, (5) the Capital Diffusion Reinsurance Corporation (the only new entity, modeled after the Federal Housing Administration), and (6) the Federal Reserve. Figure 1 shows an ownership-broadening "binary financing" transaction consummated with the voluntary participation of each of these entities. Figure 1 may be seen as a single binary financing transaction or the aggregate representation of all such transactions.

In a binary economy, in addition to their usual means of acquiring capital assets (borrowing, retained earnings, and sale of shares), prime credit-worthy corporations could raise the funds to acquire capital assets by selling special full-dividend common shares to a Capital Ownership-Broadening Trust for the benefit of employees, customers, neighbors, and others, paid for with a bank loan to the Trust, insured by a private capital credit insurer and government reinsurer, and discounted at a rate of 99.75% by the Federal Reserve (with 1/4 of one percent reflecting its estimated administrative cost). Once the capital acquisition loan repayment obligations are met, the full net capital earnings (net of reserves for depreciation, research, and development) would be paid to the binary owners to help them meet their needs and wants and to provide the basis for increased investment, employment, and production.²⁸

²⁸ The full payout of capital earnings (net of reserves for depreciation, research, and development) is essential to enable poor and working people to acquire capital with the earnings. If the capital earnings of poor and working people are taxed or retained by the corporation, the capital will not be able to repay its acquisition cost at a competitive rate and will not distribute needed income to provide for their needs and support sustained growth.

General Theory Diagram



Source: Kelso & Kelso (1989). Reproduced with permission

Figure 1

B. The Cost of Financing to Participating Corporations and the Binary Owners

Based on the profitable capital credit experience of the Federal Housing Administration, the customary bankers spread, and the estimated administrative costs of Federal Reserve discounting, the combined cost of binary financing to the corporation and the beneficiaries will not, under most economic circumstances, exceed the following:

(1)	Capital Credit Insurance	2%
(2)	Customary Banker Spread	1–2%
(3)	Federal Reserve Discount	0.25%
	Total	3.25–4.25%

The reason underlying the low cost of financing rate is that

monetized credit does not use existing financial savings as the source of the loan and therefore does not require compensation for their use. The estimated cost of capital credit insurance might be questioned, but it could even be doubled and still provide a competitive cost of financing in many instances.

C. Binary Growth in a Binary Timeframe

Figure 2 illustrates the distributive, growth-sustaining feature of an ownership-broadening binary economy. For simplicity, Figure 2 assumes a seven-year cost recovery period for capital investment. It shows the number of years of annual acquisitions that will have paid for themselves over time. The figure assumes that in every year after the implementation of the binary economy, some number, N , of an economy's largest prime credit-worthy companies voluntarily have profitably utilized binary financing to acquire in the aggregate some percentage, X , of their capital investments. Figure 2 also assumes that the capital credit insurance is properly priced to pay for those financings that fail to repay the acquisition loans so that N and X are net of those failures. For simplicity, as a first iteration, the figure also assumes that N , X , and the rate of return on capital remain constant throughout the period.

Although beginning slowly, the broadening distribution of capital ownership and income will increase steadily and thereby provide the basis for binary growth. Each year after the initial cost recovery period of the most productive capital, more binary capital will have paid for itself and will be distributing capital income to members of the poor and middle class. Consistent with the conservative assumption of a seven-year capital cost recovery period, Figure 2 shows the steady growth in the number of fully paid annual capital acquisitions. In the eighth year, the first annual acquisition of capital will have paid for itself and will begin paying its full return to the new binary owners. In the ninth year, the second annual capital acquisition will be fully paid for and will therefore begin paying its full return to the new binary owners. In fourteen years, 50% of the annual capital acquisitions will have paid for themselves, and will have begun paying their full annual return to the new binary owners. In the twenty-eighth year, 75% of the acquisitions will have paid for themselves; and so on. In the long run, the linkage between supply (in the form of the incremental productive power of

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capital) and demand (resulting from the widespread market distribution of capital income to consumers) approaches 100%. The more binary financing that is undertaken, the greater the distributional growth effects.

With the prospect of more broadly distributed capital income, to maintain market share in the projected growing economy, producers will have to increase production and productive capacity by more fully utilizing existing capacity and creating more capacity. Because present demand for capital goods is dependent on the anticipation of more future demand for consumer goods and services, the broader pattern of capital acquisition and resultant broader distribution of capital income should be reflected in increased capital spending within the timeframe required to acquire and employ the added capital necessary to increase production to satisfy the additional anticipated consumer demand. Thus, for example, with a capital cost recovery period of seven years, and a capital planning investment horizon of five years, increased incentives for increased capital spending might materialize in the third year.

Percent of Binary Capital Acquisitions that Fully Link Supply with Demand

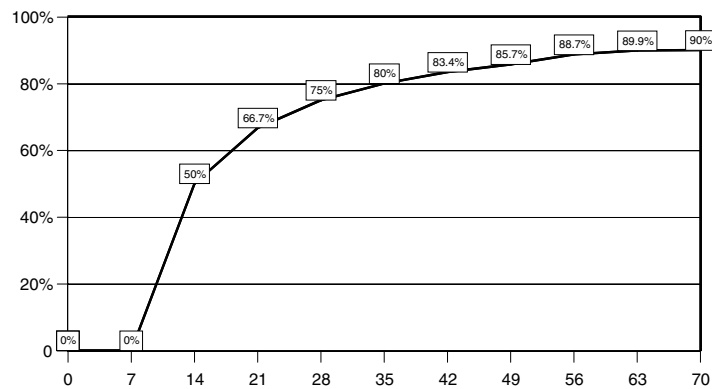


Figure 2

Indeed, the incentives for increased capital investment might start even earlier. First, to the extent that the return on the equity represented by the binary shares exceeds the debt-servicing requirements, income will be available for payment to the binary beneficiaries before completion of the capital recovery.

Second, to the extent that consumers feel wealthier by reason of their capital ownership, their marginal savings and consumption rates will shift towards more consumption even before they begin to receive binary income. Furthermore, the terms of the loan agreements may provide for increasing partial dividend payments directly to the beneficial owners as specified percentages of the loans and shares become fully paid.

The broader distribution of capital ownership also has the capacity to reduce the need for taxes on corporations and individuals. In light of government expenditures and tax-transfer payments that are made to provide benefits to people who cannot afford those benefits (based on their labor earnings), to the extent that those people begin to receive income from capital (after it has paid for its acquisition costs) the government's direct expenditures and tax-transfer payments can be reduced. For example, if people who are receiving tax-transfer payments begin receiving capital income, the government can partially reduce future tax-transfer payments and give a tax credit in the following year to the corporation whose shares are earning that income for welfare recipients. Thus, an economy that provides public corporations with a voluntary, ownership-broadening means to enable people to acquire capital with the earnings of capital also provides a long-term means to reduce taxes, welfare dependence, and deficits.

Moreover, to the extent that welfare recipients begin receiving capital income from the shares they have acquired with the earnings of capital, it would not be proper to call that income "redistribution," because such income exists only to the extent that their capital has paid for itself and then earned net income (after paying all operating expenses, plus reserves for depreciation, research, and development). From a binary perspective, the incremental binary consumer income is neither inflationary nor redistributionary because it exists only as a result of voluntary transactions, and only if the underlying capital has produced goods or services sufficient, first, to return its acquisition cost, and then to pay net income to its owners. The greater and more broadly distributed wealth is the result of increased production as a market response to the broader pattern of capital acquisition.²⁹

²⁹ See Ashford, *The Promise of Universal Capitalism*, *supra* note 2, at 63-76, 79-

VI. ADVOCACY IN SUPPORT OF BINARY PROPERTY RIGHTS FOR
WOMEN AND PEOPLE OF COLOR

To acquire capital with the earnings of capital, public corporations and well-capitalized people use the pre-tax earnings of capital,³⁰ non-recourse corporate credit, insurance and markets to cover risks of business failure, and a friendly monetary policy designed to protect private property. Binary analysis reveals that the same institutions of capitalism that work profitably primarily for the few can be opened to work even more profitably if all people are endowed with competitive capital acquisition rights. Operating without taking anything from existing owners, these institutions could be opened to provide the financial infrastructure to enable corporations to satisfy their credit-worthy capital requirements even more profitably than at present while enabling their employees, consumers, neighbors, and other stakeholders to acquire full-dividend paying common shares of the participating corporations.

Broadening the right to acquire capital with the earnings of capital is an important issue of interest-convergence among the vast majority of people of color, women, poor and working people, and public corporations.³¹ The convergent interest is to open the system of corporate finance to broaden capital acquisition so as to provide the foundation for (1) increasingly widespread prosperity for people who own little or no capital and (2) a growing economy in which public corporations can increasingly employ their productive capacity more fully and profitably.

Through the years, many compassion and justice based

87; Ashford, *Louis Kelso's Binary Economy*, *supra* note 2, at 39-41; Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility*, *supra* note 2, at 1532. See generally ASHFORD & SHAKESPEARE, *supra* note 2.

³⁰ Operating on a foundation of legislation and regulation, well-capitalized people enjoy reserves for depreciation, research and development, and tax credits, which enable owners to replace and modernize their capital and acquire additional capital with the pre-tax earnings of capital. These benefits that enable people to acquire capital with the pre-tax earnings of capital are largely denied to most people who own little or no capital. A laborer cannot depreciate the value of his earning capacity over her working life, but an owner can depreciate the cost of a machine that replaces her. By working to minimize taxable corporate and personal income while maximizing credits and deductions, tax accountants, advisors, and lawyers work to maximize the ability of owners to acquire capital with the pre-tax earnings of capital. Working pro-bono, the same professionals can work to secure the identical capital acquisition rights of people who own little or no capital.

³¹ See Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 523 (1980).

initiatives to help economically disadvantaged people have failed to meet their objectives because of resistance to redistribution. This resistance is based in part on a widely expressed, practical concern, fortified by mainstream economic theory, that redistribution will, or may, destroy incentives for productive activity. This resistance also has a moral dimension based on the belief that assisting the economically disadvantaged should be voluntary rather than compulsory. Not surprisingly, this resistance to redistribution frequently finds some of its most ardent expression from among those whose assets are being (or would be) redistributed against their will. Many attorneys for the economically disadvantaged would concede that the anti-redistribution sentiment is a powerful obstacle to such initiatives. But the binary approach, based on universalizing the right to acquire capital with the earnings of capital, does not require any redistribution of existing assets, but rather merely the opening of the capital markets to all people.

The fact that binary growth does not require redistribution makes it an especially powerful approach for economically advantaged people in many contexts. In the debate regarding Black reparations, for example, a major impediment to progress has been a widely advanced argument that it is wrong to require the present generation (many of whose ancestors were also the victims of exploitation, oppression, and genocide in other countries) to pay for the wrongs of the past for which they have no complicity. Noting that the extension of binary rights requires no redistribution, Professor Anthony Cook has eloquently endorsed the binary approach and advanced its application as a means to achieve just reparations for the institution of slavery, without redistribution, by according to the descendants of slaves priority in the process by which the binary property right is extended to the economically disadvantaged.³² In Professor Cook's view, the inclusive, binary approach is in harmony with the approach of Reverend Dr. Martin Luther King in calling for the "beloved community."³³

Bearing in mind that the duties of corporate fiduciaries flow first to the corporation and secondarily to the shareholders,³⁴

³² See Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959, 999–1014 (2000).

³³ *Id.* at 1013–14.

³⁴ See, e.g., MODEL BUS. CORP. ACT § 8.30(a) (1984); MODEL RULES OF PROF'L

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attorneys for women and people of color should join with attorneys for the economically disadvantaged, consumers, employees and their retirement plans, and other stakeholders. Together they should approach corporate counsel and urge them, within the bounds of their fiduciary responsibilities, to explore and advise their corporate clients of the substantial benefits to corporations and society of the binary ownership-broadening approach to corporate finance.³⁵

The principles of binary economics thus suggest that public corporations have an inherent interest in considering ways to broaden their share ownership. These principles reveal a little understood opportunity for public corporations to enhance their wealth substantially over time by working in concert to open the existing system of corporate finance to enable their employees, consumers, neighbors, and others to acquire capital with the earnings of capital.

According to binary theory, the more broadly capital is acquired in voluntary market transactions, the faster an economy, and large corporations within that economy, will grow. More broadly distributed capital acquisition will:

- (1) distribute more consumer demand, thereby enhancing the market for good and services;
- (2) profitably employ more unutilized capacity (both capital and labor);
- (3) increase capital investment;
- (4) accelerate technological advance;
- (5) enhance employee productivity, consumer loyalty, and general goodwill among neighbors of participating companies and the general population;
- (6) reduce the need for taxation, other forms of redistribution, and associated transactions costs;
- (7) enhance general wealth of most major corporations, their shareholders, and the general population;
- (8) broaden, deepen, and more fully democratize the institution of private property by opening its benefits to more people; and
- (9) strengthen political democracy by opening capital acquisition with the earnings of capital to more people.³⁶

CONDUCT R. 1.13(a) (1983).

³⁵ See Ashford, *supra* note 3; Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility*, *supra* note 2, at 1575–77.

³⁶ See Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social*

Of course, as to some of these benefits, there may be a so-called "collective action problem": no single corporation can be assured of maintaining its share of the overall growth. For example, people encapitalized by one producer may use their additional capital income to buy products of a competitor that has no participation in the binary financing; but as a matter of corporate interest, it is generally better to compete for market share of a faster growing economy than a slower growing, stagnant, or shrinking one.

Moreover, not all of the benefits of binary financing are subject to the collective action problem. For example, financing at least a portion of its capital acquisition by way of the binary ownership-broadening alternative has promise to benefit a corporation by encapitalizing:

- (1) employees (by increasing worker productivity and commitment to the welfare of their employer, and by decreasing pilferage, absenteeism, and monitoring costs);
- (2) consumers of the corporation's product (witness the rationale underlying existing frequent flier programs and other consumer-patronage plans);
- (3) neighbors (with most major corporations owning facilities generally surrounded by poor and working people living nearby, there is the prospect of reduced vandalism and security costs, and better relations with local governments); and
- (4) welfare recipients (as noted above, a corporation that encapitalizes welfare recipients can be given tax credits equal to all or a portion of the transfer payments that are replaced in any year with capital income that is earned from the corporation's shares and distributed to the welfare recipients based on their share ownership).

Given the interest of public corporations in enhancing their wealth and profitability, corporate fiduciaries and counsel may not, consistent with their fiduciary duties, simply ignore the binary arguments that indicate that broadening corporate share

Responsibility, *supra* note 2, at 1539. The importance of widespread ownership to democracy received special attention in KELSO & KELSO, *supra* note 2. Many binary economists believe that the vast majority of people are denied equal protection because they are substantially excluded from government-provided legal protections by which capital markets function to enable well-capitalized people to acquire capital with the earnings of capital. See Ashford, *The Promise of Universal Capitalism*, *supra* note 2, at 99–101; Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility*, *supra* note 2, at 1571–73.

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ownership will achieve these objectives. Rather, due diligence requires a careful, good faith assessment of the likely effect on corporate profitability and corporate wealth that would result from encapitalizing employees, consumers, neighbors, and welfare recipients by way of binary strategies.

Of course, not all shareholders would favor a binary policy of encapitalizing corporate employees, consumers, neighbors, and welfare recipients even if that policy would enhance corporate profitability and wealth. Like other monopolists, those who are members of a group that together enjoy an effective monopoly on capital acquisition with the earnings of capital may prefer slower growth, provided they acquire it all, to greater growth if it must be shared with others. Some existing shareholders may prefer to own a larger portion of a smaller, less profitable corporation than a smaller portion of a larger, more profitable corporation even if in material terms they would be better off with the smaller portion of the larger, more profitable corporation. But there is no reason to assume that all shareholders would be so stingy. Many shareholders might prefer the binary ownership alternative if they were presented with and understood the arguments supporting it. If the binary approach to capital acquisition would benefit the corporation, at least shareholders should be presented the arguments supporting it and given the choice. Directors owe fiduciary duties to the corporation to present profitable corporate opportunities to all the shareholders even if some would oppose it.

CONCLUSION

Binary economics offers an opportunity beyond mainstream thinking for helping the vast majority of women and people of color. It provides important insights regarding the persistence of widespread unmet needs and desires of billions of people alongside the unutilized productive capacity to meet more fully those needs and desires. It also reveals opportunities for achieving enhanced corporate profitability and growth and more broadly shared economic prosperity by way of voluntary, ownership-broadening market transactions.

According to binary theory, the right to acquire capital with the earnings can be extended to growing numbers, and eventually to all people, without redistribution. This inclusive, enriching approach to corporate finance can be achieved with

only modest modifications of the existing system, and its achievement can be greatly hastened if law teachers and lawyers come to see its importance for clients and for economic justice.

It would better serve the interest of the vast majority of most people of color, women, and virtually all people who own little or no capital if their attorneys and advisors would include the question of unutilized productive capacity and the subject of binary economics in their discussions on corporate governance, fiduciary duties, and social responsibility.

In a context in which persistent and growing underutilized corporate productive capacity is widely accepted as fact, public and private concern for the plight of the economically disadvantaged increases. In such a context, it is not at all clear that the substantial corporate wealth-enhancing promise of broadening ownership based on binary theory can simply be ignored (as it has been in the past) based on the authority of mainstream economic theories. These theories have failed to explain or remedy the persistent and growing phenomenon of unutilized productive capacity of public corporations.

Some people start with the premise that proponents of the binary approach to corporate finance have a burden of proving that their proposed reforms have sufficient merit to be implemented. But fiduciaries must start with the recognition that they have an independent, affirmative duty of investigation³⁷—a duty to consider and explore wealth maximizing opportunities even if the reformers' burden of proof has not been met to the satisfaction of economists.

In support of the inclusion of binary economics in the discussion of corporate governance, fiduciary duties, and social responsibility, when judged under the scientific criteria of (1) reasonable assumptions, (2) internal consistency, and (3) descriptive, predictive, and prescriptive power, the binary approach fares at least as well if not better than the classical, neoclassical, and Keynesian economic approaches to unutilized productive capacity and growth, which are explicitly or implicitly relied upon by clients and counsel in the discussion of those topics.

Many counsel for people of color, women, and the

³⁷ *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

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economically disadvantaged (who have undertaken to represent such people regarding their economic interests) frequently advance labor rights, welfare rights, compensation rights, and other corporate policies to address inequities and hardships suffered by their clients. The same is true for many legal advocacy organizations, foundations, and government agencies that have as their objective or mandate advocacy and direct action (1) on behalf of such people and (2) regarding the improvement of legislation and economic policy so as to enhance the economic well-being of such people. But very few such attorneys, organizations, foundations, and agencies advocate the binary approach that would secure for their clients or intended beneficiaries the right to acquire capital with the earnings of capital.³⁸ There is no inherent reason in law to assume such a limited notion of the responsibility of advocacy. The right to acquire capital with the earnings of capital is obviously important to wealthy clients. (From a binary historical perspective, one might say that a major reason for the Cold War was to protect the private right to acquire capital with the earnings of capital.) Then why should that right be excluded by attorneys and other advocates who represent the economic interests of the economically disadvantaged? Attorneys who represent the economic interests of people of color, women, and poor and working people should not limit their advocacy to jobs and welfare, and exclude advocacy regarding the right to acquire capital with the earnings of capital, unless their clients consent to such limitation and exclusion after consultation. Valid consent requires that the clients are given information reasonably sufficient to permit them to appreciate the significance of the matter in question.³⁹ Similar ethical considerations should guide

³⁸ A praiseworthy exception is the Center for Economic and Social Justice, which has for years championed binary economics. See Center for Economic and Social Justice, <http://www.cesj.org> (last visited Dec. 15, 2005). A book by three of its leading members, Norman G. Kurland, Dawn K. Brohawn, and Michael D. Greaney, *CAPITAL HOMESTEADING FOR EVERY CITIZEN: A JUST FREE MARKET SOLUTION FOR SAVING SOCIAL SECURITY* (2004), presents proposed legislation along with a detailed description of one approach to implementing a binary economy.

³⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983) ("A lawyer may limit the objectives of the representation if the client consents after consultation."). *Id.* In the "Terminology" section of the Model Rules, "Consultation denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Thus, it would seem that counsel for poor and working people, people of color, and women who have undertaken to advocate for

the conduct of other advocates who are not strictly governed by attorney rules of professional responsibility.

Unfortunately, at present, the vast majority of counsel and their clients seem wholly unaware that the right to acquire capital with the earnings of capital might be the subject of advocacy for people of color, women, and poor and working people generally. Although the concepts underlying binary economics were first published almost fifty years ago, generations of students of law and economics continue to graduate with no exposure those concepts. Reform of the curriculum in law, economics, and other disciplines within colleges, universities, business schools, and law schools is therefore a matter of urgent concern.

It is true that Louis Kelso, the originator of binary economics, was not an economist. But neither were Adam Smith and John Maynard Keynes. Moreover, although the binary approach is most frequently advanced as an economic theory (because that is the subject which it most significantly modifies), unlike the theories of Smith and Keynes, binary theory is grounded in the private property principles of (1) universal participation, (2) voluntary exchange, and (3) limitation, all of which have deep roots in the work of John Locke and the Anglo-American common law.⁴⁰

Thus, as a matter of long-standing legal principles, binary economics offers important insights that women and people of color and their attorneys would benefit from understanding. It offers at least one new answer to the two questions that began this Article: What else can public corporations do for women and people of color? What else can attorneys for women and people of color do to serve those clients better? Advocacy of the right to acquire capital with the earnings of capital should not be excluded by counsel and advocates in their representation of the

their economic interests would need to provide information about binary economics and its potential for assisting those clients sufficient to enable them to provide valid consent to limit the representation so as to exclude advocacy regarding their rights to acquire capital with the earnings of capital.

⁴⁰ It is significant to note that the following private property principles are also necessary conditions for a competitive market: (1) no barriers to entry, (2) voluntary exchange, and (3) limitations to prevent monopolistic practices. See ASHFORD & SHAKESPEARE, *supra* note 2, at 336–38; KELSO & KELSO, *supra* note 2, at 23–29; Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility*, *supra* note 2, at 1569.

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economic interests of women and people of color without their clients' informed consent.

APPENDIX: BINARY ECONOMICS AND TWELVE QUESTIONS FOR
COUNSEL TO WOMEN AND PEOPLE OF COLOR

Often, serving clients well requires that counsel ask the right question. The following are twelve questions that counsel for the economically disadvantaged rarely ask.

(1) Why does wealth tend to concentrate in market economies even in times of great prosperity?

(2) Why, if markets are basically free and competitive, does vast excess productive capacity persist alongside of widespread unmet needs and wants?

(3) Why does the great promise of the industrial revolution (abundance and leisure) remain unfulfilled for most people?

(4) Why does every generation of students graduate deeper in debt?

(5) Does it matter whether the ownership of capital is highly concentrated or broadly distributed among people?

(6) What is behind the adage, "It takes money to make money"?

(7) What are the growth and distributive consequences of the fact that most capital is acquired with the earnings of capital?

(8) How can more economic opportunity become more broadly distributed?

(9) Is there a practical, efficient way to enable all people to acquire capital with the earnings of capital without taking anything from existing owners?

(10) Will an opening of the capital markets produce substantial distribution-based economic growth?

(11) How can the need for increased economic growth to benefit poor and working people be harmonized with environmental necessities?

(12) What is the relationship between the distribution of ownership and the functioning of a democracy?

Binary economics offers important new insights, answers, and solutions.