AFTERWORD—INCREASING GENDER DIVERSITY ON CORPORATE BOARDS: IT'S GONNA BE A LONG WAR[1]

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In reading the submissions to this symposium, and in listening to the presentations that gave rise to most of them, two points stood out. First, a tremendous disparity exists between the pool of women who are qualified to sit on corporate boards of directors and the number of women who sit on those boards. As Mildred Woryk put it, "[w]orldwide, the number of women on corporate boards is disproportionately low when compared to their representation in the workplace. In countries without legislation enforcing quotas, the rate of increase in women's board representation has been quite slow."[3] Professor Black succinctly summarizes the dismal numbers and slow pace of change in her contribution.[4] Moreover, as Ms. Woryk notes, this phenomenon is not confined to the United States, but appears to be worldwide, at least outside the confines of the Scandinavian countries.[5]

Second, no shortage of ideas exists for increasing the representation of women on corporate boards. Some of these ideas, such as the claim that it makes good business sense to have gender-diversified boards, and the increasing availability of openings and qualified women candidates to fill them because of various demographic trends, seem to suggest that, even without conscious action, the representation of women on boards of directors will increase (albeit inadequately and too slowly). Other ideas, such as more aggressively enforcing already mandated disclosure for business efforts to enhance gender diversity on boards of directors, setting quotas for women directors, and broadening the criteria managers and directors use in nominating candidates for membership on the board, require conscious action on the part of governmental entities and private firms.

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1 The subtitle of this article is derived from the last line of the 1979 Steven Spielberg comic film *1941*. Historical character Major General Joseph W. Stillwell (played by Robert Stack) responds to the assertion by fictional character Sergeant Frank Tree (played by Dan Ackroyd) that "You know, this year wasn't the big year of the war, '41. I think the really big year is going to be 1942." Stillwell sighs and says "It's gonna be a long war." Internet Movie Database, *1941*, *available at* http://www.imdb.com/title/tt0078723/quotes.

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3 Mildred Woryk, *Women in Corporate Governance: A Cinderella Story*, 37 U. DAYTON L. REV. 21, 21 (2011) (footnotes omitted).

4 *See* Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7 (2011).

5 Woryk, *supra* note 3, at 22–24.

To these two points, I would like to add a third one. The various trends and actions are either infeasible in the United States, or will have, at best, a slow and marginal effect in increasing the representation of women on corporate boards of directors. Slow, incremental progress in the area is all that can reasonably be expected.

TREND—THE REPRESENTATION OF WOMEN ON CORPORATE BOARDS OF DIRECTORS WILL INCREASE AS BUSINESSES SEE "IT MAKES GOOD BUSINESS SENSE" TO IMPROVE THE GENDER DIVERSITY OF THEIR BOARDS.

Some who advocate increasing the gender diversity of corporate boards claim that doing so will enhance corporate performance in two respects. First, it will improve corporate governance. Second, it will enhance bottom-line profitability of the business. Under this line of reasoning, corporations will put more women on their boards of directors simply out of self-interest. This conclusion assumes that managers will act as rational maximizers of their corporation's efficiency and profits, an assumption that may or may not be true. Even assuming that corporate managers do largely seek to enhance efficiency and profitability, the problem with this conclusion is that the relationship between board gender diversity and corporate governance and profitability has not been firmly established.

There are theories and empirical studies that do indeed suggest that increased gender diversity on the board is associated with improved corporate governance and enhanced profitability.[6] Those arguing for increasing such diversity are quite fond of citing such theories and studies.[7] However, other theories and studies show either no relationship between gender diversity on the board and good corporate governance and enhanced profitability, or even show a negative relationship between them.[8]

As Ms. Woryk, Professor Black, and other scholars have recognized, the fairest assessment of the conflicting theories and studies is that the evidence on whether a link exists between increased gender diversity on boards of directors and improved corporate governance and

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[6] *See, e.g.*, Frank Dobbin & Jiwook Jung, *Board Diversity and Corporate Performance: Filling in the Gaps: Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 813–20 (2011); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* 5–6, 10–15 (Rock Ctr. for Corp. Governance, Working Paper Series No. 89, 2010).

[7] *See, e.g.*, Judy B. Rosener, *Women on Corporate Boards Make Good Business Sense*, DIRECTORSHIP, May 2003, at 5 (citing study by Conference Board of Canada on female corporate board members), *available at* http://www.womensmedia.com/lead/87-women-on-corporate-boards-makes-good-business-sense.html; *Statement on Corporate Board Diversity,* INTERORGANIZATION NETWORK, http://www.ionwomen.org/wp-content/uploads/2011/06/IONs-Policy-Statement-on-Corporate-Board-Diversity1.pdf (last visited Sept. 18, 2011).

[8] Dobbin & Jung, *supra* note 6, at 815–19; Rhode & Packel, *supra* note 6, at 8.

enhanced profitability is inconclusive.[9] Given the inconclusive nature of the evidence, those disinclined to put women on boards of directors will not likely be rushing to do so in search of better corporate governance and higher profits.

TREND—THE CONFLUENCE OF AN INCREASING NUMBER OF WOMEN MANAGERS AND A DEMOGRAPHIC LABOR SHORTAGE WILL FORCE FIRMS TO PUT MORE WOMEN IN TOP POSITIONS AND ON THE BOARD OF DIRECTORS TO ATTRACT QUALIFIED WOMEN.

In her contribution, Ms. Woryk suggests that demographics and competition for qualified managers will combine to increase the number of women in boardrooms; she writes:

> The emergence of well-educated and experienced women is juxtaposed with an upcoming talent shortfall projected in Europe by 2040, when a dearth of twenty-four million skilled workers is forecast. The United States and Japan are also facing flattening birth rates; hence, employers and planners are already strategizing for optimization of the skilled workforce. The aging of the workforce in developed countries combined with the rise of rapidly developing economies driving up demand for skilled professionals will, by necessity, increase women's access to the boardroom.[10]

Even if the demographic projections prove to be accurate, it does not necessarily mean that we will see more women on corporate boards of directors. First, as Professor Jayne Barnard points out, the size of boards in publicly held companies has been decreasing.[11] Thus, simply decreasing the size of the board may be an alternative to the inclusion of more women.[12]

Second, and more importantly, while the pool of women managers may continue to grow, social and cultural factors may limit the number of women in the pool from which directors are typically drawn—top managers and executives of corporations. In many corporations, reaching that pool requires huge sacrifices of time and effort, sacrifices that may come at the expense of family and other personal relationships. In our society, the reality is that women still devote substantially more time and effort to family care-giving than men, although the gap has narrowed in recent years. That reality may render women unable or unwilling to make the sacrifices necessary to jump into the directorial-candidate pool. The court's opinion in

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[9] Woryk, *supra* note 3, at 25; Black, *supra* note 4, at 20; Rhode & Packel, *supra* note 6, at 15.

[10] Woryk, *supra* note 3, at 36 (footnotes omitted).

[11] Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 711–12 (2007).

[12] *Id.* at 712.

the recent case of *Equal Employment Opportunity Commission v. Bloomberg* puts the situation rather bluntly:

> Former General Electric CEO Jack Welch stated, "There's no such thing as work-life balance. There are work-life choices, and you make them, and they have consequences." Looking at it purely from a career-or compensation-focused point of view, Mr. Welch's view reflects the free-market employment system we embrace in the United States, particularly for competitive, highly paid managerial posts such as those at issue here . . . . The law does not mandate "work-life balance." It does not require companies to ignore employees' work-family tradeoffs - and they are tradeoffs - when deciding about employee pay and promotions . . . .
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> In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences. But those consequences occur for anyone who takes significant time away from Bloomberg, not just for pregnant women and mothers. To be sure, women need to take leave to bear a child. And, perhaps unfortunately, women tend to choose to attend to family obligations over work obligations thereafter more often than men in our society. Work-related consequences follow. Likewise, men tend to choose work obligations over family obligations, and family consequences follow. Whether one thinks those consequences are intrinsically fair, whether one agrees with the roles traditionally assumed by the different genders in raising children in the United States, or whether one agrees with the monetary value society places on working versus childrearing is not at issue here.[13]

Perhaps the allocation of household and familial obligations between men and women will continue to become more even. Perhaps businesses will begin to believe that "all out dedication" retards business efficiency and profitability. Even if these changes occur, they are likely to occur extremely slowly; the demographic and labor-market-trends that Ms. Woryk describes are not likely to increase the representation of women on corporate boards of directors, except perhaps, in the very long run.

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[13] Equal Emp't Opportunity Comm'n v. Bloomberg L.P., 778 F. Supp. 2d 458, 485–87 (S.D.N.Y. 2011).

ACTION—NORWEGIAN-STYLE QUOTAS FOR THE INCLUSION OF WOMEN ON BOARDS OF DIRECTORS

Norway, Iceland, and other countries in Europe have adopted formal quotas for gender diversity on corporate boards of directors.[14] While such a move would be efficacious in diversifying corporate boards of directors here in the United States, it is a complete non-starter both politically and legally. As Gregg Smith, Managing Director of Boyden Global Executive Search, succinctly noted:

> Culturally, quotas will not be successful in the United States . . . . American culture is one where we see ourselves as members of a meritocracy. We believe whole-heartedly that anyone can grow up to be president. President Barrack [sic] Obama's election is proof positive to many that anyone can get to the top, if they are prepared and work hard. The other barrier to using quotas in America is the fact that courts have not looked favorably on them, except as a remedy for the most blatant forms of discrimination.[15]

ACTION—IMPROVE REQUIRED DISCLOSURES OF CORPORATE EFFORTS TO ENHANCE GENDER DIVERSITY ON BOARDS OF DIRECTORS.

In 2009, the Securities and Exchange Commission ("SEC") adopted a requirement that beginning on February 28, 2010, issuers subject to the SEC's proxy rules must disclose:

> [H]ow, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy[.][16]

The SEC's rule does not define the term diversity.

As pointed out in both Professor Black's and Professors Hazen and Broome's contributions to the present symposium, the results of the new disclosure mandate have been disappointing.[17] Professor Black, in

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[14] See Secretary-General of the European Comm'n, *Commission Staff Working Paper - The Gender Balance in Business Leadership* 10–11 (March 3, 2011), *available at* http://register.consilium.europa.eu/pdf/en/11/st07/st07231.en11.pdf, for a description of the formal quotas adopted in various European nations.

[15] Gregg Smith, *Could Gender Quotas Work in Corporate America?,* BLACK ENTER. (May 25, 2010), http://www.blackenterprise.com/2010/05/25/could-gender-quotas-work-in-corporate-america/.

[16] 17 C.F.R. § 229.407 (2011).

[17] Black, *supra* note 4, at 14; Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 U. DAYTON. L. REV. 39, 74 (2011).

surveying the disclosure of a limited number of Fortune 500 companies (including ten with both female CEOs and 25% or more female director), found that:

> None of them stated that it had a formal policy on diversity. Diversity was most commonly described as diversity of backgrounds, skills, experiences, and perspectives. Furthermore, several did not explicitly identify gender as a factor of diversity. After personal attributes (integrity, independence, etc.), business expertise was most frequently identified as important. The discussions about the importance of diversity are even more abbreviated or formulaic at companies with zero women directors, the group of companies that we might hope would recognize the need to change.[18]

The results put forth by Professors Hazen and Broome were somewhat more encouraging, but still disappointing. For example, the number of Fortune 100 proxy issuers mentioning gender in their proxy materials involving the nomination of directors rose from nine to forty-one after the effective date of the new rule.[19] While this increase would seem to represent substantial progress, it still leaves a majority of Fortune 100 proxy issuers who do not even mention gender in discussing the consideration given to diversity in selecting nominees for the board of directors.[20]

Of course, it may be too early to see any positive effect of the current SEC diversity disclosure initiatives and impossible to predict the impact of moves to strengthen those initiatives. Nonetheless, even if those initiatives are clarified and strengthened, the end result may be a group of reporting issuers who pay lip service to enhancing gender diversity on their boards, but who make no real efforts to do so.[21]

ACTION—GET BOARDS OF DIRECTORS TO BROADEN THEIR CRITERIA FOR SUITABLE CANDIDATES FOR THE BOARD.

One suggestion for increasing the number of women on corporate boards is for boards to broaden their criteria for potential board nominees.

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[18] Black, *supra* note 4, at 15.

[19] Hazen & Broome, *supra* note 17, at 69.

[20] *Id.*

[21] Indeed, one opponent of the SEC's diversity initiative has suggested that firms simply resort to boilerplate disclosures to meet the new rule. He writes:

> At the end of the day, it would seem that boilerplate disclosure, such as "The nominating committee of the Board takes into account the diversity of experience of Board candidates, and determines how that experience will improve the function of the Board," would be sufficient to sidestep the burdens of this new regulatory overreaching.

J.W. Verret, *Diversity for Corporate Boards*, TRUTH ON THE MARKET (Dec. 23, 2009), http://truthonthemarket.com/2009/12/23/diversity-for-corporate-boards/.

Specifically, boards have traditionally looked upon former CEOs of major corporations as the prime pool for board candidates.[22] In recent years, the pool has been broadened somewhat to include those with experience in other top-level corporate managerial positions such as CFOs and CIOs.[23] Even that broadened pool is disproportionately male. Some of those who support increasing the number of women on boards of directors urge directorial-nominating committees to think outside the box by looking to candidates who have achieved senior positions in law or accounting, or who serve on the boards of not-for-profit corporations, or who have managerial experience in government. Whether the attitudes and habits that make one a top lawyer or accountant are useful in being a director of a corporation is an open question. Whether the managerial skills developed in the government or non-profit worlds are transferable to the world of for-profit corporations is also an open question. Regardless of how these questions are ultimately answered, getting corporate board members to broaden their lists of potential candidates for membership away from the pool of top managers of for-profit corporations will be very difficult.

The reason why it will be difficult to coax directors to look outside the traditional nominee pool of top corporate managers is very simple—it runs contrary to their self-interest. In a publicly-held corporation, incumbent management generally dominates the board. Professor Donald Langevoort describes the situation as follows: "[B]oards are dominated by an inner circle of directors with a preference for the status quo and close social and political ties to the CEO and the senior management team."[24] A large majority of board members were themselves CEOs or members of the senior-management team at various corporations.[25] When selecting nominees for new board members, the incumbent members of the board, as well as the CEO and senior-management team, wish to select members with whom they are comfortable. This does not just mean that they want new members who look like them in terms of gender, age, ethnicity, etc.; they want members who will understand what it is like to be in their position, and be cognizant and understanding of the challenges they face. They want someone who has walked a mile in their shoes, i.e., someone who was a CEO or member of the senior-management team at a for-profit corporation. Someone who has not had such experience may not understand why profit targets have not been met, major plans have to be shelved, or why top managers should get increases in compensation even if the corporation is not doing well. While directors responsible for nominating new members to the board may not be quite so consciously cynical or crass in their thinking, the

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[22] Rhode & Packel, *supra* note 6, at 15–16; Barnard, *supra* note 11, at 707.

[23] Barnard, *supra* note 11, at 707.

[24] Donald C. Langevoort, *Board Diversity and Corporate Performance: Filling in the Gaps: Commentary: Puzzles About Corporate Boards and Board Diversity*, 89 N.C. L. REV. 841, 848 (2011).

[25] Barnard, *supra* note 11, at 707.

need to appoint someone who understands their position is likely to influence them strongly and keep them from looking outside the traditional pool for corporate directors.

CONCLUSION

A person reading this essay might get the idea that none of the aforementioned trends or plans will have any effect on getting more women on to boards of directors, and that trying to do so is a fool's errand. This is not the case. I merely mean to suggest that, individually, these trends and strategies will not have a dramatic short-term effect. Together with other tactics and strategies they may, however, lead to a change in social attitudes. They may cause directors to internalize the notion that society expects women to play a significant role on the boards of corporations, and that a strong case exists for increasing gender diversity on corporate boards based on notions of fairness, justice, equity, and equal opportunity. We may reach the point where a director will believe that it is just as embarrassing and inappropriate for him to serve on an all-male corporate board as for a politician to belong to a club that excludes women or minority members. That is the goal, but as the title of this essay suggests, it is likely to take a great deal of time and struggle to reach it.