PERSPECTIVES ON GENDER AND BUSINESS ETHICS: WOMEN IN CORPORATE GOVERNANCE

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Those arguing for equality among the sexes are plagued by an important question: What does equality mean? In the employment context, one tempting answer is to use a statistical approach based on the composition of society. Under such an approach, women and men currently comprise roughly equal portions of the population, and both sexes should have roughly equal representation in all sectors of the job market.

Although this type of approach provides an easy and neat answer as to what constitutes equality, it is flawed for two main reasons. First, it denies the unique and important contribution that many women make to society via reproduction. Reasonable accommodations should obviously be provided in the workplace for pregnancy, and at least one academic commentator has even gone so far as to suggest that pregnancy should be treated as a temporary disability under the Americans with Disabilities Act.[2] Even if pregnancy does or should fit within the ambit of the Americans with Disabilities Act, however, reproduction is not a disability in the traditional sense because it allows for the continuation of the human race.[3] Women who opt-out of traditional labor markets should not be marginalized for this choice, nor should they be ignored in thinking about statistics relating to the composition of the job market. Similarly, women who opt for a work-life balance that accommodates time split between work and family should not be marginalized or ignored either.

A second and related flaw to using a statistical approach based solely on the composition of society is that it reinforces male notions of success. Advocating for roughly equal presence of women in all sectors of the job market suggests that women can be successful only by attempting to achieve the same goals as men. Remarkably, this undercuts the quest for freedom and right of self-determination that fueled the equal rights

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[2] *See* Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, B.C. L. REV. (forthcoming 2012).

[3] *See* Pamela Laufer-Ukeles, *Cross-Dressers with Benefits: The Role of Female Combat Soldiers in U.S. and Israel*, U. BALT. L. REV. (forthcoming 2012) ("Categorizing women's differences as disabilities fails to appreciate the reality of women's lives. Women are not disabled when they are pregnant; they are reproducing . . . .").

movement. The fact that women deserve to be able to compete on equal footing with men is beyond peradventure. As individuals, however, women also deserve to determine their own definition of success that may not fit within traditional male ideals.

Even with all of the issues that come along with trying to define equality, women remain woefully underrepresented in corporate governance. In large, publicly-held corporations in the United States, the number of female chief executive officers, other senior executives, and board members remains remarkably low. Determining the reasons for and effects of the underrepresentation of women in corporate governance is both difficult and complex.

On February 25, 2011, the Project for Law and Business Ethics at the University of Dayton School of Law hosted *Perspectives on Gender and Business Ethics: Women in Corporate Governance*.[4] This symposium brought together legal academics, practicing attorneys, corporate directors, and other individuals to reflect on the role of women in the governance of corporations and other business entities.[5] Participants in the event either authored or co-authored the essays that follow this introduction.

Each essay offers a unique perspective on women in corporate governance. In *Stalled: Gender Diversity on Corporate Boards*, Professor Barbara Black argues that progress in increasing the number of female executives and women on corporate boards has come to a standstill.[6] After reviewing a variety of statistics on the low percentage of women who are chief executive officers, other senior executives, and board members of large, publicly-held companies in the United States,[7] Professor Black explains that both private initiatives and government efforts have fallen short in increasing the presence of women in corporate governance.[8] She suggests that increased involvement by the United Securities and Exchange Commission in reviewing companies' diversity policies, the convening of blue ribbon panels by securities exchanges to develop best practices for improving board diversity, and requiring companies to interview at least one female candidate for all executive and board positions may help jumpstart gender diversity in corporate governance.[9] She concludes in the absence of "aggressive intervention" that progress toward "equal opportunity" for

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[4] *Women in Corporate Governance Symposium*, UNIV. OF DAYTON SCHOOL OF LAW, http://www.udayton.edu/law/academics/law_and_business_ethics/symposia/women_in_corporate_governance.php (last visited Dec. 16, 2011).

[5] *Id.*

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

[7] *Id.* at 8–9.

[8] *Id.* at 9–17.

[9] *Id.* at 17–19.

women will not occur.[10]

Ms. Mildred Woryk, in *Women in Corporate Governance: A Cinderella Story*, expands the discussion by providing statistics regarding the representation of women on corporate boards in industrialized and emerging economies throughout the world.[11] Similar to the United States, with few exceptions, women are underrepresented on corporate boards around the globe.[12] Ms. Woryk then explores domestic and international legislative efforts to increase the number of women participating in corporate governance.[13] She admits that the financial value of adding women to corporate boards remains "inconclusive,"[14] and that the issue has largely been ignored by the corporate social responsibility movement.[15] However, she believes based on changing cultural and demographic trends that the representation of women in corporate governance will continue to improve.[16]

Next, in *Board Diversity and Proxy Disclosure*, Professors Thomas Lee Hazen and Lissa Lamkin Broome explore the impact of federal proxy regulation on gender and minority diversity of corporate boards.[17] After discussing a variety of different approaches to increasing board diversity,[18] Professors Hazen and Broome focus on the role of proxy regulation, including analysis of both regulation of shareholder proposals and of required disclosure of board diversity nomination policies.[19] They then turn their attention to the SEC's 2009 amendment of Item 407(c) of Regulation S-K, which now requires companies subject to the SEC's proxy rules to

> Describe . . . whether, and if so how, 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.[20]

Professor Hazen and Broome then detail the results of their study to

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10 *Id.* at 20.

11 Mildred Woryk, *Women in Corporate Governance: A Cinderella Story*, 37 U. DAYTON L. REV. 21, 22–24 (2011).

12 *Id.*

13 *Id.* at 26–29.

14 *Id.* at 25.

15 *Id.* at 29–33.

16 *Id.* at 33–36.

17 Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 U. DAYTON L. REV. 39, 41 (2011).

18 *Id.* at 41–44.

19 *Id.* at 44–59.

20 17 C.F.R. § 229.407(c)(2)(vi) (2011).

determine the impact of the amendment of Item 407(c), which became effective on February 28, 2010.[21] Based on their research, they state that the amendment has proven to be "a positive step that may increase discussion of diversity issues in board nominating committees."[22] They argue, however, that the SEC needs to provide more interpretive guidance for the amendment to fuel additional disclosure and discussion regarding the issue.[23]

In *The Last Male Bastion: In Search of a Trojan Horse*, Professor Joan MacLeod Heminway seeks to highlight the contributions of women to corporate governance by reframing and reconceptualizing the discussion from one focused on individualized accomplishment to one focused on team production.[24] Professor Heminway begins with the presumption that women in corporate governance "add something new to the mix" and that a corporation that fails to capitalize on this resource may negatively impact its profitability.[25] She then argues that traditional concepts of corporate governance, which focus on individual achievement, may be preventing women from obtaining governance positions.[26] Professor Heminway proposes that if a "team production (or another communitarian-oriented) theory of the corporation" is used that the value of women in corporate governance will be more easily recognized.[27] She then details various empirical studies that suggest that the gender composition of management teams can impact team performance.[28] Professor Heminway admits that more study is needed regarding team production and women in corporate governance.[29] Her article, however, advances the discussion and recognition of the contributions of women in the governance of corporations and other business entities.

Finally, in *Increasing Gender Diversity on Corporate Boards: It's Gonna Be a Long War*, Professor Harry Gerla argues that even if women are grossly underrepresented in corporate governance and even though no shortage of good ideas exist for increasing their representation in governance positions, that "[s]low, incremental progress in the area is all that can reasonably be expected."[30] Professor Gerla notes that studies are inconclusive as to whether gender diversity increases profitability,[31] and he also notes that decreasing board sizes and prevailing cultural norms will

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21 Hazen & Broome, *supra* note 17, at 59–73.
22 *Id.* at 73.
23 *Id.* at 73–74.
24 Joan MacLeod Heminway, *The Last Male Bastion: In Search of a Trojan Horse*, 37 U. DAYTON L. REV. 77, 78–79 (2011).
25 *Id.* at 80.
26 *Id.* at 84–85.
27 *Id.* at 85.
28 *Id.* at 86–89.
29 *Id.* at 89.
30 Harry S. Gerla, *Increasing Gender Diversity on Corporate Boards: It's Gonna Be a Long War*, 37 U. DAYTON L. REV. 91, 92 (2011).
31 *Id.* at 92–93.

likely slow or prevent increased representation of women in corporate governance.[32] Although countries in Europe, such as Norway and Iceland, have been willing to adopt quotas requiring gender diversity on corporate boards, Professor Gerla believes that the political climate in the United States will not allow for the adoption of such quotas in this country.[33] Professor Gerla also questions whether new diversity policy disclosure requirements and other efforts to get boards to expand their criteria for suitable candidates will be effective because boards tend to be dominated by incumbent managers who benefit from and are comfortable with the status quo.[34] Ultimately, Professor Gerla agrees that "a strong case exists for increasing gender diversity on corporate boards based on notions of fairness, justice, equity, and equal opportunity," but his essay makes clear that it will likely take "a great deal of time and struggle to reach [that goal]."[35]

Even though Professor Gerla is correct that reaching anything resembling equality in terms of corporate governance will likely take a substantial amount of time and effort, the burden should now shift to companies to justify why they are failing to place women in governance positions. As Professor Black writes, "The number of women, including professional women, in corporate America, should put the onus on the business community to explain their failures to nominate more female candidates for board positions."[36] In fact, directors and other mangers may be in breach of their fiduciary duties of care, loyalty, good faith, and disclosure unless they direct their attention to the issue and answer to their equity holders. As Professor Heminway argues, "[T]o best meet its obligations under the duties of care and loyalty (especially the subsidiary duty of good faith), the board must endeavor to understand how women may—not merely individually, but also as a group and as part of a group—add value to the executive team and overall corporate team in that firm."[37] Incumbent management and directors should be forced to live up to their duties to their firms.

As detailed at the beginning of this essay, defining equality and creating an environment of equal opportunity are difficult tasks. But companies now have the obligation to justify their behaviors. Professor Gerla is correct that "it's gonna be a long war" to achieve equality in corporate governance. The tide has turned, however, and advances will continue to be made.

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32 *Id.* at 93–94.
33 *Id.* at 95.
34 *Id.* at 95–98.
35 *Id.* at 98.
36 Black, *supra* note 6, at 20.
37 Heminway, *supra* note 24, at 86.