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# GENDER DIVERSITY ON CORPORATE BOARDS: HOW RACIAL POLITICS IMPEDES PROGRESS IN THE UNITED STATES

Cheryl L. Wade\*

The excellent conference organized by Darren Rosenblum comparing global approaches to board diversity inspired me to think about how progress in this context has unfolded in the United States. Even though the issue of diversity on corporate boards has become a global issue, few U.S. boards have moved beyond mere tokenism when it comes to female directors. One reason for the lack of diversity among corporate directors is that board selection has been based on membership in a particular network.<sup>1</sup> This essay, however, focuses on the persisting problem of discrimination—a more invidious explanation for the fact that very few corporate boards reflect the gender and racial diversity of their workers, consumers, and the communities in which they do business.

If asked, most business leaders would acknowledge the historical discrimination that women and people of color have faced in the U.S. They understand that the historical underrepresentation of women and people of color at the top of corporate hierarchies relates to outdated notions about their

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<sup>1</sup> Regina Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L.J. 585, (2011), “[T]he issue is not a dearth of board-ready diversity candidates, but that board candidates are often within the nominating committee’s or CEO’s ‘circle of acquaintance’; those committees and acquaintanceships just do not include many qualified women or people of color”; Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 149 (2010), “[N]ot only does being a board member often depend upon one’s social and professional connections, but remaining on the board also depends upon ensuring that those connections are not damaged.”

place in society. Yet, many business leaders seem complacent about the continuing homogeneity of most corporate boards. The fact that some boards are all white and all male, and that most boards remain predominantly white and male, is rarely discussed. And, the discussions that do occur are not about confronting discrimination. The discourse is all about embracing diversity. This diversity discourse that ignores the continuing problem of twenty-first century discrimination is prevalent not just in the business setting but in American culture in general.

I call this rhetorical focus on diversity “diversity doublespeak”. This focus allows business leaders to ignore the discrimination that persists in corporate culture. Doublespeak is a phenomenon described in a book written by William Lutz entitled, “Doublespeak: How Government, Business, Advertisers, and Others Use Language to Deceive You.”<sup>2</sup> Lutz defined “doublespeak”:

Doublespeak is language which pretends to communicate but really does not. It is language which makes the bad seem good, something negative appear positive, something unpleasant appear attractive, or at least tolerable. It is language which avoids or shifts responsibility; language which is at variance with its real and its purported meaning; language which conceals or prevents thought. Doublespeak is language which does not extend thought but limits it.<sup>3</sup>

Diversity doublespeak focuses on happy, positive concepts – inclusion, access, affirmative action, equal opportunity – and ignores persisting discrimination issues. Diversity doublespeak sanitizes the conversation and obfuscates the continuing problems of racism, sexism and discrimination. Lutz says that doublespeak is deceptive in that, by merely pretending to communicate, the speaker can make bad concepts seem good.<sup>4</sup> Diversity doublespeak does the same thing. It makes the bad (continuing discrimination) seem good (diversity efforts).

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<sup>2</sup> See WILLIAM LUTZ, *DOUBLESPEAK: FROM REVENUE ENHANCEMENT TO TERMINAL LIVING: HOW GOVERNMENT, BUSINESS, ADVERTISERS, AND OTHERS USE LANGUAGE TO DECEIVE YOU* (1989).

<sup>3</sup> William Lutz, *Doublespeak*, PUB. REL. Q. 25, 26 (Winter ed. 1988-89), available at <http://users.manchester.edu/FacStaff/MPLahman/Homepage/BerkebileMyWebsite/doublespeak.pdf>.

<sup>4</sup> *Id.*

“Doublespeak shifts responsibility”<sup>5</sup> said Lutz. Diversity doublespeak shifts responsibility from business leaders. We see this shift in responsibility when corporate officers and directors explain that their senior executive ranks and boardrooms are not diverse because the pool of women and people of color appropriate for service is small. This is a pipeline problem, they lament.<sup>6</sup>

Lutz explains that “[d]oublespeak is language which does not extend thought but limits it.”<sup>7</sup> In the diversity context, happy talk focusing solely on inclusion, access, diversity and equal opportunity limit thought about the continuing problem of discrimination. Doublespeak, according to Lutz, reflects incongruity between how facts are perceived compared to what they really are.<sup>8</sup> The same is true for diversity doublespeak. Companies say that diversity is a priority even while they fail to confront persisting discrimination. Diversity doublespeak precludes realistic discussion about racism, sexism and discrimination.<sup>9</sup>

Business leaders have not moved beyond superficial and mindless rhetoric about diversity. They cannot address the problem of twenty-first century discrimination unless they acknowledge it. And there can be no acknowledgement of the problem if no one articulates it. Diversity doublespeak allows companies to avoid responsibility for enduring discrimination within the firm. When managers and boards talk about their diversity efforts and ignore discrimination, racism and sexism, their firms’ reputations glisten while the women and people of color they impact suffer.

Diversity doublespeak inspires superficial thinking about the issues of racial and gender homogeneity. One glaring example is the tendency to use the term “diverse candidate”.

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<sup>5</sup> *Id.*

<sup>6</sup> Twitter’s chief technology officer, Adam Messinger, commented on the company’s priority to hire more women engineers observing that there “is definitely a supply-side problem.” Claire Cain Miller, *Mostly Male Cast*, N.Y. TIMES, Oct 5, 2013. The chief executive of a Silicon Valley recruiting firm proclaimed that the “issue isn’t the intention, the issue is just the paucity of candidates.” *Id.*

<sup>7</sup> Lutz, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> See Cheryl L. Wade, “We Are an Equal Opportunity Employer”: *Diversity Doublespeak*, 61 WASHINGTON & LEE L. REV. 1541 (2004).

What is a diverse candidate? Diverse is defined as “distinct in kind.”<sup>10</sup> But the term, diverse candidate, is obfuscating. What, in particular, makes the candidate diverse? Is she a woman? Is the candidate of color? Does the candidate bring a skillset that has been lacking on a particular board? Using this term obscures the goals of a search for nominees to the board. The language of diversity itself is problematic if one is interested in gender and racial diversity.

In the U.S., we ask for diversity. We ask business leaders to diversify. Discussions that focus only on diversity are problematic because they make women and people of color supplicants, and business leaders become their benefactors. Women employees and suppliers, and employees and suppliers of color must *ask* for inclusion, equal opportunity, and diversity. As supplicants, women and people of color risk the possibility that corporate managers will talk about diversity but employ only cosmetic efforts that fail to achieve racial equity. Corporate managers may choose to grant requests for diversity, access, or inclusion, or they may ignore them. Because of the law prohibiting discrimination, this element of choice does not exist if the focus is on antidiscrimination measures. Corporate officers and employers *must* comply with antidiscrimination law, and corporate boards owe a duty to monitor such compliance.

There are other problems with diversity discourse in the business setting. The discussions about diversity are overly broad to the point of confusion. Business actors frequently ignore the important distinctions between the goal of racial and gender diversity, and the goal of an effective board comprised of members with a wide array of experiences, skills and background. There is a huge difference between the two goals. Looking for board members who bring unique skills and perspectives is not a new goal. Looking for diversity of skills and background is imperative. Board selection has been based on membership in a particular network, but is has also been based on a search for the person with the skills that will meet the board’s needs. The problem of racial and gender homogeneity on boards, however, is a more recent discussion and endeavor. The goals of racial and gender diversity are different. These kinds of diversity efforts should be in place in order to counter-

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<sup>10</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

act present, implicit biases. These efforts are not solely about past discrimination.

It is important to understand differences in the impact of racial and gender diversity, on the one hand, and skills, background and experience diversity on the other. Having more women and people of color on boards will not mean that boards will engage in better governance or best practices. The presence of women or people of color may not maximize shareholder wealth. It is very possible that women and people of color will not provide viewpoint diversity. To expect them to provide a particular viewpoint reduces the two complex groups to stereotyped monoliths. In fact, the frequent expectation that women and people of color speak out about diversity issues is a type of invidious exploitation. Race and gender diversity are important not because they will improve corporate governance or make companies more profitable. Diversity efforts that focus on increasing the numbers of women and people of color in the business setting, and ensuring their equitable treatment once they are included, reflect our national policy against discrimination.

Do disproportionately low numbers of women and people of color on corporate boards result from present day discrimination? Or, are the low numbers just a continuing legacy of past discrimination. Do the numbers reflect disparities in education and qualifications? We will never know the answers to these questions unless boards and those who advise them move beyond the superficial rhetoric of diversity and think more deeply about these issues.

#### CRITICAL LEGAL STUDIES AND MODERN-DAY RACISM AND SEXISM

Scholars have noted the qualitative changes in racism and sexism that occurred near the end of the twentieth century and in the first years of the twenty-first century.<sup>11</sup> While there are still instances of blatant, overt racism and sexism, most modern-day discrimination is subtle, implicit, or unconscious. The impediments to more diverse boards are the result of covert or

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<sup>11</sup>Tori DeAngelis, *Unmasking 'racial micro aggression'*, 40 American Psychological Association (2009); Valerie Vevan & Mark Learmonth, "I wouldn't say it's sexism, except that...It's all these little subtle things": *Healthcare scientists' accounts of gender in healthcare science laboratories*, Social Studies of Science.

implicit racism, sexism or discrimination, and U.S. law, policy, and discourse reflect the belief that discrimination is wrong—even if it is subtle, unconscious, or implicit. This is why a business case for diversity is inappropriate.<sup>12</sup> The business case for diversity is the idea that having more women and peo-

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<sup>12</sup> Professor Lisa Fairfax questioned the appropriateness of making a business case for diversity. She suggests that the social or moral case for diversity would not have to rely on empirical evidence that diversity improves a company's bottom line. I agree with Fairfax, but making a social or moral case for diversity is not a simple proposition. It is easy to underestimate the difficulty of making such a case. Making the social or moral case challenges the routinely cited and fundamental tenet of corporate governance that for-profit corporations exist to maximize shareholder wealth. Many of the business leaders to whom the moral and social case will be made do not envision corporations as social or moral actors. This is a difficult challenge with which diversity advocates must grapple.

One reason why it is difficult to make the moral case for diversity is that business leaders conclude that the U.S. is now post-racial and post-feminist. There is a failure to understand that discrimination and bias are present-day problems. The business case for diversity is also problematic because of negative stereotypes that prevent some business leaders from thinking that women and people of color will have a positive impact on a company's success. This is even more problematic in the context of race because stereotypes are more powerful since most business leaders live separately from people of color. They do, however, live with and have empathy for white women. They know their stories. These are the stories of their sisters, wives, daughters, and mothers.

The most basic challenge for diversity proponents is to discover a way to inspire corporate boards and nominating committees to move beyond the superficiality that burdens most diversity discussions. Business leaders push back when the topic turns to corporate social responsibility and good citizenship. For-profit firms exist to profit shareholders, they argue. But, every company speaks about the good of other constituencies. All business leaders know that doing well for stakeholders' benefits shareholders in the long run. Treating employees well, being fair to consumers and communities impacted by corporate activity, benefit shareholders. Before corporate directors make any decision relating to diversity, whether it is a decision about disclosure or implementation, they must consider why women and people of color are still underrepresented on corporate boards in the twenty-first century. Complacency about almost all white boards, and predominantly all male boards, suggests that there is something wrong with people of color.

Typically, there are few qualified women and people of color in the pipeline. Most large publicly held corporate boards nominate candidates for membership from a small pool of senior executives who will bring the business experience and financial acumen needed for boards to be effective. There are relatively few women and minorities in this pool. The challenge for diversity advocates is to inspire existing board members to ask several questions that dig more deeply into the problem of homogenous boards. Why are so few women and minorities in the pipeline? Why are the numbers of women and minorities among senior executives so low? What does it mean to be a qualified director?

ple of color on corporate boards results in better governance or higher profitability. There is, however, no clear empirical evidence that supports the business case for diversity. This lack of empirical support for the business case for diversity is not especially salient because, as a normative matter, corporate boards should be diverse not because it is good for business, but because diversity reflects good citizenship. We should expect big business to behave in a way that reflects our national policy opposing discrimination – even when it is subtle and unconscious. Anti-discrimination discourse can compel change in a way that diversity talk does not.

#### QUOTAS IN EUROPE AND WHY THE QUOTA APPROACH WOULD NOT WORK IN THE U.S

The approach to gender diversity in Norway provides an interesting comparison to efforts to diversify corporate boards in the U.S. Norway's efforts began with voluntary quotas that became mandatory in 2006.<sup>13</sup> Norway mandated that forty percent of the boards of its public limited liability companies be comprised of women by 2008.<sup>14</sup> Norway has enforced this gender quota since 2008, and by 2009, women occupied forty percent of the board seats of most of Norway's limited liability companies.<sup>15</sup>

In the U.S., boards are far more diverse than they were a decade ago. Far fewer corporate boards are all white or all male. The numbers of white women and people of color on boards have increased significantly, yet in recent years, the numbers of white women serving as directors have stagnated. Women occupy less than seventeen percent of the board seats of the largest U.S. companies.<sup>16</sup> There has been, however, no serious discussion in the U.S. about requiring quotas in order to achieve greater gender diversity on boards.

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<sup>13</sup> Anne Sweigart, Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada, 32 NW. J. INT'L L. & BUS. 81 (2012).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> In 2012, women held only 16.6% of the board seats of Fortune 500 companies. See Boris Groysberg & Deborah Bell, *Dysfunction in the Boardroom*, 91 HARVARD BUS. REV. 88 (2013), available at <https://archive.harvardbusiness.org/cia/web/pl/product.seam?c=26569&i=26571&cs=d20d481898d113ddaaf14188a7b7a9b0>.



The U.S. approach to gender diversity on corporate boards is based on disclosure. It employs the rhetorical discourse of diversity and inclusion that I describe earlier in this essay. The recent focus in the US on board diversity began in earnest on December 16, 2009, when the Securities and Exchange Commission (the "SEC") amended Item 407(c) of Regulation S-K.<sup>17</sup> Under the amended rule, corporate boards must disclose in their proxy and registration statements the process they use to find and evaluate individuals to join and serve on the board.<sup>18</sup> In describing this process, boards must disclose whether they include diversity as one of the bases for identifying and choosing board members.<sup>19</sup> If diversity is a consideration, boards must describe how it factors into the decision-making.<sup>20</sup> If boards have a policy covering diversity in the board nomination process, they must disclose the policy, the way it is implemented and they must describe how the policy's effectiveness is evaluated.<sup>21</sup>

The effective date for the SEC rule on board diversity disclosure was February 28, 2010. In 2010, 74.5% of Fortune 500 directors were white men.<sup>22</sup> White women held 12.7% of the board seats at Fortune 500 companies; African American men held 5.7% of Fortune 500 directorships; African American women held 1.9% of the seats; Latinos held 2.3% of the seats; and Latinas held just 0.7%.<sup>23</sup> In 2011, the percentage of white women on the boards of Fortune 500 companies rose slightly to 13.1%.<sup>24</sup> African American women, Latinas, and Asian women held 3.0% of the board seats of Fortune 500 companies that

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<sup>17</sup> SEC, *Proxy Disclosure Enhancements: Final Rule*, 74 Fed. Reg. 68,334, 68 343-44 (Dec. 23, 2009), available at [sec.gov/rules/final/2009/33-9080.pdf](http://sec.gov/rules/final/2009/33-9080.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> The exact language of the amended rule is that boards must:

"[d]escribe the nominating committee's process for identifying and evaluating nominees for director...and 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." 17 CFR 229.407(c)(2)(vi).

<sup>22</sup> Women on Boards, CATALYST, <http://www.catalyst.org/knowledge/women-boards> (last visited Oct 10, 2013).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

year.<sup>25</sup> In 2011, most Fortune 500 companies (70.7%) had *no* women of color serving on their boards.<sup>26</sup>

The slow progress in the U.S. in this context becomes even more vivid when one examines the composition of boards in certain industries. When it comes to gender, the boards of technology companies are alarmingly homogenous. “Across Silicon Valley, start-ups tend to have all-male boards.”<sup>27</sup> Even public technology companies are likely to have few women at the top of their organizations.<sup>28</sup>

There was some intrinsic potential for the SEC’s board diversity rules to inspire corporate directors to think about the homogeneity of their boards in a meaningful way. The goal of disclosure is to provide potential investors and security holders with material information. But disclosure also has the potential to change corporate behavior.<sup>29</sup> Diversity disclosure can inspire meaningful change. Corporate managers may change policies or practices that could damage their company’s reputation if they are required to disclose information relating to those policies or practices. Or, companies may boost their reputations by voluntarily disclosing certain facts. For example, some companies voluntarily disclose the racial and gender composition of their boards by sending shareholders proxy materials that include directors’ pictures. These companies have more minority and women directors than companies who do not engage in this kind of voluntary disclosure.<sup>30</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Claire Cain Miller, *Curtain Is Rising on a Tech Premiere With (as Usual) a Mostly Male Cast*, N.Y. TIMES, Oct. 5, 2013, at B1.

<sup>28</sup> *Id.*

<sup>29</sup> In the 1970s, several public interest groups petitioned the SEC to revise mandatory disclosure rules to include information regarding a company’s civil rights and environmental performance. The SEC declined to mandate that companies disclose equal employment opportunity practices, nor would it require disclosure of unlawful employment discrimination. Exchange Act Release No. 5,627, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,310, at 85,706 (Oct. 14, 1975). The Commission stated that “[a]s a practical matter, it is impossible to provide every item of information that might be of interest to some investor in making investment decisions. . . .” According to the Commission, several commenters “suggested more than 100 topics concerning which they desired disclosure. A disclosure document which incorporated each of the suggestions would consist of excessive and possibly confusing detail. . . .” *Id.* at 85,712.

<sup>30</sup> Richard A. Bernardi, David F. Bean & Kristen M. Weippert, *Minority Membership on Boards of Directors: The Case for Requiring Pictures of*

The SEC board diversity rule could have encouraged boards with no formal or informal diversity policy to think about adopting one. The requirement that boards describe how they implement their diversity policy could have encouraged reflection about the process. And, the SEC's mandate for boards that have a diversity policy to disclose how they evaluate their policy's effectiveness had the power to promote introspection about the adequacy of the process. Unfortunately, however, the SEC's amended rule does not seem to have inspired meaningful reflection about the lack of race and gender diversity on corporate boards.

After the SEC board diversity disclosure rules became effective in 2010, more corporate boards added discussion about diversity in their proxy statements. But, even in the first few months after the rules' effective date, it was clear that the diversity discussion inspired by the SEC's changes was diversity doublespeak. The SEC rules did not define diversity so some companies articulated a commitment to diversity but defined the concept expansively. Many companies expressed a commitment not only to racial and gender diversity, but also enumerated a long list of others factors including ethnicity, age, national origin, along with diversity of geographic location, experience, background, viewpoint and skills.<sup>31</sup> The disclosure was vague, superficial and obscure.

This kind of expansive definition of diversity was common in the business context long before the SEC required disclosure about board diversity. This was evident on corporate websites where companies articulated their commitment to a diverse workforce. The concepts of race and gender diversity get lost among the various types of diversity that business leaders claim to value. This approach to diversity obscures the fact of historical discrimination against women and people of color. Diversity efforts are necessary because, for decades, women and people of color have faced discrimination that has impeded their entry and success in the business world. The history of discrimination in the U.S. on the basis of age, ethnicity and national origin is comparable in many ways. But, there is no sim-

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Boards in Annual Reports, 16 CRITICAL PERSPECTIVES ON ACCT. 1019 (2005).

<sup>31</sup> Kimberly Gladman, *Beyond The Boilerplate: The Performance Impacts of Board Diversity*, (July 29, 2010), available at <http://www.thecorporatelibrary.com/reports.php?reportid=327>.

ilar history of discrimination on the basis of viewpoint, experience, background or skills in the U.S. It is true that elitism, class-consciousness and politics have impeded the professional advancement of individuals with certain viewpoints, or those from modest backgrounds. But, these individuals have not faced the pervasive and systematic discrimination that women and people of color have endured. Diversity of skills, viewpoint, experience, background, and even geographical location are essential for successful firms. These are important considerations when hiring employees, promoting managers, and identifying board members. Companies, however, should pursue viewpoint, experiential and background diversity without eclipsing the very different goals of racial and gender diversity.

The biggest failure of the SEC's rule on board diversity is the fact that the SEC did not define diversity. The SEC's approach does not inspire thinking about diversity that goes beyond the superficial. Companies are free to ignore racial and gender diversity or they may define diversity so broadly that they never explore the possibility that nominating processes are tainted by unconscious or implicit bias. They fail to focus on racial and gender homogeneity. It is just the way things are. It reflects how things have always been in this regard. The SEC's failure to define diversity, and the tendency to define diversity without distinguishing racial and gender diversity from skills diversity, mean that all white, and almost all male boards are not seen as a problem. Some companies have reported that they have a diversity process, but without genuinely reflecting on the continuing problem of implicit bias, it is unlikely that they move beyond the check the box approach.

Understanding why Norway's gender quotas would never work in the U.S. requires the acknowledgement of important historical and social differences between the two nations. Norway's culture, history, and law allowed for the imposition of quotas that compel diversity. Norway's relative racial homogeneity has allowed the nation to focus exclusively on the problem of gender diversity. In the U.S., the messiness and complexity of our racial heterogeneity make the issue far more complex. Quotas have worked well in Norway. They would not, however, work in the U.S. The notion of quotas in the U.S. is inextricably linked to the national debate about race and affirmative action. Even though affirmative action efforts have

primarily benefitted white women, the idea of quotas and set asides is particularly distasteful in the U.S. because they are linked to people of color. Quotas have been the bases for arguments about reverse discrimination under the U.S. constitution. Many business leaders would likely be afraid that a quota for women would lead to quota requirements for racial, ethnic and religious minorities. The fear is that every corporate board would have to have a certain number of Italian Americans, Jewish Americans, Irish Americans, etc.<sup>32</sup> On the other hand, the quota discussion in Europe is about white women. That is why it works. It is free from the complexity and messiness of racial difference with which we struggle in the U.S.

#### DISCRIMINATION AND THE LACK OF DIVERSITY ON CORPORATE BOARDS

A recent news article described the scarcity of women among the senior executives and board members of technology companies.<sup>33</sup> The article's author explained that a "sexist engineering culture often dissuades young women in the field." The author also mentioned other explanations for the low numbers of women at the top of tech companies. She acknowledged the dearth of female role models and the fact that the entrepreneurs who are most likely to get financing for tech startups are, more often than not, members of "an old boys' club."<sup>34</sup> A recent report revealed that women are more than twice as likely to leave the tech industry as men because of "lack of promotions. . ." The author acknowledges the discrimination women in the industry face. Rarely are these kinds of explanations for board homogeneity discussed. Most discussions about the issue focus on what women need to change rather than the need to change discriminatory corporate cultures. For example, according to the founder of a firm that provides advice to women about tech careers, women at technology companies "pursue roles in product management or customer support,

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<sup>32</sup> This sentiment was expressed by an audience member attending a panel discussion at the ABA Business Section Meeting in 2013.

<sup>33</sup> Claire Cain Miller, *Curtain Is Rising on a Tech Premiere With (as Usual) a Mostly Male Cast*, N.Y. TIMES, Oct. 5, 2013, [http://www.nytimes.com/2013/10/05/technology/as-tech-start-ups-surge-ahead-women-seem-to-be-left-behind.html?\\_r=0](http://www.nytimes.com/2013/10/05/technology/as-tech-start-ups-surge-ahead-women-seem-to-be-left-behind.html?_r=0).

<sup>34</sup> *Id.*

even though hard-core engineering or finance roles are more likely to lead to top positions.... Women need to become more technical,” said the founder.<sup>35</sup> This discussion focuses on what women need to change. It is very much like the advice offered by Sheryl Sandberg who encourages women to be more attentive to their careers. Sandberg does not focus on discriminatory corporate cultures that create impediments to women’s career advancement.<sup>36</sup>

Recent events involving tech companies offer hope for proponents of greater diversity on corporate boards. When Facebook announced that it would go public in 2012, observers criticized the firm’s all-male board. This criticism seemed to inspire the company to nominate its first female director – Sheryl Sandberg. Zynga appointed its first female director when it went public. Twitter will go public in 2013, and like Facebook and Zynga, it is facing criticism because of its all-male board of directors. Activists, lawyers and the general public have made corporate board homogeneity an issue.

#### WOMEN EXECUTIVES

The lack of gender diversity is not only a problem for corporate boards, it is also a problem among the ranks of senior executives. Businesses become more homogenous as workers climb the corporate ladder. In large public companies, for example, the ranks of senior executives are predominantly white and male. There is also an income gap between men and women. Women earn only 77 cents for every dollar a man earns. This income gap widens as workers climb to the top of organizational hierarchies. In fact, even women chief executives are not immune to pay disparities. Female CEOs make 69 cents for every dollar earned by their white counterparts.<sup>37</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013).

<sup>37</sup> In 2005, a prominent feminist observed that even though white women make only 77 cents for every dollar made by a white male, great progress had been made. Women, when she entered the workforce, she said, made a little over half of what men earned.

## CONCLUDING THOUGHTS

This symposium helped to bridge the gap between legal theory and legal practice. As a law professor, I have time to read and think about theoretical implications for law practice. I always benefit when I hear from practitioners involved in real world issues. But, I think, perhaps somewhat immodestly, that the benefits run both ways. Lawyers need to hear from the academics who engage in legal research and writing. The research of academics can help practitioners and businesspeople to engage themselves in processes that move beyond superficiality and dig beneath almost impenetrable surfaces. The lack of diversity at the top of corporate hierarchies is one of the almost impenetrable surfaces that lawyers, regulators, legislators, executives and managers have approached only superficially. It is true that many academics are naïve about the way boards really function. But naivety inflicts corporate lawyers, managers and directors also. Many are naïve about the continuing problem of discrimination against women and people of color who attempt to climb corporate hierarchies. The gap between theory and practice is lessened when academics speak in plain English about their research, and when practitioners are open to listening.

Some are encouraged by the increase in recent years of the numbers of women who have joined corporate boards in the U.S. It would be beyond cynical to fail to appreciate the progress made. But there is great danger in complacency. The percentage of women on corporate boards does not reflect our nation's demographics. It is not even close. And for men and women of color, the percentages are disgracefully low.

There is interesting research by Professor Kimberly Krawiec and others that reveals that meaningful discussion about racial and gender diversity is not a hot topic in the boardroom.<sup>38</sup> The authors interviewed a broad sample of corporate directors. One of the questions asked was why boards should pursue diversity. Few interviewees had thought very deeply about the issue. These kinds of considerations require the kind of time that boards may not have. Or, boards may be

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<sup>38</sup> Kimberly D. Krawiec et al., *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N. C. L. REV 759 (2011).

unwilling to invest time on this topic. There are, after all, so many other pressing issues.