

## DANGEROUS CATEGORIES: NARRATIVES OF CORPORATE BOARD DIVERSITY\*

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*In this Article, we report the results of a series of interviews with corporate directors about racial, ethnic, and gender diversity on corporate boards. On the one hand, our respondents were clear and nearly uniform in their statements that board diversity was an important goal worth pursuing. Yet when asked to provide examples or anecdotes illustrating why board diversity matters, many subjects acknowledged difficulty in illustrating theory with reference to practice.*

*This expressed reluctance to come to specific terms with general claims about the value of director diversity inspired our title phrase: dangerous categories. That is, while “diversity” evokes universal acclaim in the abstract, our respondents’ narratives demonstrate that it is an elusive and even dangerous subject to talk about concretely. So we are left with narratives that simultaneously extol difference and express embarrassment with it.*

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#### INTRODUCTION

In this Article, we report and analyze the results of forty-five lengthy, wide-ranging interviews with corporate insiders—thirty-eight directors, and seven executives, regulators, and consultants—on the general topic of whether and how the racial, ethnic, and gender composition of corporate boards matters. In particular, we explore the contrast between two aspects of their views. On the one hand, our respondents were clear and nearly uniform in their statements that board diversity was an important goal worth pursuing. Moreover, those respondents who served on boards with some level of race and/or gender diversity (as did nearly all of our respondents) suggested that race and gender had been a relevant consideration in board candidate selection. Many female and minority respondents noted that the firm’s desire to diversify the board had been explicitly mentioned as a consideration in their selection, and others suspected that it had been a relevant consideration, even if not overtly presented as such. Elements of various diversity rationales appear in their narratives, many of which are standard fare within the broader literature on work group diversity as well as the subset that deals specifically with board diversity.

Yet when asked to provide examples or anecdotes illustrating why board diversity matters, many subjects acknowledged difficulty in illustrating theory with reference to practice. In particular, some subjects, when asked to elaborate on the ways in which particular female or minority directors have contributed, digressed into

examples that had little to do with race or gender, and in fact distanced themselves from these demographic variables.

The rationales that corporate insiders advance to justify board diversity as an important goal fall into a few broad categories. Most are functional, and at least loosely associated with corporate performance. In particular, we heard repeatedly that boardroom discussion is richer and more productive with a diverse group of directors. Some respondents put the same point in a negative way, saying that board diversity reduces the likelihood of uncritical “group-think” and its attendant risks. In either its positive or negative form, this rationale was strikingly evocative of Justice Lewis Powell’s original explication of the value of diversity in his 1978 opinion in *Regents of University of California v. Bakke*.<sup>1</sup> Respondents also told us of instances where non-white-male board members were able to offer specific suggestions about doing business more effectively with “their” respective constituencies. Very few respondents articulated a social justice claim that it is simply right to take affirmative steps to include demographic groups that have been historically excluded from the boardroom.

With a few exceptions, however, the purported contributions of a diverse board were at a level of detail that we would not expect to be the subject of boardroom strategizing. In addition, when pressed for evidence that would support performance-related arguments for diversity, respondents tended to back away from their initial assertions that demographic differences have functional correlates, frequently providing examples of contributions from female and minority board members related more to their skill sets than to any differences stemming from race, ethnicity, or gender.

This expressed reluctance to come to specific terms with general claims about the value of director diversity inspired our title phrase: *dangerous categories*. That is, while “diversity” evokes universal acclaim in the abstract, our respondents’ narratives demonstrate that it is an elusive and even dangerous subject to talk about concretely. The fundamental reason for this awkwardness is readily apparent: to argue that diversity matters in some specific way is to argue that diversity is a proxy for difference. Yet to suggest group-based difference is to open the door to both stereotyping and invidious

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1. 438 U.S. 265 (1978). See generally John M. Conley, Lissa L. Broome & Kimberly D. Krawiec, *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters*, in DISCOURSE PERSPECTIVES ON ORGANIZATIONAL COMMUNICATION (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1415803](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415803) (discussing *Bakke*).

comparison. Everyone in the debate has a vested interest in not walking through that door. Those who are not members of the excluded groups do not want to be heard to say that “they” are all alike, whereas those who are members do not want to point to fundamental differences that might be translated as “less qualified” or “needing assistance.” So we are left with narratives that simultaneously extol difference and express embarrassment with it.

One narrative that ran counter to this general trend relates to the corporation’s relations with employees. Some respondents argued that corporate board diversity sends an important signal to a company’s employees about the value it places on diversity and about the availability of role models and mentors at the top of the corporate hierarchy. Others posited more direct benefits to employees. Some female and minority directors reported that they are more readily able than their white male counterparts to empathize with lower-level employees, and that they use this empathy to improve employee relations. Some also said that diverse boards aid in the recruitment, retention, and promotion of women and minorities, particularly with succession issues in senior management. Respondents reported instances of diverse board members taking a personal interest in these issues and ensuring that they are a subject of board attention.

The categories of race and gender appeared less dangerous to our respondents in the context of employee relations. Both female and minority directors discussing their own role on boards and white male directors discussing the contributions of their female and minority colleagues seemed more at ease with a narrative of difference here. It is difficult to say with any certainty why this may be. Perhaps when race and gender are invoked as a means to benefit the professional prospects of other women and minorities either directly (through substantive action) or indirectly (through signaling or role modeling), those categories seem to lose their historically dangerous trappings.

In Part I we review the relevant literatures, including the business and social science literature that expounds various theories of board diversity and the sociolinguistic literature that underlies our research method. Part II then explains that method in detail. In Part III we report the results of our analysis, focusing on our respondents’ never-resolved tension between an abstract commitment to diversity and the difficulty of justifying it as it works on the ground. In the Conclusion, we discuss our results against the background of the existing literatures and offer some tentative conclusions.

## I. LITERATURE REVIEW

A. *Theories of Diversity*

There are a range of theories offered in support of board diversity. One rationale is simple fairness: corporate boards should be more diverse because it is the morally correct outcome. This argument has an obvious appeal. It seems only fair that the highest levels of corporate America—including boards of directors—should represent the nation’s demographic diversity. Moreover, women and minorities in positions of prestige and influence can serve as important role models for younger members of groups traditionally underrepresented at the highest levels of business enterprises.

Such fairness-based arguments have limited appeal within the U.S. shareholder welfare-focused paradigm, however, and were rarely invoked by our respondents.<sup>2</sup> If the impact of board diversity on corporate performance is neutral (or, even worse, negative) and entails implementation costs, then the normative case for “doing the right thing” becomes more difficult to justify. Why should current public shareholders incur the costs of providing a public good in the form of greater board diversity?

Not surprisingly then, debates about the value of board diversity within the United States tend to revolve around corporate performance. We have identified six rationales posited in the

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2. See *infra* notes 138–43 and accompanying text (discussing the dearth of social welfare arguments posited by study respondents). Other cultures appear more comfortable with a reliance on fairness rationales for board diversity. Norway, for example, which legislatively mandates that roughly forty percent of board seats be allocated to women, explicitly invokes both fairness and business justifications in the enacting legislation. Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Value Effect of a Massive Exogenous Shock* 8 (May 19, 2010) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1364470](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1364470) (discussing gender fairness rationales motivating Norway’s law). Recent Canadian Senate Bill S-238, which would mandate gender parity on certain boards, invokes no business rationale in the legislation’s preamble, other than a brief allusion to the talent pool, relying instead on broader representational arguments for the inclusion of women. Bill S-238, *An Act to Establish Gender Parity on the Board of Directors of Certain Corporations, Financial Institutions and Parent Crown Corporations*, 2d Sess., 40th Parl. 2009–10 (first read on June 2, 2009). However, the bill was tabled after a first reading. *Id.* The proportional board representation movement has also gained ground in other countries, including Iceland, Spain, and Israel (for government-owned companies). See CATALYST, INC., *WOMEN ON BOARDS* 3–4 (2010), [http://catalyst.org/file/389/qt\\_women\\_on\\_boards.pdf](http://catalyst.org/file/389/qt_women_on_boards.pdf); Tara Patel, *Bearded Women Challenge French ‘Boys Club’ Boards in Paris*, BLOOMBERG (June 9, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGgkIHI.W6eo>. Similar legislation is pending in other countries. *Id.*

literature or by our respondents as business justifications for board diversity:

- (1) Firms seeking board diversity are accessing an untapped talent pool;<sup>3</sup>
- (2) Female and minority board members reduce agency costs (those costs that stem from the separation of corporate ownership from control)—by virtue of their status as outsiders, they may be less likely to defer to management, thus reducing the risk of self-serving behavior by managers;<sup>4</sup>
- (3) A more diverse board possesses more and better information;<sup>5</sup>
- (4) Diverse boards operate differently; for example, they may be more likely to engage in constructive dissent, or women may engage in problem-solving and/or questioning in a different manner than men;<sup>6</sup>
- (5) A diverse board conveys a credible signal to relevant observers of corporate behavior;<sup>7</sup> and
- (6) Board diversity is a meaningless public relations maneuver, designed to quiet vocal critics, but generating no real costs or benefits for shareholders.<sup>8</sup>

As elaborated in the following section, some of these rationales are relevant to issues of group or workplace diversity more broadly, whereas others are specific to the corporate board context.

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3. *E.g.*, Interview, Transcript No. DS300056, at 20 (Nov. 14, 2008) (all transcripts on file with authors at the University of North Carolina School of Law) (arguing that if companies do not consider female and minority candidates they will “overlook really talented people” and will not be “making the best use of the best human capital that’s available”); Interview, Transcript No. DS300069, at 11 (Nov. 19, 2009) (arguing that the “pool is so rich if you look beyond the traditional”). The talent pool argument has another side—that there are few women and minorities qualified for board service so there is only a small pool of these director candidates from whom to pick. *See, e.g.*, Interview, Transcript No. DS300069, at 6 (Nov. 19, 2009) (“[I]f you require prior board experience, well, guess what? That really limits your pool.”).

4. *See* Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance*, 94 J. FIN. ECON. 291, 308 (2009) (concluding that female directors monitor more aggressively than men, decreasing value in well-managed firms).

5. *See infra* notes 9–11 (discussing research on heterogeneity in groups).

6. *See id.*; Part III.B (discussing the “Mars versus Venus” perspective).

7. *See generally* Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431 (2008) (discussing signaling in detail).

8. *See infra* Part III.F (discussing the “rare dissenters”).

*B. Previous Diversity Research*

Theories regarding diversity's impact on corporate boards build on a significant body of research on heterogeneity in groups.<sup>9</sup> That research is largely inconclusive with respect to race and gender diversity, predicting both positives and negatives. On the positive side, diverse groups may possess more information, consider more varied alternatives to any given course of action, and generate higher-quality decisions.<sup>10</sup> On the negative side, race and gender diversity may reduce group cohesion and increase member dissatisfaction and turnover.<sup>11</sup>

Consistent with the research on group heterogeneity more generally, the empirical literature on corporate board diversity also yields largely inconclusive results. This is not terribly surprising, given the mixed empirical findings on the impact of other board characteristics on firm performance.<sup>12</sup> Quantitative studies typically test for a relationship between board diversity and various measures of corporate performance.<sup>13</sup> Although some studies find evidence consistent with the theory that board diversity positively affects firm performance, they often do not fully control for endogeneity.<sup>14</sup> This

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9. See generally Susan E. Jackson, *Recent Research on Team and Organizational Diversity: SWOT Analysis and Implications*, 29 J. MGMT. 801 (2003) (reviewing studies for commonly analyzed attributes and effects); Francis J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402 (1996) (searching for common patterns in diversity research); Katherine Y. Williams & Charles A. O'Reilly, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RES. ORG. BEHAV. 77 (1998) (reviewing studies on organization demography and diversity).

10. See Milliken & Martins, *supra* note 9, at 403 (reviewing studies on point).

11. *Id.*; see also Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 817–20 (2011) (reviewing the literature on race and gender diversity in groups and considering its application to board diversity).

12. Researchers have sought to analyze the impact of numerous board characteristics on firm performance, with conflicting results. See generally Sanjai Bhagat et al., *The Promise and Peril of Corporate Governance Indices* (European Corp. Governance Inst., Working Paper No. 89, 2007), available at [http://papers.ssrn.com/sol13/papers.cfm?abstract\\_id=1019921](http://papers.ssrn.com/sol13/papers.cfm?abstract_id=1019921) (summarizing the literature on this point). See also Dobbin & Jung, *supra* note 11, at 823 (“Even the governance norms championed by agency theorists as the key to strong financial performance—outside directors, small board size, and independent chairmen—have shown mixed effects on performance.”).

13. In addition, a few qualitative studies address the topic of board diversity. See, e.g., Vicki W. Kramer et al., *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, at iv (Wellesley Ctrs. for Women Working Paper Series, Report No. WCW 11, 2006) (interviews and discussions with fifty women directors, twelve CEOs, and seven corporate secretaries from Fortune 1000 companies).

14. See, e.g., David Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003) (finding that Tobin's *q* is positively related to both the

problem arises when two variables—such as board diversity and company performance—appear to be causally related, but the direction of the causation cannot be determined.<sup>15</sup> In other words, a positive relationship between board diversity and firm performance might be evidence that diversity causes better performance. But it could also indicate that better performance leads to diversity in one or more of several ways, including (1) that more successful firms have greater resources to dedicate to the pursuit of board diversity, (2) that more successful firms are under greater public scrutiny and pressure as regards board diversity, or (3) that female and minority directors are scarce commodities who can choose to serve only on the boards of more successful firms.<sup>16</sup>

Studies employing robust endogeneity controls generally have found no evidence that board diversity affects corporate performance.<sup>17</sup> A few have concluded that gender diversity on boards has a negative impact on firm performance, though some attribute

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percentage of female directors and the percentage of minority directors); Niclas L. Erhardt et al., *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE 102, 106–07 (2003) (finding that the percentage of caucasian females plus ethnic minority directors on the board is positively related to both Return on Equity (ROE) and Return on Assets (ROA)).

15. Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 237 (2002) (“Board composition could affect firm performance, but firm performance can also cause the firm to change its board composition.”); Adams & Ferreira, *supra* note 4, at 306 (referencing studies finding a positive relationship between board diversity and corporate performance, but concluding that they do not fully address problems of endogeneity and reverse causation, rendering causal interpretations difficult).

16. See Broome & Krawiec, *supra* note 7, at 433–34 (discussing endogeneity problems in studies of board composition’s influence on corporate performance).

17. See, e.g., David Carter et al., *The Gender and Ethnic Diversity of U.S. Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOVERNANCE 396, 411 (2010) (finding no significant relationship between the gender or ethnic diversity of the board, or important board committees, and financial performance for a sample of major U.S. corporations, and also finding evidence suggesting that the gender and ethnic minority diversity of the board and firm financial performance are endogenous); Dobbin & Jung, *supra* note 11, at 828; Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect of Gender*, 11 J. CORP. FIN. 85, 102–04 (2005) (finding a significant, positive relation between ROA and the likelihood of adding a woman to the board, but failing to detect a significant market reaction to the addition of a female board member, thus undercutting the case for causation); Caspar Rose, *Does Female Board Representation Influence Firm Performance? The Danish Evidence*, 15 CORP. GOVERNANCE 404, 412 (2007) (finding no effects of board gender diversity on corporate performance in a sample of Danish firms and urging case studies to shed light on the role played by female directors in board decision making); Charles Shrader et al., *Women in Management and Firm Financial Performance: An Exploratory Study*, 9 J. MANAGERIAL ISSUES 355, 365–66 (1997) (finding no relationship between the percentage of female directors and profit margin, ROA, or ROE).



this finding to other factors, such as institutional investor bias or differences in the talent pool.<sup>18</sup>

Finally, researchers have begun to turn serious attention to gender diversity's potential impact in another arena with some similarities to the boardroom environment—the judiciary, especially appellate judges who work in panels.<sup>19</sup> This research explores both whether men and women reach different rulings in similar cases (referred to as “individual effects”) and whether female members of multi-judge courts influence their male colleagues' decisions (known as “panel effects”).<sup>20</sup> As with studies seeking to measure the impact of diversity in other settings, the results here are mixed, with some studies claiming to show significant panel or individual effects, some finding mixed results, and others finding no significant differences.<sup>21</sup> Recent studies employing a different methodology have found both individual and panel differences with respect to only one substantive legal area: sex discrimination cases.<sup>22</sup>

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18. See Adams & Ferreira, *supra* note 4, at 292 (stating that “although the correlation between gender diversity and either firm value or operating performance appears to be positive at first inspection, this correlation disappears once we apply reasonable procedures to tackle omitted variables and reverse causality problems” and concluding that, on average, firms with greater gender diversity on the board perform worse); Ahern & Dittmar, *supra* note 2, at 28–29 (finding that the Norwegian mandate had a significant negative effect on firm value, but attributing the decline to youth, inexperience, other characteristics of the new directors, and concluding that gender diversity has no effect on firm value); Dobbin & Jung, *supra* note 11, at 828 (finding no effect); David A. Matsa & Amalia R. Miller, A Female Style in Corporate Leadership? Evidence From Quotas 27 (Nov. 30, 2010) (unpublished working paper), <http://ssrn.com/abstract=1636047> (finding that the Norwegian quota is associated with a relative decline in corporate profitability, due to increased labor costs); Øyvind Bøhren & R. Øystein Strøm, Boards and Politics 19 (Aug. 21, 2008) (unpublished manuscript) (on file with the North Carolina Law Review) (finding a negative association between corporate performance and board gender diversity in a sample of all non-financial firms listed on the Oslo Stock Exchange from 1989 to 2002).

19. See Christina Boyd et al., *Web Appendix to Untangling the Causal Effects of Sex on Judging*, NW. LAW, 2–5, <http://epstein.law.northwestern.edu/research/genderjudgingapp.pdf> (last visited Feb. 24, 2011) (describing the results of over thirty studies on this topic).

20. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 400–06 (2010).

21. *Id.* at 392. Some studies also report efficiency effects from gender diversity on courts. See John Szmer et al., Diversity and Judicial Efficiency: An Examination of Federal Appellate Court Decisions (Apr. 2, 2009) (paper presented at the Midwest Political Science Association's 67th Annual National Conference), available at [http://www.allacademic.com/meta/p364553\\_index.html](http://www.allacademic.com/meta/p364553_index.html) (“[P]anel diversity seems to decrease efficiency unless the circuits have reached a critical mass of gender diversity.”).

22. Boyd et al., *supra* note 20, at 405 (finding neither individual nor panel effects in twelve of thirteen substantive areas of the law).

## II. METHODS

The inconclusiveness of the quantitative research on board diversity led us to begin our qualitative study involving interviews of corporate board members and other relevant corporate actors. Our principal objective has been to learn what impact, if any, these respondents thought board diversity might have on board processes and corporate performance. We conducted confidential,<sup>23</sup> semi-structured interviews of forty-five to ninety minutes in length with forty-five individuals. All interviews were tape recorded, transcribed, and reviewed for accuracy.<sup>24</sup> In addition to being asked to discuss their board experiences, respondents were asked to verify biographical information such as race, ethnicity, and board service.

A. *Finding Respondents*

We began by contacting and interviewing public company board members with whom one of the co-authors had direct or indirect personal or professional contacts. At the conclusion of each interview, the respondent was asked to name other potential interview subjects (or to contact them on our behalf), meaning that many respondents were found using the “snowball” sampling method.<sup>25</sup> Snowballing is a commonly employed methodology (particularly in interview-based research) for reaching difficult-to-access populations, such as the homeless, the socially stigmatized, or the elite.<sup>26</sup> As stated by Rowland Atkinson and John Flint, the main value of the snowballing methodology

lies as a method for dealing with the difficult problem of obtaining respondents where they are few in number or where

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23. Respondents were promised that their names, the names of the companies with which they were associated, and any other information that might lead to their identification would not be reported in any publications resulting from our study.

24. Seven interviews were conducted by telephone. For three other interviews, one interviewer participated by telephone while the other interviewer was physically present with the interview subject. With the exception of one telephone interview, in which all three co-authors participated, all other interviews were conducted by two of the three study co-authors. One of the co-authors (Lissa Broome) participated in every interview but one.

25. In a sample based on the snowball method respondents are asked to suggest other potential study subjects according to some inclusion criteria defined by the researchers. Because the sample selection is nonrandom, samples generated through the snowballing method present problems of sample bias.

26. See Rowland Atkinson & John Flint, *Snowball Sampling*, in 3 THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS 1043, 1044 (Michael S. Lewis-Beck et al. eds., 2004); Jean Faugier & Mary Sargeant, *Sampling Hard to Reach Populations*, 26 J. ADVANCED NURSING 790, 792 (1997).

higher levels of trust are required to initiate contact. Under these circumstances, such techniques of “chain referral” may imbue the researcher with characteristics associated with being an insider or group member which can aid entry to settings in which conventional approaches have great difficulty.<sup>27</sup>

Snowball sampling is particularly useful in recruiting corporate director respondents for a variety of reasons. Directors of public corporations are a relatively small population. Moreover, they are busy people who may be reluctant to devote time to a person or project not recommended by someone they already know and trust. This may be especially true when, as here, respondents are asked to comment on sensitive topics ranging from the performance and behavior of board colleagues to their own and others’ views of the contributions of female and minority board members.

#### *B. Characteristics of Respondents and Firms*

Figure 1 details the racial and gender breakdown of respondents. As of March 15, 2010, our sample contained a total of thirty-eight directors who serve or had served on public company boards, six of whom had also served as a chief executive officer. Due to multiple board service, these interviews represent 128 public company board experiences at 115 different public companies.<sup>28</sup> Seven additional respondents (three white males and four white females) brought our total interview pool to forty-five. These seven respondents had no public company board experience but fell within other categories of interest—regulators, board advisors, diversity advocates, proxy advisors, and institutional investor board members.<sup>29</sup>

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27. Atkinson & Flint, *supra* note 26, at 1044.

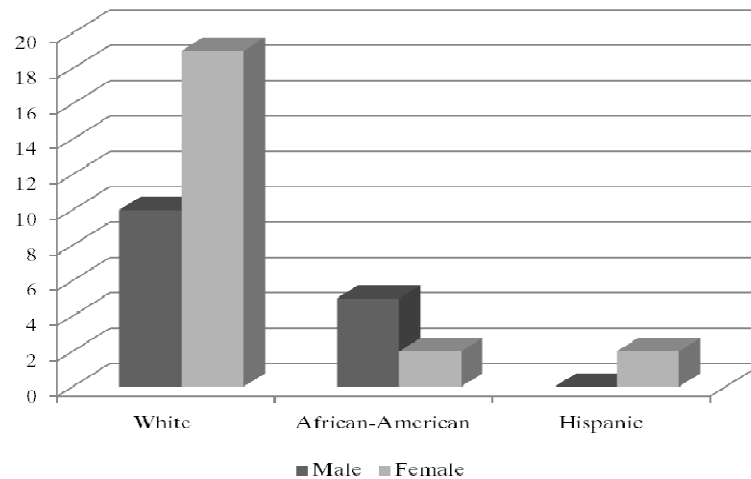
28. The number of “public company board experiences” is larger than the number of distinct public companies represented in the sample because several director-respondents served with each other on at least one board. To illustrate, assume that two respondents, Mary and John, both serve on the board of Alpha Corporation and, in addition, John serves on the board of Beta Corporation. The result is: two individual respondents (Mary and John) and three board experiences (Mary’s experience on Alpha Corporation, John’s experience on Alpha Corporation, and John’s experience on Beta Corporation) at two distinct firms (Alpha Corporation and Beta Corporation).

29. Some firms operate in heavily regulated industries, in which a regulatory body must approve start-ups and, in some cases, exert continuing oversight over firm operations. Some regulators report that board diversity is a consideration that they may raise with firm promoters, whereas others do not. *Compare* Interview, Transcript No. DS00033, at 5 (Feb. 5, 2008) (stating that he raises the issue of board diversity with promoters), *with* Interview, Transcript No. DS300042, at 16–17 (May 8, 2008) (stating that he does not view it as his place to raise the issue of board diversity with firm promoters).

### 1. Respondent Characteristics

Of the thirty-eight interview subjects with public company board experience, twenty-three (or 61%) are female, and nine (or 20%) are non-white.<sup>30</sup> Males are underrepresented in the sample, compared to their percentages on Fortune 500 boards (39% in our sample versus 85% of Fortune 500 board seats).<sup>31</sup> Women, in contrast, are overrepresented, relative to their numbers on Fortune 500 boards (61% in our sample versus 15% of Fortune 500 board seats).<sup>32</sup> The overrepresentation of women may be a function of the snowball sampling method (female respondents seemed more likely to identify other females as potential respondents); a response bias triggered by the two female co-authors who conducted thirty-three of the interviews (female directors may be more inclined than males to speak to female researchers, leading to a higher response rate among women); or of the subject matter (female and minority directors may naturally be more interested in diversity research).<sup>33</sup>

*Figure 1: Respondent Race and Gender*



30. Of non-white respondents, seven self-identify as African American, and two self-identify as Hispanic.

31. RACHEL SOARES ET AL., 2009 CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS 1 (2009), available at [http://www.catalyst.org/file/320/2009\\_fortune\\_500\\_census\\_board\\_directors.pdf](http://www.catalyst.org/file/320/2009_fortune_500_census_board_directors.pdf).

32. *Id.*

33. The third co-author, John M. Conley (a white male) participated in twelve of the interviews.

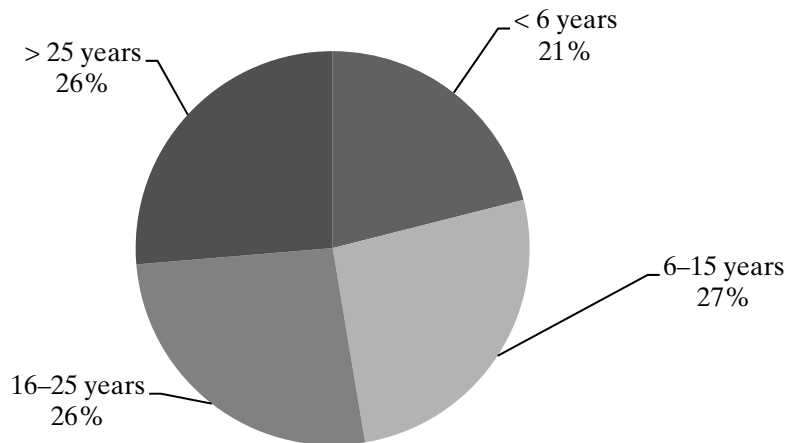
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As indicated in Figure 2, our sample of thirty-eight directors is diverse in terms of board experience. The least experienced director in our sample has only one year of public company board service and has served on only a single board, while each of the four most experienced directors has more than fifty years of total public company board experience at multiple public companies. Of our director respondents, eight (or 21%) have served fewer than six years as a public company director, ten (or 26%) have served six to fifteen years, ten (or 26%) have served sixteen to twenty-five years, and ten (or 26%) have served more than twenty-five years.

*Figure 2: Public Company Board Experience*



## 2. Firm Characteristics

A diverse group of 115 firms are represented in our sample. Because some of the respondents serve on the boards of the same companies, our respondents reported 128 board experiences. For six companies, there were two respondents from the same company's board, for two companies there were three respondents who served on that company's board, and for one company there were four respondents from the same company's board, although all four did not overlap in their service. Figure 3 details the breakdown of board experiences by size of firm. Eighteen (or 14%) of the board experiences are with Fortune 100 companies, thirty (or 23%) board experiences are with Fortune 500 companies, fourteen experiences (or 11%) are with Fortune 1000 companies, and sixty-six (or 52%) board experiences are with publicly traded corporations not listed in *Fortune*.

Figure 3: Firm Size

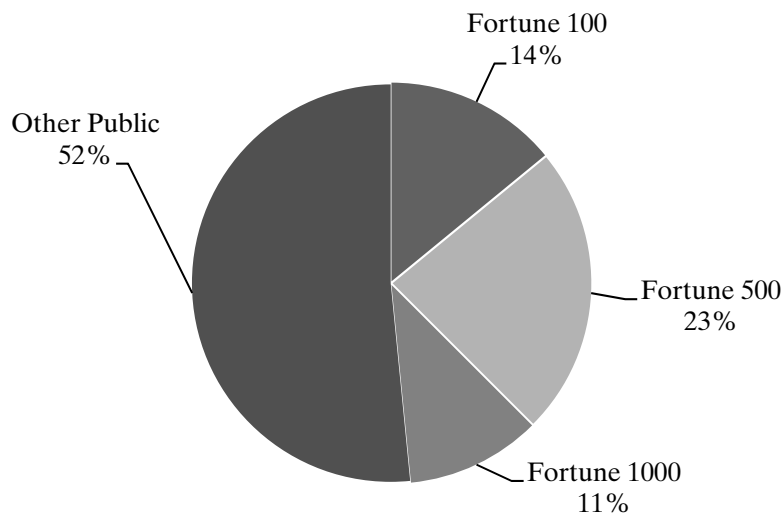
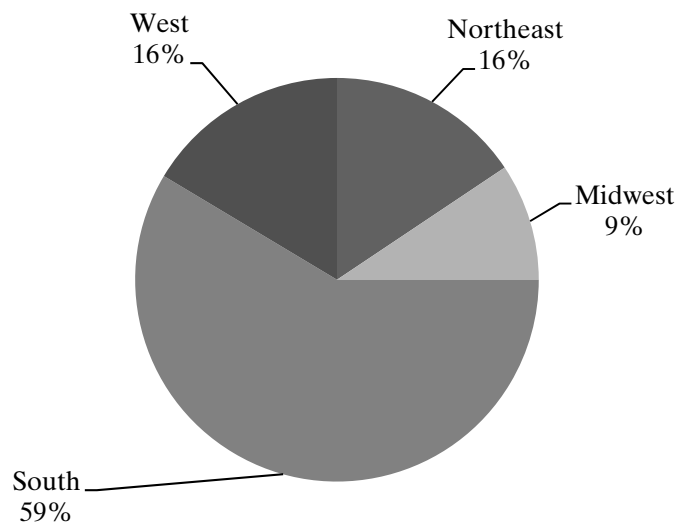


Figure 4 details the breakdown of board experiences by the region where the firm is headquartered.<sup>34</sup> Twenty board experiences (or 16%) represent firms headquartered in the Northeast, twelve (or 9%) represent firms headquartered in the Midwest, seventy-five (or 59%) represent firms headquartered in the South, and twenty-one (or 16%) represent firms headquartered in the West. Firms headquartered in the South are overrepresented in the sample since it was easiest for the researchers to find respondents and conduct interviews with directors from companies located in the same area as the researchers work. It is possible that attitudes toward female and minority board members are different at companies located in this part of the country than in other areas, though we saw no obvious manifestations of this among our respondents.

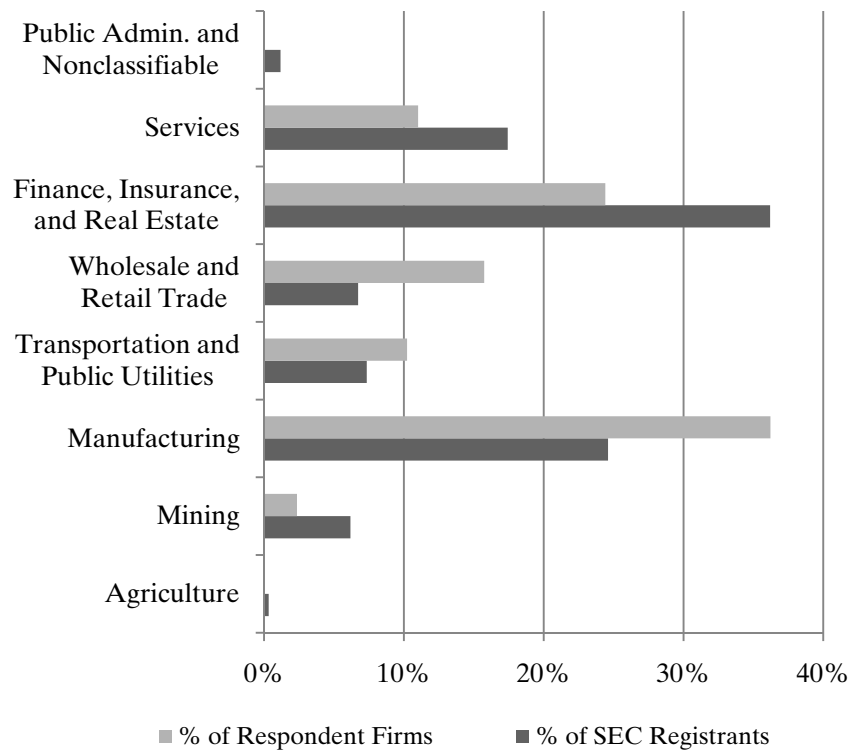
*Figure 4: Firm Headquarters*



34. The firm's region is defined by reference to its corporate headquarters as disclosed in SEC filings. The regions are those employed by the U.S. Census Bureau. See *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, [http://www.census.gov/geo/www/us\\_regdiv.pdf](http://www.census.gov/geo/www/us_regdiv.pdf) (last visited Feb. 24, 2011).

Figure 5 details the breakdown of board experiences by industry, using broad standard industrial code (SIC) classifications.<sup>35</sup> As the figure demonstrates, our respondents' board experiences were overweighted in some industry categories (manufacturing, transportation and public utilities, and wholesale and retail trade) and underweighted in others (mining, finance, insurance and real estate, and services).

Figure 5: Industry Breakdown



### C. Discourse Analysis

We have used the methods of qualitative discourse analysis in evaluating the interview transcripts. *Discourse*, in its basic linguistic

35. The four-digit standard industrial classification (SIC) codes that appear in a company's disseminated EDGAR filings are assigned by the U.S. government to indicate the company's type of business. See *SIC Division Structure*, U.S. DEPT OF LABOR, [http://www.osha.gov/pls/imis/sic\\_manual.html](http://www.osha.gov/pls/imis/sic_manual.html) (last visited Feb. 24, 2011). The number of total SEC registrants in each broad industry category is available at [http://www.secinfo.com/\\$/SEC/SIC.asp?Start=](http://www.secinfo.com/$/SEC/SIC.asp?Start=) (last visited Feb. 24, 2011).



sense, refers to connected segments of speech or writing larger than a single sentence or utterance.<sup>36</sup> It includes conversations, interviews, stories, question-and-answer sequences, and so forth.<sup>37</sup> But discourse can also refer to more abstract social phenomena. Under the influence of the French philosopher Michel Foucault,<sup>38</sup> discourse has come to mean not simply talk itself, but the way that something gets talked about—the broad range of discussion that takes place within a society about an issue.<sup>39</sup> Well-known examples from Foucault include the discourse of punishment<sup>40</sup> and the discourse of sexuality,<sup>41</sup> and, in a similar fashion, we now add the discourse of director diversity.

We use the term *discourse analysis* to refer to the qualitative, fine-grained, interpretive study of recorded discourse. Our approach to discourse analysis has its roots in the ethnomethodological perspective inspired by sociologists Erving Goffman<sup>42</sup> and Harold Garfinkel.<sup>43</sup> Its defining characteristic is a bottom-up approach to the discovery of social structure and meaning.<sup>44</sup> Prescinding from the search for top-down, rigid, or otherwise “real” rules and meanings, a broad range of language scholars (including linguistic anthropologists, conversation analysts, sociolinguists, and business discourse analysts) have focused instead on the patterns that appear in the course of actual interactions.<sup>45</sup> Rules, structures, and meanings are thus seen as emergent rather than exogenous.

Much recent work in discourse analysis focuses particularly on the stories, or narratives, that people tell.<sup>46</sup> Stories have been defined

36. See Emanuel A. Schegloff, *Discourse as an Interactional Achievement III: The Omnirelevance of Action*, in THE HANDBOOK OF DISCOURSE ANALYSIS 229, 230 (Deborah Schiffrin et al. eds., 2001).

37. *Id.* at 231.

38. For a comprehensive introduction to Foucault’s work, see generally MICHEL FOUCAULT, THE ESSENTIAL FOUCAULT: SELECTIONS FROM THE ESSENTIAL WORKS OF FOUCAULT, 1954–1984 (Paul Rabinow & Nikolas Rose eds., 2003).

39. Stuart Hall, *The Work of Representation*, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 13, 44 (Stuart Hall ed., 2003).

40. MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

41. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley trans., 1990).

42. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

43. HAROLD GARFINKEL, STUDIES IN ETHNOMETHODOLOGY (1967).

44. See *id.*; see also J. MAXWELL ATKINSON & PAUL DREW, ORDER IN COURT: THE ORGANISATION OF VERBAL INTERACTION IN JUDICIAL SETTINGS *passim* (1979) (explaining and demonstrating this approach in study of courtroom speech).

45. See ATKINSON & DREW, *supra* note 44, at 3–4, 18–21.

46. See generally Robin H. Conley & John M. Conley, *Stories from the Jury Room: How Jurors Use Narrative to Process Evidence*, 49 STUD. L., POL. & SOC’Y 25 (2009) (reviewing recent work and analyzing stories told in jury rooms).

as “everyday communication devices that create interpretive contexts for social action.”<sup>47</sup> They are significant because “[i]n everyday social situations people use stories as a means of conveying selective interpretations of social behavior to others.”<sup>48</sup> In the words of the sociologists Patrick Ewick and Susan Silbey, “[S]tories people tell about themselves and their lives both constitute and interpret those lives; the stories describe the world as it is lived and understood by the storyteller.”<sup>49</sup> We focus in this Article on the stories that directors and other relevant corporate actors tell about director diversity.

Specifically, our approach has followed the model of conversation analysis.<sup>50</sup> The collection and transcription of the interviews is an ongoing process. We meet regularly as a group to discuss individual interviews, listening to the recording with transcript in hand. We comment on and discuss whatever issues any of us notices and raises. While the interviews themselves follow a broad topical outline, the analysis sessions are open-ended, with an agenda emerging only as the session proceeds. The whole approach is unapologetically interpretive. It is rigorously empirical, in the sense that every inference is rooted in specific textual evidence, but it is not positivist and makes no claims to be so. Moreover, discourse analysis is agnostic on the question of what people “really” think or mean. Even if that were knowable, because the method focuses on the meanings that emerge in social interactions, the text of those interactions is the only relevant evidence, both necessary and sufficient to the purpose.

The fact that a member of a cultural group analyzes and interprets the world in a particular way does not, of course, permit one to generalize about what other members are thinking or doing. Yet by the same token, aggregate data about a group as a whole do not allow one to say anything about any particular individual. Discourse analysis, though, creates a set of firm data points grounded in actual members of the group. Unlike any aggregate method, discourse analysis permits a researcher to say, “This is what a set of real people actually report about their thoughts and actions.” At a minimum, it offers “native” hypotheses for subsequent testing. That

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47. W.L. BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 7 (1981).

48. *Id.*

49. P. EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 28–29 (1998).

50. *E.g.*, J. MAXWELL ATKINSON & JOHN HERITAGE, STRUCTURES OF SOCIAL ACTION: STUDIES IN CONVERSATION ANALYSIS *passim* (1984).

is, rather than organizing a topic in terms of their own preconceptions and priorities, researchers can listen to the people involved and follow the agenda that they seem to be setting. In addition, by revealing the messy realities of the interview process, discourse analysis can provoke a critique of quantitative techniques that are based on the categorization of subject responses.

### III. RESULTS

In this Part we review and analyze our results, organizing the material thematically. Several major themes dominated the interviews. One was the subjects' nearly universal endorsement of the proposition that board diversity is an unmitigated good and a worthy goal. There was less consensus, however, on the reasons why this is true. Especially prominent was the contention that demographic diversity produces a diversity of experiences and sensibilities and thus promotes richer discussions, though examples were hard to come by.<sup>51</sup> Sometimes, benefits attributed to diversity were really benefits derived from the specific skill sets of particular female or minority directors. A powerful narrative related to employee relations and included sending signals to female and minority employees, recognizing and attending to employee concerns, addressing diversity issues in succession planning for senior level executive positions, and increasing vigilance on equal opportunity in employee recruitment, retention, and promotion. The narrative regarding the moral imperative behind diversity was almost nonexistent. Very few of our respondents expressed skepticism about the value of diversity, but as one respondent noted, boards rarely, if ever, attempt to articulate the value to the company of a diverse board.

#### A. *Diversity of Perspectives*

Almost every respondent was a diversity enthusiast to a greater or lesser extent. Moreover, many indicated that diversity currently plays a role in the selection of board members.<sup>52</sup> Many female and

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51. We have pointed out elsewhere the similarity between this narrative and Justice Lewis Powell's seminal argument for diversity in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). See Conley et al., *supra* note 1, at 1–16.

52. See, e.g., Interview, Transcript No. DS300035, at 9 (Mar. 3, 2008) (discussing searches for board members); Broome & Krawiec, *supra* note 7, at 443–46 (2008) (discussing this in greater detail and including respondent quotations). The U.S. Securities and Exchange Commission (SEC) now requires disclosure, effective as of February 28, 2010, of (1) whether or not the nominating committee considers diversity in identifying nominees for director; and (2) if the nominating committee has a diversity policy, how the policy is implemented and an assessment of its effectiveness. 17 C.F.R. § 229.407(c)(2)(vi)

minority respondents noted that the firm's desire to diversify the board had been explicitly mentioned as a consideration in their selection, and others suspected that it had been a relevant consideration, even if not overtly presented as such.<sup>53</sup> An exchange with one female respondent is representative:

A: He [the CEO] wanted to have a woman, he was looking for a woman, and it just needed a little bit of acquaintanceship around there to make sure I didn't have three heads or something. . . .

Q: Were there reasons articulated as to why they were looking for a woman for the board at that time?

A: Not articulated, no. I just think they thought it was time or something.<sup>54</sup>

In explaining their own support of diversity, our respondents most often advanced functional arguments. Prominent among them was the contention that demographic diversity yields a diversity of perspectives, which in turn leads to more productive boardroom discussion. In the succinct phrasing of an African American man who had been a trailblazing minority director: "It means different experiences, different perspectives. That you can bring something to the table that they hadn't thought of before."<sup>55</sup> In a parallel reference to the "table" that was simultaneously literal and figurative, an African American female executive and director said that boards "would be well served by a voice that may have had a different path to get to the board table than some of the others *at* the board table."<sup>56</sup>

A white woman with substantial experience as an academic and a board member elaborated on the perspective argument, at the same

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(2010).

53. *E.g.*, Interview, Transcript No. DS300029, at 6 (Dec. 17, 2007) ("[The CEO called me up] and said, 'You know, we'd really like to have more women on our Board.'"); Interview, Transcript No. DS300030, at 5 (Dec. 18, 2007) (diversity was "absolutely" a factor in the nomination of female and minority board members according to white female board member); Interview, Transcript No. DS300031, at 2 (Dec. 19, 2007) (white female director discussing two separate director nominations where "[t]hey were looking for diversity"); Interview, Transcript No. DS30010, at 3 (July 30, 2007) (the fact that respondent was a female "was absolutely a factor" in both of her board nominations and "was positioned to [her] that way"); Interview, Transcript No. DS300024, at 2 (Dec. 4, 2007) (African American male reporting that, when he was selected for his first corporate board seat, the company "wanted to diversify the board").

54. Interview, Transcript No. DS300032, at 4 (Dec. 19, 2007).

55. Interview, Transcript No. DS300070, at 14 (Nov. 25, 2009).

56. Interview, Transcript No. DS300059, at 9 (Feb. 18, 2009).

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time warning of the risks inherent in what some have called “groupthink”<sup>57</sup>:

As a former CEO said, “I hate to see a board that has only on it the people I went to prep school with.” And it’s exactly true. Diversity in gender and race I think of as a proxy for different perspectives. And if you don’t have different perspectives on a business, you’re really missing a lot. Business case for it. It adds something. And it clearly does at [the company’s] board meetings. . . . African Americans, Hispanics, Asian Americans—I mean, I think people have different experiences, and they bring it to the board meeting, and different knowledge.<sup>58</sup>

A very experienced white male director similarly claimed that diversity brought “an entirely new perspective” to the board, with attendant “creative vibes.”<sup>59</sup>

Q: What do you see as the advantages to a company of a other than white male board?

A: Well I think it brings an entirely new perspective to the thinking of a board. It creates a very positive dynamic and [laughs] you’re right; I’ve sat on boards where all of us were silver haired males and the dynamic is different from when you have minorities and women on boards so I guess I just feel that there’s more creative vibes going on [laughs] if you’re on a board where there’s different thinking and different channels of thinking.<sup>60</sup>

He, too, warned against the limitations of the pre-diversity status quo, emphasizing that “the base experience level of most of the males, the seasoned males, has been channeled in a similar direction.”<sup>61</sup> He characterized that direction as “an old, classic hierarchy of organization, which is, I think, rapidly becoming outmoded.”<sup>62</sup>

An African American male respondent echoed the point. In answer to the question of whether he would consider it problematic if

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57. Social psychologist Irving Janis coined this term in his book *Victims of Groupthink* to describe poor decisions made by a group as the result of pressure from the group that resulted in reduced moral judgment and eliminated a reality check. IRVING L. JANIS, *VICTIMS OF GROUPTHINK* 9 (1972).

58. Interview, Transcript No. DS300041, at 4–5 (May 7, 2008).

59. Interview, Transcript No. D3300046, at 4 (Aug. 18, 2008).

60. *Id.* at 3–4.

61. *Id.* at 4.

62. *Id.*

boards were not diverse at all and whether “we could still pursue the agendas that are important to corporate America without diversity on boards,” he responded that “you could probably pursue the same agendas, but I think that you would lose some of the flavor, if you will, that comes from having people of different backgrounds on the board.”<sup>63</sup>

*B. Perspectives from Mars and Venus*

A specific instance of the different-perspectives argument focuses on the benefits of gender diversity (although it also has a race and ethnicity variant). This rationale invokes the allegedly different sensibilities, reasoning processes, and interpersonal skills of men and women. Several respondents generalized about women and the ethic of care in ways that were strongly reminiscent of Carol Gilligan’s feminist classic, *In a Different Voice*.<sup>64</sup> A white man with years of experience as both an executive and a director made the point in especially colorful terms:

[W]omen are a lot better dealing with egos of other people than men are and they’re a lot more patient and they’re a lot more team oriented and they’re a lot about let’s do this together. Men are, the New York Times article said and I happen to believe this; just because it’s in the New York Times doesn’t make it true but the average male in America according to this in depth research is lucky to have one and a half friends and the average woman in America typically will have nine to ten to eleven friends because men are so competitive and they’re so blustery and they don’t stay until the diapers are pinned down. They just have a tendency just to go flying off and so there’s a huge personality difference and it worked at [a particular company]. The women were extremely good in human relation issues . . . .<sup>65</sup>

Some of our subjects made explicit reference to men being from Mars and women from Venus, but tended to back away from those generalizations when asked for specifics. A white man who has been a director, an executive, and an academic said this in responding to a request for an example of “where you think because there was a woman or a person of color that you heard a point of view that was

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63. Interview, Transcript No. DS300024, at 13 (Dec. 4, 2007).

64. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (describing a different moral decision-making style between men and women).

65. Interview, Transcript No. DS30006, at 6 (June 18, 2009).

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different than you would have otherwise heard or that was helpful in making a decision”:

There are other instances where in that spirit of men are from Mars and women are from Venus that and probably after we're all dead it will be accepted and okay to talk about the differences between the sexes and not pretend that everybody is exactly alike but there will be discussions about how do the typical employees feel or react in the organization and I don't know that may be slightly more than average, women will comment on issues of culture and staff acceptance or staff issues and by staff I mean at all levels.<sup>66</sup>

Yet when asked to elaborate on the extent to which “somebody's race or somebody's gender predicts a different kind of point of view,” the same subject admitted that he could not go beyond stereotyping. By doing so, he seemed to be acknowledging the “dangerousness” of the gender and race categories:

Well you can't other than to say stereotypically you might see some of that fulfilled but when people of color are on a board, part of the reason they're on a board is to represent the point of view of people of color so I don't know whether that's stereotyping. I mean that's why they're there. You know? You don't want me to represent them. I can't. So I'm not sure quite how to answer your question.<sup>67</sup>

A very senior white male with long experience as a director also used the Mars-Venus language in responding to a question about the integration of men and women into boards:

I mean women are not different from men on a [specific industry] board. I mean I don't see any difference. Sometimes their sensitivities are different.

Q: In the sense that—

A: I mean, you know, Mars and Venus [laughter]. But I mean their sensitivity is different but they don't come to a different conclusion as a rule. I don't see it.<sup>68</sup>

Seconds later, he recycled the reference to sensitivity. Now, however, he used “sensitive” to mean “thin-skinned” rather than “aware” or “attuned to” and rejected the notion that men and women were fundamentally different after all. Responding to an interviewer's

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66. Interview, Transcript No. DS300045, at 6 (Aug. 8, 2008).

67. *Id.* at 5.

68. Interview, Transcript No. DS300007, at 16 (July 27, 2007).

suggestion that having multiple women on a board might “give them some comfort with each other,” he said:

Well we don't room together so I don't know. I think it probably does. I think they, but I don't sense that. I don't sense that any of these women are at all uncomfortable with who they are. I don't see them as, they don't occur to me to be oversensitive.<sup>69</sup>

A third subject, a white female lawyer with extensive board service, also suggested that there might be gender-based sensitivity differences that derive from different experiences. She mentioned—echoing Gilligan<sup>70</sup>—a specifically feminine approach to problem-solving. She backtracked immediately, however, and wondered whether this was more of a legal skill than a gender-based attribute. In another demonstration of how dangerous a category gender can be, she characterized her initial suggestion as “really terrible to say”:

I think sometimes women bring a different way of solving problems, a different—I think sometimes what I bring, I mean it's really terrible to say, but it's sort of their motherly skills in a way, you know, they're sort of trying to get people to figure out how to agree and how to find a common solution, and how to cut through all the arguments and synthesize. I mean they may really be lawyer skills rather than motherly.<sup>71</sup>

Several other subjects also suggested that the value of difference derived not so much from gender and race as from specific professional skills or experience. Their narratives extol the abstract value of race or gender diversity. But the ultimate focus turns out to be a particular skill set or background experience, not necessarily connected to the director's race or gender, that proved valuable—for example, organizational skill gained through high-level military service (an African American male),<sup>72</sup> or engineering (a white female),<sup>73</sup> or regulatory expertise (an African American female).<sup>74</sup>

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69. *Id.*

70. See GILLIGAN, *supra* note 64, at 1–4 (advancing the thesis that men and women, as a consequence of their different socialization experiences, develop fundamentally different processes of moral reasoning).

71. Interview, Transcript No. DS300029, at 10 (Dec. 17, 2007).

72. Interview, Transcript No. DS300024, at 7 (Dec. 4, 2007) (reflecting on the value of his own military experience).

73. *Id.* at 22 (reflecting on how a hypothetical senior woman engineer might add value to one of the boards on which the white female respondent serves: “[S]he'd add value from a different side of the table. She might not have the business acumen or the international experience but golly she'd have a lot to say about the research and engineering piece and that might be a big added value . . .”).



An African American male director who came to board service from higher education began by focusing on race and gender, but then talked about the value of having someone who, like himself, was an outsider, a “novice”:

But I think we’re much better off because we do have, not only diversity from the standpoint of race and gender, but diversity from the standpoint of experience. My experience is quite different from a lot of other people on these boards but when you have someone that’s got a different point of view, a world view, if you will, for whatever reason I think it strengthens the board to have those kinds of people interacting. Because lots of times, even on the [company name] board I feel like kind of the novice on that board, there are things that either I don’t understand or they don’t seem quite right. If you bring them up you get a more fulsome discussion than if everybody is kind of a like mind and says well, you know that’s the way it’s always been or yeah, we can go ahead and do that, sort of thing. So, I think that we’re better off having diversity of experience and all the other kinds of diversity represented on boards.<sup>75</sup>

Another respondent praised the contribution of a female board member as deriving from both skills and gender:

[W]hen you think about [one of the company’s products] particularly and its relationship to women’s health and appearance, we needed a marketing, a woman who, a person who looks at women’s health and who has a marketing background. [Name of white female director] fits both of those.<sup>76</sup>

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74. A white male board member praised the substantive expertise of an African American woman with whom he served on a bank board:

She doesn’t have a tremendously strong background in business of having run a business and faced all the problems that you face in trying to make one, you know, how do you make payroll and how do you make a right decision over a twenty year period, but her [regulatory] credentials were just phenomenal and so I thought she was very strong . . . .

Interview, Transcript No. DS300014, at 6 (Aug. 30, 2007). He added, “[T]he fact that she was a woman and minority didn’t make a hill of beans of difference. I mean the votes came out the same; there was nothing that happened that would make a difference.” *Id.* He acknowledged later, though, that the diversity aspect was important in the candidate’s selection to the board: “It [her diversity both in race and gender] was an absolute plus. Had there been someone else; let’s say it was a white man with exactly the same characteristics and the same background and the two of them were there they would have picked her because she would have fulfilled the diversity characteristic.” *Id.* at 12.

75. Interview, Transcript No. DS300024, at 13 (Dec. 4, 2007).

76. Interview, Transcript No. DS300035, at 12 (Mar. 6, 2008).

An exchange with a white female director prompted a similar example of the contributions of a Hispanic female director that appeared to stem from a combination of ethnicity and expertise:

She is right now really interested in the whole immigration issue, immigration reform, and so yes, she certainly does, but I don't know if that's because she's Hispanic. I think it's because of what her background is, and her knowledge base, and her area of business research, and she lectures and gives and has a television talk show from time to time.<sup>77</sup>

The woman who made the “motherly skills” comment quoted above also downplayed the implications of gender in other ways. In common with many other subjects, she emphasized the importance of fitting in, of learning how to perform the role of board member, and emphasized that this was a gender-neutral task.<sup>78</sup> While commenting on the issue of being the only woman in a boardroom, she made the point that even if at the outset men and women are indeed from different planets, their distinctive qualities erode as women learn and adopt appropriate board behavior:

Well, I'm sure I spent my life being the only woman in various rooms and so you get used to it, so it was, you know, I think there was an awkwardness in there, a period when everybody's sizing you up and you're sizing them up and trying to establish the right tone and the right role, and establish your credibility, but I'm not sure it's that, I mean I'm sure it's somewhat different than male and female, but I think there are overlaps and I think you learn to not talk too much at the beginning, and then you know, try to ask one or two smart questions each time, so a certain formula.<sup>79</sup>

She later stressed the same point—learning how to fit in—in the context of using other women as mentors and role models:

So I think in a boardroom, each boardroom, as you said, has very different culture and in some boardrooms a really spirited conversation; in other boardrooms it's a much quieter conversation with everybody being super-polite and complimenting each other back and forth, you know, their comments and nobody ever cutting each other off, and so, you know, you don't want to come in and be totally off the page in how you interact, and so I think watching other women is

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77. Interview, Transcript No. DS300029, at 4 (Dec. 17, 2007).

78. *See id.* at 3–4, 14, 27.

79. *Id.* at 3–4.

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particularly useful, too, to me, but I don't do it exclusively with women, but just seeing how they interact.<sup>80</sup>

Elsewhere, in response to a question about corporate cultures, this same subject emphasized the role of dress and appearance in mentoring and fitting in:

It's really pretty funny, and if there's another woman on the board, you kind of gauge how you dress based on how they dress, and so you go to the first board meeting and you don't really know what to wear, so basically you dress pretty conservatively, and then you see kind of, do people wear pants, or do they all wear skirts and you know, do they wear—

Q: Colors?

A: —colors, exactly. At [company's name], not this last one, in the shareholders' meeting before there were three women, we talked about how we all kind of went to the back of our closets and got sort of our dowdiest things.<sup>81</sup>

We also heard accounts of female and minority directors who did not learn to fit in. Sometimes, the different point of view and approach that are argued to be the primary benefit of diversity can cause a director to fail. An African American male director of a national company told the story of a female colleague who “didn't work out” even though he thought she was “wonderful”:

She was exceedingly competent and assertive and asked a lot of questions and pressed a lot of issues and I think some people got uncomfortable. I don't know whether they got uncomfortable with her because of the issues she was raising or because she was raising issues and was a woman. I don't know for a fact but she wasn't around very long.<sup>82</sup>

But it is not always a case of minimizing one's distinctiveness in order to succeed. The same African American male subject noted forcefully that a lack of social and stylistic fit has never impeded him as a director. He described his board colleagues—bluntly—as “all in these gated communities . . . comfortable talking with people who are just like they are.”<sup>83</sup> The night before the meeting “they go out to dinner with each other” and do not invite him.<sup>84</sup> But he claims not to

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80. *Id.* at 27

81. *Id.* at 25.

82. Interview, Transcript No. DS300070, at 7–8 (Nov. 25, 2009).

83. *Id.* at 25.

84. *Id.*

care. He went through “a year as a fully paid, non-voting aspirant” before being confirmed.<sup>85</sup> During his tryout year, he reported, “I talked. I got involved . . . .”<sup>86</sup> Now, “I like to push the envelope . . . and they’re just reminded that I am black . . . .”<sup>87</sup> Yet he has survived and, in his view, been taken seriously.

*C. Different Perspectives in Action?*

In most interviews, we followed up on respondents’ statements about the value of diversity with requests for examples. Where a subject claimed that diversity would yield new perspectives or produce better boardroom dynamics, we asked for instances of the theory in action. The results were remarkably consistent: with some exceptions, subjects usually could think of nothing, or offered examples that seemed trivial in the sense of unrelated to the strategic planning that is presumably the province of boards. Some subjects, when asked to elaborate the ways in which particular female or minority directors had contributed, digressed into examples that had little to do with race or gender, and in some cases distanced themselves from demographic variables.

There were a few exceptions, which might broadly be categorized as statements about the heightened sensitivity of minority and female directors to issues of fairness and social welfare and their empathy with “little people” like employees or customers (this last with attendant profitability benefits). In one of the most notable of these narratives, a white woman with more than ten years of board experience described the role of two African American directors in helping a board analyze a major and potentially controversial industrial facility expansion.<sup>88</sup> It is a long story, but well worth quoting. (Note, by the way, that when she refers to “black and white” she seems to be talking about quantitative data, not race):

It’s tense a lot of times but I think it’s a healthy discourse. [Name of African American woman] is a really bright woman, a [name of elite college] graduate in like microbiology or something and she is chair of the [relevant] committee and she really pushes the conversation. We’re in the process of preparing to build a new [facility] and I’ve been so impressed with her willingness to really push the conversation and to push the envelope beyond the financials. . . . What I think I’m

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85. *Id.* at 3.

86. *Id.* at 6.

87. *Id.* at 24.

88. Interview, Transcript No. DS300057-58, at 14 (Dec. 12, 2008).

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observing at [name of company] and what I hope that I am bringing to the boards where I was the first minority member is there is a willingness to talk beyond the numbers. What is happening here? What are the implications for the company? What are the implications for the culture of the company? How are employees responding to these things? What is the community response to it and to the [facility] construction? . . . [T]here was heavy board discussion about that process of change. Support for it because financially it made sense short term and long term so you kind of get the black and white out of the way but that board tends to spend a little more energy beyond the nuts and bolts and so we were heavily engaged in the process of how would we communicate it politically, how would we share it with the community, what would we do to support downtown when we were gone, what were the implications for our employees, those types of things and some of that comes out of [name of African American male director] who has been as a minority very active in community redevelopment in [name of city] and so he had a particular sensitivity to that as a minority.<sup>89</sup>

A second narrative also illustrated strategic thinking by a diverse board, but in an enigmatic context. A white male who has been an executive and a director told this story of an African American board member's enhanced sensitivity to fairness:

There was a person that was, and this unfortunately happens in a lot of board rooms, that was accused of sharing inside information with a not for profit company. It was about the value. They were going to make a donation of their stock to a not for profit company and they gave what they thought the stock was worth in an email. Well, that technically is something the SEC would, that's inside information because you've got a director giving the value of the stock. So everybody was really down on this particular director and there was a movement afoot to get him off the board immediately. It was a he and one of the blacks put it in perspective in about how it (a) wasn't intended, and (b) the no harm consequence, and (c) that we could do it by talking this through and making sure that that's understood that that shouldn't happen again and he won the day but he won the day by sheer determination. He knew that it wasn't fair because he had been subject to things that weren't fair and he wasn't going to let it happen.<sup>90</sup>

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89. *Id.*

90. Interview, Transcript No. DS300061, at 7 (June 18, 2009).

This is a striking example in a couple of respects. First, it is a rare instance of a subject recalling a specific instance of a minority director's contribution and, moreover, specifically relating that contribution to the board member's unique experience as an African American. But given the legal complications associated with this story—involving as it does an impermissible disclosure of inside information and the board's after-the-fact acquiescence in that disclosure—one might reasonably question how this example illustrates the *benefits* of board diversity.

Other subjects sought to illustrate the value of board diversity with stories about specific marketing insights, often driven by heightened sensitivity to customer needs. Some of the suggestions were said to translate directly to the bottom line, providing at least anecdotal support for the elusive business case. But while the stories are detailed, the insights are of the sort that a company might expect from its lower-level retailing specialists.

For example, a white female director of a retail store that catered to lower-income consumers described her role in urging the store to adopt a product mix that would get “people in the store more often and to spend more money each time they come . . . .”<sup>91</sup> She attributed her insight to her understanding of the hassles of having to stop at multiple stores, park, and get in and out of a store with kids in tow.<sup>92</sup> As she said, “That’s very appealing to me as a female. The guys aren’t paying any attention to that.”<sup>93</sup> The same director also advocated undertaking the investment necessary to allow the retail outlets to accept food stamps

because I’m a woman and I understand the plight of the single female head of household who’s only feeding and caring for her family adequately because she has access to WIC or she has access to groceries through food stamps and if she can’t use those in our store she’s not going to come to our store.<sup>94</sup>

She added, “Well obviously I wasn’t the only one in the company with that kind of voice but for that voice to also be heard at the board table is very, very important.”<sup>95</sup>

The respondent had not herself been a single mother on food stamps, but attributed her empathy to a time early in her career when

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91. Interview, Transcript No. DS300057-58, at 6 (Dec. 12, 2008).

92. *Id.* at 6–7.

93. *Id.* at 7.

94. *Id.* at 6.

95. *Id.*

she had had direct customer contact with this population segment, and to the fact that “it is just kind of where my heart rests to be sensitive to the people in communities that have need.”<sup>96</sup> She also commented that her African American colleague on the board “is not so quick to speak up on those issues but when I speak up he will then follow and agree.”<sup>97</sup> She surmised that he might be asking, “should I use my capital there?” while women may have become “a little bolder about supporting each other.”<sup>98</sup>

A white male director of a home health services company also invoked the ability of a woman board member to put herself in the place of the customer, but again in a context that one might expect from lower-ranking corporate actors. A female board colleague, he told us, recognized that “often times our delivery person was the highlight of the day for our shut-in customers” and made suggestions based on that insight that affected the company’s bottom line.<sup>99</sup> According to his account, the woman board member said our employees should look around and see how else we can “help the patient-client and what other referrals” for the company’s products and services the employee—the customer’s trusted friend—could make.<sup>100</sup> The female board member also suggested that for services covered by health insurance, the employee could collect the co-pay by credit card charge at the time of delivery instead of the company billing for it later and encountering the inevitable collection challenges. As the male director commented, “[O]nce we established a good relationship with our customer-client-patient, we started getting a credit card to pay the bill on the spot. Man, boy! That was really helpful.”<sup>101</sup> He concluded that women board members “tend to be more sensitive to what’s going on . . . .”<sup>102</sup>

Examples relating to racial diversity also tended to focus on marketing contributions that might be expected well below the board level. A white male director offered this “classic example” of the “new value system” that diversity brings:

[S]o [name of an African American female director] was a classic example. She actually brought us new ways of thinking about how to approach the minorities where we had in many

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96. *Id.* at 8.

97. *Id.* at 7.

98. *Id.*

99. Interview, Transcript No. DS300069, at 4 (Nov. 19, 2009).

100. *Id.*

101. *Id.*

102. *Id.*

instances, some of the [company's restaurants] were located in predominantly African American areas [identifying information deleted] and she just gave us a lot of great insight into what stimulates an African American family to experience [the company's style of restaurant]. It was very valuable.<sup>103</sup>

Female and minority directors themselves added little by way of specific examples. In another story from the restaurant business, an African American male director and executive offered this illustration of "what that point of view means and looks like":

Well I mean if you look at African Americans, I mean in our world the dining habits are different and so seeing those differences we can pick up a lot of them. We have that conversation in the boardroom about what those are and there are a lot of questions . . . African Americans eat later in our restaurants so if we're in a place that has a pretty high population, are we changing our operating hours. Groups are bigger.<sup>104</sup>

Other narratives promised more depth, but rarely delivered. In the middle of a long and rambling narrative about her experience as the sole woman on a board, a white female with lengthy board experience began what seemed like a significant story about enhanced sensitivity to language portending a change in practice. She talked about expressing her concern with the use of the word "salesmen," only to learn that it reflected reality:

At my second board meeting there was a senior management person doing a slideshow on work in Europe and he was running through this and he had a slide up there that said eighty-two salesmen Europe wide and he flipped through it and I asked him to go back and I said you know can you talk about the typo on this page and he looked at it and he goes no Miss [name of subject] I don't think there is and I said well it says salesmen. You must mean salespeople and he said no actually I do mean salesmen. There aren't any women and I said than that's a deeper problem then that we have here that if this company does not use language that opens up positions like salespeople where there is lucrative to be in that role then women will never feel comfortable even aspiring to that and they will only get your coffee and only be the assistants and the secretaries on the C suite and that's inappropriate for a company of this size in this decade and all my colleagues on the

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103. Interview, Transcript No. DS300046, at 4 (Aug. 18, 2008).

104. Interview, Transcript No. DS300071, at 7 (Dec. 10, 2009).



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board looked at me with huge eyes and thought to themselves what have we done to ourselves I'm sure. [Laughter].<sup>105</sup>

Yet when we followed up to see if a change in the underlying reality followed the language change, she surprised us. The language change she fought for turned out to be nothing more than that:

Q: Have things changed since that remark?

A: My board colleagues are better about language. . . .

Q: How about on the ground? Has the workforce changed?

A: No.<sup>106</sup>

A male African American bank director provided a somewhat more substantial instance, based on his own contribution to a board. He was asked, "Does the experience of someone who is a racial minority or is a woman, does that experience, in and of itself, add something . . . ?"<sup>107</sup> He immediately responded in the affirmative, and then launched into an example that had little to do with perspective, point of view, or thought processes. It did evidence differential knowledge, but in a limited way—he knew specific people who were helpful to the bank on one occasion. His value as a minority director, in other words, came not from a unique intellectual approach to issues, but from his ability to function as a local-level intermediary on a single occasion—a valuable contribution, no doubt, but not a basis for a broad argument about superior board functioning:

Yeah, I think it does. When [a large bank on whose board I serve] acquired [a local bank] in [a city with a large African American population] there was considerable concern across the community that [the local bank] had been the "family bank" that everybody knew and if you wanted to start a business you went to [the local bank] and you could get some money and that kind of thing. So people were very comfortable but there was an awful lot of concern about what was gonna happen when the marquee no longer said [the local bank] and it changed over to [the large bank]. And [an African American female director] and I were both able to be helpful to [the large bank] because we knew people in that market who [the large bank] folks could go talk to, to allay those kinds of fears. And that worked well. I think that given the skill sets of everybody are the same, the experience and background and kind of things

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105. Interview, Transcript No. DS300050, at 5 (Oct. 3, 2008).

106. *Id.*

107. Interview, Transcript No. DS300024, at 13 (Dec. 4, 2007).

you know that you can bring to the table are beneficial to boards.<sup>108</sup>

#### D. *Employee Relations*

The single narrative that gave the most coherent and specific account of the potential value of a diverse board concerns the corporation's relations with employees. Some respondents proposed indirect benefits to employees stemming from a diverse board: that corporate board diversity sends an important signal to a company's employees about the value it places on diversity and about the availability of role models and mentors at the top of the corporate hierarchy. Others suggested more direct benefits. Echoing the previously discussed argument that women empathize with customers, some contended that female or minority board members are better able to empathize with corporate employees. Female and minority board members were also said to be particularly attentive to diversity in senior management succession, and to aid in the recruitment, retention, and promotion of women and minorities more generally.

##### 1. Sending Signals to Employees

"Signaling," as used in economics, refers to the communication of information from one party to the other in order to convey meaningful but not readily observable information about the party sending the signal.<sup>109</sup> A job applicant, for example, might obtain and advertise an educational credential to send a signal about her merit as a potential employee.<sup>110</sup> Several respondents told signaling stories—that is, stories that portrayed board diversity as a credible means of conveying relevant but difficult-to-observe corporate traits—in this case, that the company cares about the interests and welfare of female and minority employees, and that the organization is one in which members of these groups can rise to the highest ranks.<sup>111</sup>

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108. *Id.*

109. Signaling theory is in fact far more complex. For a fuller discussion, see generally Broome & Krawiec, *supra* note 7.

110. This example comes from the seminal work in the field, Michael Spence, *Job Market Signaling*, Q. J. ECON., Aug. 1973, at 355, 358.

111. Board diversity is also claimed to signal other relevant audiences, including customers, shareholders, regulators, or the general public. See generally Broome & Krawiec, *supra* note 7, at 447–52 (discussing and critiquing signaling theories of board diversity in depth); Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1027–34 (2011) (critiquing signaling theories of workplace diversity as little more than "showcasing").

An experienced white female board member emphasized that the presence of female board members had been important to her when she was an employee, saying, “I think this is more recognition that, you know, people, that women or minorities are competent, capable and can be in leadership positions, to give you a sense of pride, and a little bit of comfort.”<sup>112</sup>

Another white female respondent told us that having women on the board mattered to the senior women management at the company, by providing them with “a comfort level”:

[T]here were senior women in the company and they made a point of—not in the middle of the meeting, but part of board service is spending time, sometimes through dinners or other events that would be arranged with senior people, of speaking to me and I assume they did to [the other female director] as well about how much it meant to them to have a woman sitting there.<sup>113</sup>

Here and in other interviews, our respondents echo the refrain of many researchers and diversity advocates that signaling is a potential benefit of board diversity.<sup>114</sup>

## 2. Empathy with Employees

Some female board members also commented about their attention to and empathy with the concerns of lower-level employees of the company. As will become evident, their comments often tracked the Mars-Venus theme. A white female director stated that women “tend to be more sensitive to the people issues within the company” and “tend to deal with the softer side and understand the workers more” than their male counterparts.<sup>115</sup> Her specific examples included thinking through communicating “various things within the organization when you’re dealing with something like selling the company,” including the people issues.<sup>116</sup> The company was not “putting enough emphasis on that piece of it. And so I think I was able to make an impact from that standpoint.”<sup>117</sup>

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112. Interview, Transcript No. DS300029, at 12 (Dec. 17, 2007).

113. Interview, Transcript No. DS300031, at 6 (Dec. 19, 2007).

114. As we have discussed at length elsewhere, however, the complexity of signaling theory cautions against blanket assertions about its significance in the board context. See Broome & Krawiec, *supra* note 7, at 447–52.

115. Interview, Transcript No. DS300067-68, at 17 (Nov. 12, 2009).

116. *Id.* (the respondent described the “people issues” as including understanding the concerns of workers).

117. *Id.*

A Hispanic female board member also mentioned being sensitive to employee concerns because as a woman

You feel it. You've seen it. You've experienced it. You're sensitive to it. You understand it and when you make a decision whatever that decision is whether it's about an acquisition, whether it's about anything it just makes you more sensitive to everyone that's involved, everyone that's involved; their health care, their retirement, all their benefits. If one of our employees becomes very ill, making sure that their family is going to be taken care of; that you have an appreciation for the contribution that they've made to the company.<sup>118</sup>

This same board member talked about recognizing that she has a great appreciation "for the worker bees in a company"<sup>119</sup>: "I feel like part of my role is to represent the worker bees, not to lose sight of those people and to make sure that they're remembered and not forgotten because that's where the rubber meets the road" and a business cannot succeed without them.<sup>120</sup>

It was obvious, however, that this empathy did not emerge from any working-class experience that she might have had. Rather, she talked about the company's employees as being different from herself, essentializing the workers as "they" or "them," and perhaps condescending to them: "I understand how they think. I understand how they process information. I understand what's important to them and what's important to them may not be important to you and me."<sup>121</sup> She gave an example of conversing in Spanish with workers from a company on whose board she sits while on a plant site visit. She explained that she used this contact to try to find out what "troubles" the workers, and felt that they often identified with her and opened up to her<sup>122</sup>:

And you ask them about their lives and about their families and what they're doing here and how they like working here and what do they need that they don't have, what's important to them, what do they worry about everyday. You know when you get down inside of them what is it that troubles them.<sup>123</sup>

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118. Interview, Transcript No. DS300019-21, at 9 (Nov. 7, 2007).

119. *Id.*

120. *Id.* at 8.

121. *Id.*

122. *Id.* at 11.

123. *Id.*

Although these examples typically did not emerge in response to our requests for specific illustrations of the Mars-Venus distinction, they seem to be variations on that theme. That is, the women who asserted a special empathy for lower-level employees appeared to be making a claim about their sensitivity *as women*. That claim is—to repeat the quote with which we introduced this section—that women “tend to be more sensitive to the people issues.”

In the end, like so much of the dialogue associated with board diversity, women’s purported greater ethic of care can also be “dangerous.” For reasons we elaborate in the Conclusion, an attention to employee relations (particularly attention to equal opportunity practices in hiring, retention, and promotion) could suffice as a business justification for the pursuit of board diversity, either from a risk management or from a profitability standpoint. But, as David Matsa and Amalia Miller find, too much “empathy” with employees could also reduce shareholder value to the extent it results in inefficient labor policies.<sup>124</sup>

### 3. Succession

Another related set of narratives relate to attempts to recruit, retain, and promote women and minorities in the organization. Perhaps the most prominent claims for the value of board diversity involved the recruitment and promotion of managers and succession planning for the “C-suite.” In response to a question about how board diversity affected boardroom dynamics, some directors pointed to succession planning. A male African American director on several large company boards put the point succinctly: “I think the pressing them on the real diversity issue in the staff, the senior level staff, I think that is something that has happened . . . .”<sup>125</sup>

Later in the interview, the same respondent noted that both the former and current CEO of a Fortune 500 company had pushed to increase senior management diversity. When this director was asked whether he thought his encouragement and perhaps that of other board members had played a role in this focus, he replied, “Yes. I know I’m not the only one but for awhile I was the only one, only

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124. Matsa & Miller, *supra* note 18, at 3 (finding that labor costs at firms affected by the Norwegian quota increased twenty-one percent relative to unaffected firms and that average employment increased even more, and further concluding that the “pattern may reflect a greater concern on the part of female board members for the well-being of workers at the lower end of the wage distribution”).

125. Interview, Transcript No. DS300070, at 14 (Nov. 25, 2009).

black on the board so the only one I think was really pushing that was me and they're doing better."<sup>126</sup>

Said another:

When we talk about succession planning which every board does, it's in the boards that I've been on where there was a person of color, that person always spoke up about the need for greater progress in the management ranks for people of color and that would be, that kind of gets to your point too. That's not unexpected. It's welcomed that they do it.<sup>127</sup>

A white male board member reported that a female board member frequently questioned management about women in the senior ranks. "She drew our attention to it. She didn't make a big stink about it, but she was constantly bringing it up in a nice way. And then, when someone would be promoted, she would again recognize that."<sup>128</sup> He noted that "it made a difference. It enriched our pool; our pool within."<sup>129</sup>

Another white female who had formerly served for almost twenty years on the board of a Fortune 100 company noted that although she "didn't raise gender questions very often," she did several times

raise questions about how realistic it was, when we would do our performance analysis each year, of the people who were up and coming in the firm, and there would be a number of women each year, but the expectation that in order to make it to the very top, you were going to have to be available to work 24/7 and travel whenever it was needed. And so I would several times ask a question about how realistic that was, as a pattern of life for a young woman with a family?<sup>130</sup>

At the time of this board service, however, she did not think that her questions made much of an impact. There was a sense that the company was "family-friendly" and a "very good place to work for women," but that

if you were going to get to the top, you had to be willing to play by the same rules, and show that you were dedicated and show that you had it in you, and that that was more important than

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126. *Id.* at 17.

127. Interview, Transcript No. DS300045, at 6 (Aug. 8, 2008).

128. Interview, Transcript No. DS300069, at 13 (Nov. 19, 2009).

129. *Id.* at 14.

130. Interview, Transcript No. DS300060, at 7 (May 21, 2009).

changing the game somehow, so that a young woman with a family might have a chance to make it some day.<sup>131</sup>

A white female director emphasized that it is the board's "job to let the CEO know that part of his job is to bring a diverse workforce to this organization."<sup>132</sup> She described the board's review of succession planning for the most senior thirty or so managers in the organization. "[W]e have visibility so we see where there are women and where there are people of color and those are identified" in the matrix that is presented to the board, and if "there are no women on this page at all" ask where they are.<sup>133</sup> If "there's no people of color anywhere on this, where are they, and we ask those very pointed questions and so, which is entirely different than it was a decade ago when I joined" the board.<sup>134</sup>

In sum, succession issues, more than any other, seemed to be an area in which our respondents did not struggle with "dangerous categories" or strain for relevant, concrete examples. Important as this issue may be, however, it says little about board dynamics. "Different perspectives"—that people of diverse backgrounds see and analyze problems in different ways—seems to mean, in its strongest sense, attention to the prospects of historically excluded people within a company. This is a powerful argument for board diversity—that female and minority directors will try to protect people like them. But it is not fully consistent with the *theories* of diversity that our subjects advanced. That is, attention to the specific issue of diversity in promotion and succession is not evidence of a fundamental difference in the board process, the way that boards consider strategic questions, evaluate options, and arrive at decisions.

#### 4. Vigilance on Employee Retention and Promotion

Although some of the most salient stories in the employee genre related to women and minorities in management, the narrative sometimes extended to the hiring and retention of other employees as well. For example, one respondent argued that a diverse board was important, among other reasons, because most companies have a diverse workforce. When asked whether the impact was limited to management-level employees, she responded:

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131. *Id.*

132. Interview, Transcript No. DS300050, at 12 (Oct. 3, 2008).

133. *Id.*

134. *Id.*

I think it's probably about management, in the management area, but I think with the rank and file women who've been in the workforce realize how difficult it is sometimes for women to move from secretarial or administrative assistant employees up through the workforce, you know, and [Company X] would be the exception where they were very focused on trying to train women and trying to move them into higher level positions.

Q: So does that ever sort of play out with the board being involved? Does that?

A: I think perhaps in some situations where there are discussions about training programs. Actually I think boards do now talk about how to get more diverse people higher up in the ranks, you know, trying to get them out of entry level jobs and trying to move them through the ranks. In fact, I was just reading basically, I think it was [Company Y] about, yeah, I'm sure it was because I'm on the [Name of] Committee, about mentoring programs, about retention rates with women and minorities sometimes being lower, and about basically if you have more mentoring and more job satisfaction, people will tend to stay longer, and programs to try and facilitate that, so that would be where it would come up.<sup>135</sup>

Another white female respondent also discussed the role of the board in demanding that management report on gender and racial diversity within the company:

At [the only African American director's] insistence we started getting data on both gender and racial diversity at levels in the company. The company would not have brought it. It's not that you make it change but the very fact that the company has to report on it regularly highlights it as a positive. I thought that was a very clear example of the difference.<sup>136</sup>

An African American male respondent told a similar story in response to a question of how diversity issues come up in the boardroom. He discussed one company where the board on which he served had taken two steps related to diversity: (1) the CEO's performance metrics included employee diversity, and (2) the CEO was asked to recruit at historically black colleges and report to the board on such recruitment efforts. He concluded:

But we pretty much hold the CEO's feet to the fire on these things and it's one of the metrics as far as his MIP

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135. Interview, Transcript No. DS300029, at 11 (Dec. 17, 2007).

136. Interview, Transcript No. DS300031, at 5 (Dec. 19, 2007).



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[Management Improvement Plan] and his bonuses and all this sort of thing so it's pretty direct and the conversations we have with him are direct conversations. The HR folks will give us a chart that goes all the way down through the company down to even the people on the floor that are putting widgets together and we take a look at that overall picture. It's something that it's to the CEO's benefit to make sure that everybody in the company understands that we want to have a diverse workforce here at [company name].

Q: So that was not a goal that the CEO came to you with, it's one the board went to him with?

A: Right.<sup>137</sup>

*E. The Moral Imperative*

Among the diversity enthusiasts, straightforward moral arguments were rare. Very few of our respondents justified diversity on grounds of fairness and social justice. One of them, a white male regulator, told us that "diversity is a good thing" for "reasons of equity and justice."<sup>138</sup> Another, a white female consultant, was openly skeptical about the different perspectives rationale. In her view, boards do not really function better with diversity, because female and minority board members tend to be people who are known to other board members and have been vetted as able to fit in. But she was nonetheless a diversity advocate, concluding that fairness is the real justification for diversity.<sup>139</sup>

Most of those who did advance the moral argument also raised functional justifications for board diversity. Another fairness advocate, a white man who has been a business executive, a board member, and an academic, piggybacked the moral imperative on the perspectives argument:

Q: You mentioned the right reasons [for diversity]. What are the right reasons?

A: Well that you appreciate that different points of view collectively will get to a better overall answer. That you appreciate that there are points of view that you wouldn't have

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137. Interview, Transcript No. DS300024, at 9 (Dec. 4, 2007).

138. Interview, Transcript No. DS300033, at 3 (Feb. 5, 2008).

139. Interview, Transcript No. DS300062-63, at 5 (Aug. 3, 2009). A second white woman who was an academic gave two justifications for board diversity—"one, because it's justice, and two, most importantly, it makes sense for business." Interview, Transcript No. DS300041, at 4 (May 7, 2008).

because of your race or your economic status or your industry background that you wouldn't have that you need to have and that you need to take into account so and then just it's the morally right thing to do so I think boards get it on all those counts. Many of them do.<sup>140</sup>

The relative infrequency of the “morally right thing to do” argument is striking, though not surprising. From a moral perspective, diversity could be justified on any number of bases: as reparation or remedy for past wrongs, as essential to create a level contemporary playing field, or as a necessary corrective to subtle yet deep-seated and persistent biases. But our respondents' narratives reflect a near-obsession with making a complex (and frequently unpersuasive) business case for what an outsider might view as a matter of simple justice.<sup>141</sup> This is not particularly surprising, given the dominance of the shareholder-value theory of the corporation in this country.<sup>142</sup>

As a legal matter, that theory grants wide discretion to corporate decision-makers over how to achieve the ends of shareholder value, though not over the end itself.<sup>143</sup> In other words, though courts would likely view with skepticism assertions that the pursuit of corporate board diversity is necessary for social justice reasons, attempts to diversify the board would almost certainly be upheld when justified as a matter of the long-term economic interests of the corporation, regardless of any uncertainties surrounding the empirical case. For

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140. Interview, Transcript No. DS300045, at 5 (Aug. 8, 2008).

141. Our narratives are thus consistent with the progression, noted by David Wilkins, of American business leaders' defense of affirmative action in business performance terms, rather than social and moral arguments. *See generally* David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good For Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004) (discussing the rise of market-based diversity arguments).

142. *See generally* Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 494–502 (2005) (giving a comparative overview of the status of shareholder-value theory in the United States and internationally).

143. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders . . . . The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself.”); *see also* eBay Domestic Holdings, Inc. v. Newmark, No. 3705-CC, slip op. at 60–61 (Del. Ch. Sept. 9, 2009), available at <http://www.delawarelitigation.com/uploads/file/int51%281%29.pdf> (“Having chosen a for-profit corporate form, the craigslist directors are bound . . . to promote the value of the corporation for the benefit of its stockholders.”); James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. REV. 902, 906–09 (2011) (reviewing the basic legal structure and obligations of the public company board). *See generally* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431 (2006) (detailing the corporate social responsibility debate).

people who think in these terms, major changes in company policy must be justified in terms of corporate performance. Other rationales are seen as out of order, irrelevant at best and illegal at worst.

*F. The Rare Dissenters*

A few dissenting voices did emerge amid our respondents' overwhelming support for diversity. A senior white male was the only person we have interviewed thus far who was at all hostile to diversity, commenting that "when you start talking about women and minorities there's always a politically correct answer to every question and then there's a real honest answer."<sup>144</sup> A few others also had reservations about diversity, though none were so negative. A white male respondent expressed skepticism about the impact of board diversity on the bottom line, stating that, if he were faced with outside pressure to diversify a board, he would demand evidence of the superior effectiveness of diverse boards.<sup>145</sup> Another, an experienced white female director, characterized the value of board diversity as somewhere between good corporate governance and meaningless,<sup>146</sup> rejecting the notion that diverse boards operate differently from non-diverse ones.<sup>147</sup>

Another white female respondent with over fifty years of board experience, while endorsing the benefits of board diversity throughout much of the interview, ultimately suggested that diversity might be a luxury that only large and established companies can afford. When asked for her opinion on why larger companies tended to have more diverse boards she responded:

I think because they're higher visibility profile. I think it's that simple. I think maybe there's a little more recognition that diversity does bring some benefits, and it brings some different points of view, and that's what you really want, particularly if you're a large public company, and you also want to represent to your workforce that you have diversity as a value, and you want that reflected to your other stakeholders, too, so I think that's really why. I have been on boards of far more entrepreneurial companies, like [company names omitted], where that kind of concern is not raised because the concerns are so different. They're trying to stay alive, basically. It's businesses, so diversity is down the line someplace in terms of a

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144. Interview, Transcript No. DS300014, at 4 (Aug. 30, 2007).

145. Interview, Transcript No. DS300042, at 18 (May 8, 2008).

146. Interview, Transcript No. DS300056, at 20 (Nov. 14, 2008).

147. *Id.* at 19, 23.

value, not that anybody would be precluded, but it just—it doesn't come up in the same way it does.<sup>148</sup>

Similarly, a white male director characterized board diversity as “not critical,” or, at least, “not the most critical thing,” emphasizing:

It's an issue that people have on their radar screens, but the question always is, how critical do you think it is to having a well functioning board and an effective governance? And I guess I'd be a little, I guess I'm not totally persuaded that what you do is that you start off and say I've got to have three women, one minority, and no more than three white males on my board. Now I'm going to form my board. That is not the way I would have it. And I formed the [particular company's] board. And what I wanted was certain skills. And the people I looked to seemed to have those skills to a greater degree than any women or minority that I knew that would be interested in serving.<sup>149</sup>

We cannot overemphasize that these negative comments were outliers, exceptions that prove the rule.

#### G. *How Deep Is the Commitment to Diversity?*

One final narrative of diversity casts doubt on just how deeply people in the corporate world actually think about diversity. We were struck by some respondents' references to the visual impact of a non-diverse board, and by their similarity to Myles Mace's findings on the board as public image forty years ago.<sup>150</sup> Many cited the negative impression that an all-white-male board might leave on outside

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148. Interview, Transcript No. DS300032, at 9 (Dec. 19, 2007). A Hispanic female respondent, while overall endorsing the value of board diversity, echoed this sentiment about the relative unimportance of board diversity for firms in crisis. Interview, Transcript No. DS300019-21, at 20 (Nov. 7, 2007); *see infra* text accompanying note 161.

149. Interview, Transcript No. DS300022, at 10 (Nov. 29, 2007).

150. MYLES MACE, DIRECTORS: MYTH AND REALITY 87–91 (1971). In this earlier era, Mace's respondents primarily emphasized the prestige names and titles of outside directors, as opposed to their race or gender, as a means to enhance the company's public image, with one respondent saying:

You've got to have the names of outside directors who look impressive in the annual report. They are, after all, nothing more or less than ornaments on the corporate Christmas tree. You want good names, you want attractive ornaments. You want to communicate to the various publics that if any company is good enough to attract the president of a large New York bank as a director, for example, it just has to be a great company.

*Id.* at 90.

audiences, invoking visual images of photographs, annual meetings, and the like.

The one respondent (a white male) who dismissed race and gender as political correctness nonetheless acknowledged that the racial and gender composition of the board had a powerful visual impact<sup>151</sup>:

No board wants to show pictures—and they all want to put it in their annual report or something—they don't want all twelve white men. You know? It looks very bad. You want to have a woman in there. You want to have a black in there. It'd be great if you could have a Hispanic in there but there's just not that pool of talent.<sup>152</sup>

He added:

We felt pressured to have a diverse board and I think the regulators, everybody wants to see that and you want to publish those pictures and we couldn't get them. We tried to go out. We tried both in the black community and we tried both in finding women to go on our board.<sup>153</sup>

Similarly, a highly experienced white female director recalled the annual meeting at a large public company on whose board she had served, noting, “But I think it's that kind of *external viewership*, and something that's grassrootsy in the community, too, you know, who's on the board. I think people do notice.”<sup>154</sup> Finally, another white female respondent invoked the photographic image of the board and then used ironic humor to emphasize just how problematic the category of diversity can be:

Oh, it was so funny. They were all white males. But one day, they had all their pictures in the board book. And the CEO said . . . look at all that diversity. . . Catholic from Southern Ireland [laughter], Catholic from Northern Ireland, Protestant from Southern Ireland, Protestant from England [laughter]. . . And, you know, it's just a different way of counting the world.<sup>155</sup>

Comments like these, taken in the context of our entire interview corpus, raise questions about how well-thought-out the corporate world's rhetorical commitment to diversity really is. In concluding our

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151. See *supra* note 111 and accompanying text.

152. Interview, Transcript No. DS300014, at 5 (Aug. 30, 2007).

153. *Id.* at 4.

154. Interview, Transcript No. DS300032, at 10 (Dec. 19, 2007).

155. Interview, Transcript No. DS300030, at 9 (Dec. 18, 2007).

review of the interview data, we give the last word on that subject to a white female director who also has years of experience providing legal advice to corporate boards. The specific topic was why one particular board had sought diversity. Her account suggests that the business world may not have a well-reasoned diversity rationale—in fact, the question of rationale is never even discussed:

Q: When you guys were looking for another director and came up with [a minority director] and diversity was one but not the only metric [according to the subject], why was that on the list of metrics? What was articulated about what benefit might come to [the company] from having some more diversity in terms of race or gender on the board?

A: I suspect you haven't gotten many introspective answers on that because, in fact, you're never going to have a board that will honestly question whether or not there is a value associated with that. And people will accept it and move on. Everybody says the same thing because, again, I'm in board rooms a hundred times a year and I hear the same discussion. And what they say is we have these skill sets that we want and if we can find a diverse candidate who fulfills them without sacrificing the skill sets that we're looking for that would be terrific. And the analysis doesn't go any further. It just isn't discussed. So anything I tell you about why I think diversity adds value is going to be [my] thoughts not because it was a topic of discussion. [Sentence that identifies company deleted.] So to the extent we're talking about sort of that wide swath of middle America then it's nice to have a board that is in some respects emblematic of that but we've never discussed it.<sup>156</sup>

#### CONCLUSION

The literature posits many theories regarding the benefits of board diversity, but the quantitative research is contested and largely inconclusive on whether increased board diversity results in improved corporate performance. This led us to ask those who have actually been in the boardroom about the issue. What, from their perspective, are the advantages and disadvantages of board diversity? Are American corporations purposely seeking to diversify their boards along race and gender lines and, if so, why? Does board diversity result in tangible benefits, and, if so, what are they? Have those in the boardroom witnessed any negative effects of board diversity? If not,

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156. Interview, Transcript No. DS300039, at 6 (May 7, 2008).

why has board diversity not advanced beyond the apparent tokenism that seems to characterize many boards?

As a starting point, all of our interview subjects (with one partial exception) agree with the abstract proposition that board diversity is a good thing. On the more specific question of why it is good, there is broad agreement—a master narrative of sorts—that board diversity results in functional improvements to board or corporate operations—a qualitative “business case” for board diversity. Though the particulars of the functional story vary across respondents, many accounts bear a strong resemblance to Justice Powell’s original exposition of diversity in the *Bakke* case<sup>157</sup>: a diverse group of people will engage in a richer discussion that will be informed by the multiple perspectives for which their demographic diversity is a proxy.

But it has proven difficult to get beyond this very general narrative; our respondents have been able to provide few detailed or substantive examples of this presumed benefit of diversity. Indeed, it seems as if diversity is an assumed but unexamined value. As the respondent quoted at the end of the previous section said, “[Y]ou’re never going to have a board that will honestly question whether or not there is a value associated with that [diversity]. And people will accept it and move on.”<sup>158</sup>

Perhaps this reluctance to examine critically the benefits and drawbacks of board diversity results from the dangerousness of the categories associated with diversity—gender, race, and ethnicity. The argument for diversity requires the assumption that people of diverse demographic backgrounds really are *different* in some meaningful way—but difference is a concept that must be handled with great delicacy. Those who are not members of traditionally unrepresented groups do not want to be accused of stereotyping or essentializing by identifying particular unique contributions of members of those groups; no one wants to say anything like “*they* are especially good at that.” Conversely, those who are members of traditionally unrepresented groups have a vested interest in presenting themselves as *not* being different: not as token members of a group, but as individuals who have been selected based on their own merit.

Nevertheless, when we pressed our respondents we did find a few concrete examples of how contributions of particular female and minority board members may have benefited the corporation. Nearly

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157. 438 U.S. 265 (1978); see *supra* text accompanying note 1 for a discussion of the *Bakke* case.

158. See *supra* note 156 and accompanying text.

all of these examples relate directly or indirectly to employee, community, or customer relations. For example, several women board members reportedly capitalized on their empathy with the company's customers or local community to provide valuable guidance. Other female or minority directors reportedly drew on their knowledge of female or minority customers to advise on ways to improve corporate performance. As we have repeatedly noted, however, the bulk of these examples seemed at a level of daily corporate detail far removed from the strategic planning and attention to big-picture issues that is presumably the function of public corporation boards.

Perhaps more meaningfully, female and minority board members were credited with positive contributions in improving employee relations and in causing the corporation to focus more deliberately on the diversity of its workforce as it considered hiring, retention, promotion, and succession issues. This latter point could well suffice as a business justification for the pursuit of board diversity. Consequently, we find it somewhat curious that this rationale does not figure more prominently in our respondents' abstract business case (in contrast to the more prominent but less concretely supported *Bakke* narrative).

If female and minority directors are indeed paying close attention to the composition of the workforce, and making sure that a broad net is cast during times of executive succession, tangible and significant benefits may well accrue to their companies. Most directly, such companies might be availing themselves of a deeper talent pool than competitors that lack such attention-forcing directors. Perhaps equally importantly, employees would get regular reminders that, even at the top, opportunity is meaningfully available to all. In other words, board attention to equity in hiring, promotion, and succession strikes us as being at least as plausible a business justification for board diversity as the "richer discourse" story. Moreover, when we pressed our respondents for specifics, the bulk of the substantive examples they provided fell into this genre. Yet it features less prominently than the *Bakke* narrative in their telling of the abstract business case.

Beyond the potential bottom-line impact on the company, social stereotypes and legal rules may also influence the invocation of these customer and employee-related narratives. Perhaps our respondents cite these particular kinds of board contributions because society is comfortable with the notions that women, as a group, are more empathetic than men, and that African Americans will consider the



available opportunities for African Americans, as well as other traditionally underrepresented groups, when in positions of power. Our respondents may also be more comfortable discussing the specific issue of diversity in the workforce because they have been sensitized to it by legal restrictions on workplace discrimination. A board member who is attentive to this latter issue is performing a traditional board role of overseeing risk management by helping to ensure that the company is not at risk of an adverse action based on employment discrimination.

As Don Langevoort notes in his commentary to this Article, this muddle is surely due in part to the lack of a coherent, overarching explanation for how boards themselves add to firm value.<sup>159</sup> Moreover, as Langevoort explains, much of the value added by the board is likely to occur in response to some exogenous crisis and, in any event, outside of the formal boardroom setting.<sup>160</sup> If so, then the “real action” of the board will be unobservable by the group and unlikely to display much that is attributable to gender or ethnicity.

Langevoort’s description of the relative unimportance of demographic diversity in a board’s response to crisis situations is consistent with a comment from one of our respondents who is a Hispanic female. When asked about diversity concerns when she served on the board of a company experiencing deep financial distress, she said: “If you could for a moment imagine yourself in a fast flowing river drowning looking for a life boat, you wouldn’t care what color it was and you wouldn’t care who was in the life boat. All you need is a life boat.”<sup>161</sup> In other words, this crisis demanded action rather than introspection about diverse perspectives.

Finally, Langevoort’s suggestion that board meetings are routine and ceremonial is also consistent with our respondents’ accounts.<sup>162</sup> We have noted some of the seemingly “trivial” contributions to board discussion that our respondents cited as evidence of the value of diversity. Perhaps these are the best examples our respondents can offer because so much board discussion is, in fact, largely trivial.

Why our respondents do not offer more meaningful stories of diversity’s impact outside of the boardroom we can only speculate. One possibility, of course, is that minority and female board members

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159. Donald C. Langevoort, *Commentary: Puzzles About Corporate Boards and Board Diversity*, 89 N.C. L. REV. 841, 842 (2011).

160. *Id.* at 846–47.

161. Interview, Transcript No. DS300019-21, at 20 (Nov. 7, 2007); *supra* note 148; accord Langevoort, *supra* note 159, at 106–07.

162. Langevoort, *supra* note 159, at 106.

are not invited to be part of the relevant out-of-meeting conversations. This theory is consistent with the account of the African American male director who told us that he knew that some board members went out in the evening for meals and did not invite him to join them.<sup>163</sup> Overall, however, this narrative of exclusion was not echoed by other female or minority respondents. Needless to say, this possibility, if true, does not bode well for the *Bakke* “richer conversation” rationale for board diversity invoked so frequently by our respondents, and by many researchers as well.

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163. Interview, Transcript No. DS300070, at 25 (Nov. 25, 2009); *supra* note 84 and accompanying text.