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Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement

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CLOGS IN THE PIPELINE: THE MIXED DATA ON WOMEN DIRECTORS AND CONTINUED BARRIERS TO THEIR ADVANCEMENT

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In 1934, Lettie Pate Whitehead was appointed to the board of The Coca-Cola Co.[1] Reportedly, Mrs. Whitehead was the first woman appointed to the board of a major corporation.[2] Mrs. Whitehead served on the board for almost twenty years and by all accounts made a significant contribution to the Coca-Cola board and the corporation as a whole.[3] Coincidentally, the year she was appointed not only corresponds with the year Congress enacted the Securities Exchange Act of 1934 (the Exchange Act),[4] one of the first major federal acts regulating public corporations, but also with the year Congress created the Securities and Exchange Commission (SEC) to oversee that regulation.[5] Close to seventy years later, Congress enacted the Sarbanes-

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1. Ann-Marie Imbornoni et al., Famous Firsts by American Women, http://www.infoplease.com/spot/womensfirsts1.html (last visited Jan. 20, 2006).

2. Most people cite Lettie Pate Whitehead as the first woman director of a major corporation. *See, e.g., id. See generally* The Lettie Pate Whitehead Foundation, Lettie Pate Whitehead, http://www.lpwhitehead.org/bio.asp (last visited Jan. 20, 2006). However, there are a few sources indicating that Marjorie Merriweather Post was appointed to the board of Post in 1914 when she took over as head of that company. Hillwood Museum & Gardens, Marjorie Merriweather Post, http://www.hillwoodmuseum.org/mmp.html (last visited Jan. 20, 2006).

3. Mrs. Whitehead assumed responsibility of her husband's affairs when he passed away. The Lettie Pate Whitehead Foundation, *supra* note 2. Her husband, Joseph Whitehead, was one of the two men who secured an exclusive contract to bottle and sell Coca-Cola throughout the United States. *Id.* Her responsibilities included serving as chair of the board of Whitehead Holding Co. *Id.*

4. 15 U.S.C. §§ 78a-78nn (2000).

5. *Id.* § 78d.

Oxley Act of 2002 (Sarbanes-Oxley or Act),[6] one of the most sweeping amendments to the Exchange Act. Sarbanes-Oxley supposedly ushered in an era of "new" corporate governance.

This Article examines the presence and role of women directors in that new era. This examination draws upon an empirical study on women directors at Fortune 100 companies that I conducted (the *Fortune 100 Study*).[7] Based on that and other studies involving directors, this Article concludes that while women have made substantial progress onto boards since 1934 as well as significant contributions to those boards, they confront considerable barriers to board membership that must be addressed proactively. Indeed, the continued disparity between the percentage of women in the workforce and their overall board membership not only indicates that women are experiencing significant barriers or clogs in the pipeline from the more general workforce to corporate boards, but also that the mere passage of time will not eliminate those clogs. As a consequence, we must develop affirmative measures to address them. Without such measures, women may not be able to fully participate in this new corporate governance era.

Part I of this Article provides evidence of the clogs in the pipeline to women's board membership by evaluating empirical data on women directors. This data confirms that women have made considerable progress since 1934, moving from one lone woman director to a society in which women can be found in boardrooms of the vast majority of public corporations, particularly Fortune 100 corporations.[8] By contrast, the data also reveals that the aggregate number of women directors appears relatively small when compared against their percentages in the workforce and school population.[9] Indeed, women account for nearly half of the labor force, but only about thirteen percent of available board seats at Fortune 500 corporations.[10] This disparity exists despite the fact that women have accounted for an increasingly larger portion of the workforce for decades,[11] undermining the contention that such disparity would decrease over time. Part I ends by discussing the role of Sarbanes-Oxley on women's advance-

6. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 & 29 U.S.C. (Supp. II 2002)).

7. See Appendices A-B and accompanying Tables for data and research methodology.

8. *See infra* Part I.A.

9. *See infra* Part I.B.

10. *See infra* notes 31, 33 and accompanying text.

11. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1-3 (2005), *available at* http://www.bls.gov/cps/wlf-databook-2005.pdf [hereinafter WOMEN IN THE LABOR FORCE].

ment into the boardroom and illustrates that while that Act may have instigated changes in board composition that could have a positive impact on women's effectiveness in the boardroom, it does not appear to have encouraged a significant increase in women directors.

Part II examines why the relatively low number of women directors matters by addressing the contributions women can and do make on corporate boards. In recent years, several scholars have argued that gender diversity—defined as including women directors on the board—can enhance a corporation's performance in a variety of ways, including enabling corporations to reach out to their increasingly diverse customer and client base as well as facilitating the board's ability to consider a broader range of views when making decisions. Part II assesses those arguments and demonstrates that while they may have some merit, they fail to account for factors that limit women's effectiveness on boards.[12] Hence, Part II cautions that we should be more realistic in our expectations of women directors. Nevertheless, Part II insists that women do appear to play a vital role on corporate boards, sitting on and often chairing some of the most important board committees. This role underscores the importance of ensuring that women have the opportunity to fully participate on corporate boards.

Part III examines reasons for the barriers or clogs in the pipeline to women's board membership and ultimately argues one critical reason for the sluggish advancement of women on boards is the failure of women to advance to executive levels within the corporation. Indeed, the empirical evidence on directors' occupations reveals that the pipeline from the workforce to the board primarily flows through corporate executive suites.[13] After addressing reasons why women do not have a significant presence in those suites, Part III proffers some solutions for improving the number of women directors on the board thereby unclogging the pipeline or encouraging alternative pipelines.

I. THE STATUS OF WOMEN DIRECTORS: A GLASS HALF FULL OR HALF EMPTY?

The status of women on corporate boards reflects somewhat of a contradiction. Indeed, the relative disparity between the views embodied within the opening address and keynote speech at Maryland's Symposium on *Women and the "New" Corporate Governance* reflects this

12. For a discussion of the business rationales related to racial and ethnic diversity, see Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795.

13. *See infra* Part III.A.

contradiction. In her opening address, Sheila Wellington, former president and CEO of Catalyst Inc., the nation's leading research and advisory organization regarding women in business, suggested that women had made relatively little advancement into the highest ranks of corporate America, including its boards. Given that Wellington presided over Catalyst when that organization performed its groundbreaking studies on the positions of women in major corporations, her suggestion appears to be based on valid empirical evidence. By contrast, the keynote luncheon speaker, Catherine R. Kinney, the current president and co-chief operating officer of the NYSE, observed that women had made significant strides within corporate America, pinpointing the success of various women CEOs and board members. Kinney's own success, as one of the top office holders at the country's leading stock exchange, lends considerable merit to her observations. Which view regarding women's presence on corporate boards is most accurate? This Part reveals the validity of both. It also reveals the mixed impact Sarbanes-Oxley has had on advancing gender diversity in the boardroom.

A. *The Glass as Half Full*

From one perspective, women appear to have a meaningful presence on corporate boards, and their presence has grown within the past decade. In 2004, 82% of Fortune 1000 companies reported having at least one woman on their board.[14] This statistic reveals that the vast majority of major companies have women on their boards. Then too, the 2004 figure is up from 63% in 1994, a nearly 20% increase over the last ten years.[15]

The *Fortune 100 Study* indicates that women directors have an even stronger presence on the boards of top corporations.[16] The study found that 97% of such companies (or all but three) have at least one woman on their board.[17] Moreover, 68% of such companies

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14. KORN/FERRY INT'L, 31ST ANNUAL BOARD OF DIRECTORS STUDY 12 tbl.B (2004) [hereinafter KORN/FERRY STUDY]. These statistics are based on data collected from 904 publicly held companies. *Id.* at 9.

15. *Id.* at 11. According to the *Korn/Ferry Study*, 63% of Fortune 1000 companies had at least one woman in 1994, 69% in 1995, 74% in 1999, 74% in 2000, 78% in 2001, 79% in 2002, and 80% in 2003. *Id.* at 11, 12 tbl.B.

16. The *Fortune 100 Study* found that women held 199 of the available board seats at Fortune 100 companies. *See infra* app. A, tbl.A1. Within the next level of companies from 101-250, women held 255 of the available board seats. *See infra* app. C, tbls.C1, C5.

17. Those corporations are Honeywell International, Inc. (#75), Plains All American Pipeline, L.P. (#96), and News Corp. (#98). *See infra* app. B. Within the next level, 93% of companies have at least one woman on their board. *See infra* app. C, tbl.C2.

have two or more women on their boards.[18] Thus, close to half of the Fortune 100 companies have two women directors, fifteen have three women directors, two have four women directors, two have five women directors, and two have six women directors.[19] At one company, Albertson's, Inc., women comprise a majority of the board (six out of eleven).[20] Other studies mirror this strong representation of women directors at the top tier of Fortune 500 companies.[21]

Moreover, women directors appear to have made considerable strides within the past five years. Indeed, 45% of women currently serving as directors of Fortune 100 companies joined the board within the past five years.[22] This suggests that corporations are broadening their director search to include more women. This figure, however, does not necessarily mean that the total number of women serving on boards has increased within the last number of years because often corporations will elect one woman director at the same time that another woman director is retiring. In this regard, many of the women directors appointed within the past five years appear to be "replacements," and hence their elections did not signal an increase in the total number of women serving as directors.[23] Instead, about 20% of women currently serving as directors joined their boards within the last five years and were not replacement directors.[24] Yet even taking replacement directors into account, the increase in women directors appears to have gained momentum within the last five years.

Then too, women, and in particular white women, appear to be faring better than any other disadvantaged group with respect to board representation. Women of color only account for 3% of the total available board seats.[25] Thus, the vast majority of women board members are white. In addition, women appear to be better represented on corporate boards than all people of color combined. Sev-

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18. *See infra* app. A, tbl.A2. This number drops to 54% in the next tier of companies from 101-250 (representing 80 out of 149 companies). *See infra* app. C, tbl.C2.

19. *See infra* app. A, tbl.A2.

20. *See infra* app. A, tbl.A2.1. At SBC Communications, Inc., the other company with six directors, women account for six out of fourteen of the directors, almost 43% of the board. *See infra* app. A, tbl.A2.1. In the next tier from 101 to 250, there are two companies where women comprise 40% of the board. *See infra* app. C, tbl.C5 (indicating that at both Publix Super Markets, Inc. (#117) and CIGNA Corp. (#122), four out of ten directors are women).

21. CATALYST INC., 2003 CATALYST CENSUS OF WOMEN BOARD DIRECTORS 13 app.1 (2003) [hereinafter CATALYST CENSUS OF DIRECTORS] (finding that all of the companies in the top 100 of Fortune 500 companies had at least one woman director).

22. *See infra* app. A, tbl.A1.1.

23. *See infra* app. A, tbl.A1.1.

24. *See infra* app. A, tbl.A1.1.

25. CATALYST CENSUS OF DIRECTORS, *supra* note 21, at 8.

enty-six percent of Fortune 1000 companies report having at least one person of color on their board, as contrasted to 82% with at least one woman.[26] The contrast is starker when compared to each minority group. Only 47% of Fortune 1000 companies have at least one African American, 18% of such companies have at least one Latino, and 11% of such companies have at least one Asian.[27] People of color have experienced more dramatic increases in board representation within the last decade, with one group doubling and another tripling its numbers.[28] However, the board representation of these groups both individually and collectively still lags behind women.

This lag, coupled with the empirical evidence that women appear to be represented on the boards of most public corporations, supports the perspective that women directors have made significant strides towards enhancing their presence in the corporate boardroom.

B. *The Glass as Half Empty*

From another perspective, however, women have not achieved the gains on corporate boards that one would expect when viewed in the context of their percentage in the labor force, at colleges, and in professional schools.

In fact, the total number of available board seats held by women appears relatively small and has not grown significantly over the years. The *Fortune 100 Study* reveals that women hold only about 16% of available board seats at those companies.[29] A 2003 Catalyst study similarly found that women comprised 16% of total Fortune 100 board seats, suggesting relatively little movement in the past two years.[30] The overall percentage of board seats held by women declines slightly when all Fortune 500 companies are taken into account. Hence, in 2003, women held 13.6% of available board seats at Fortune 500 companies as compared to 9.6% in 1995.[31] This reflects a mere 4% in-

26. KORN/FERRY STUDY, *supra* note 14, at 11.

27. *Id.*

28. In contrast to the 20% increase for women, over the past ten years there has been more than a 30% increase in the number of companies reporting at least one ethnic minority on their board, going from 44% in 1994 to 76% in 2004. *Id.* Then too, there were only 31% of companies with at least one African American on their board in 1994, 9% for Latinos, and 4% for Asians. *Id.* Thus, Latinos have doubled their board representation, while Asians have nearly tripled their numbers. *Id.*

29. *See infra* app. A, tbl.A1. Women hold 199 of the 1207 available board seats. *See infra* app. A, tbl.A1. Similarly, within the next 150 companies, women hold only 15.7% (or 255 out of 1622) of the total available board seats. *See infra* app. C, tbl.C1.

30. CATALYST CENSUS OF DIRECTORS, *supra* note 21, at 1.

31. *Id.* Women held 9.6% of such seats in 1995, 10.2% in 1996, 10.6% in 1997, 11.1% in 1998, 11.2% in 1999, 11.7% in 2000, 12.4% in 2001, and 13.6% in 2003. *Id.* at 5 fig.1.

crease over the course of almost ten years. Then too, women of color only hold 3% of the board seats at Fortune 500 companies, an increase of only 0.5% since 1999.[32] Viewed in this light, women do not appear to hold a significant number of board seats.

These statistics appear particularly troubling when compared to the percentage of women in the workforce and at colleges or in professional schools. In 2004, women comprised roughly 46% of the U.S. labor force and held 50% of all managerial and professional positions.[33] In 2004, roughly the same percentage of men and women between the ages of twenty-five and sixty-four were college graduates.[34] Then too, in 2001, women earned 57.3% of all bachelor's degrees in the United States, 58.5% of all master's degrees, 44.9% of all doctorates, and 47.3% of all law degrees.[35] Women also comprise 30% of the student population at business schools.[36] The relatively sharp divide between these percentages and the percentage of women directors suggests that women are underrepresented on corporate boards.

This divide is even more alarming when one considers the number of years women have been in the labor force in significant numbers as well as the number of years women have served on boards.[37] Some may contend that women's presence in the boardroom will improve over time as women gain a consistent presence in the labor force, suggesting that such a sustained presence will eventually translate into top-tier positions, including those on corporate boards. However, women's presence in the labor market does not reflect a new phenomenon. Instead, women have comprised nearly half of the labor force for at least a decade.[38]

These minute increases reflect the relative lack of progress women directors appear to be making.

32. *Id.* at 8.

33. WOMEN IN THE LABOR FORCE, *supra* note 11, at 28 tbl.11.

34. *Id.* at 24-25 tbl.9. In 2004, 32.6% of women and 32.3% of men in that age group had completed college. *Id.*

35. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 2004 tbls.247, 257 (2005), *available at* http://nces.ed.gov/programs/digest/d04/lt3.asp#c3a_5.

36. CATALYST INC., WOMEN AND THE MBA: GATEWAY TO OPPORTUNITY 3 (2000) (noting that women's enrollment in business schools appears to have plauteued, while their numbers at medical and law schools have increased, and explaining possible barriers). Indeed, women apparently comprise 44% of the law and medical school populations. *Id.* at 1.

37. *See supra* notes 1, 33 and accompanying text.

38. WOMEN IN THE LABOR FORCE, *supra* note 11, at 8 tbl.2. Women ages twenty-five to sixty-four have accounted for roughly 46% of the workforce since 1994. *Id.* at 24-25 tbl.9.

By contrast, and during this same period, women appear to have made at best incremental gains on corporate boards. Like their existence in the labor force, women's presence on corporate boards is not a new phenomenon. Yet today, more than seventy years since the first woman was appointed to a major corporate board,[39] women hold only 198 more seats at Fortune 100 companies than they did in 1934, an average of 2.75 seats a year.[40] To be fair, women did not begin having a significant presence on corporate boards until the early 1970s, spurred by the Civil Rights Movement.[41] One study reveals that in 1975, twelve companies currently in the Fortune 100 had at least one woman director.[42] As of June 2005, eight of those companies have only increased their representation of women directors to two.[43] Hence, over the span of thirty years, the bulk of these companies have only added one additional woman director to their board. This, albeit limited evidence, corresponds with other studies reflecting a sluggish increase in the growth of women directors. Catalyst's study of women directors, for example, reveals that over the course of roughly ten years, there has only been a 4% increase in the number of board seats held by women directors, which is less than half a percentage point a year.[44] Apparently, women held 1% of board seats in the late 1970s.[45] Like the Catalyst study, this suggests a half a percentage point increase per year. At that rate, it will be almost seventy years before women's percentage on boards will reach 50%. When compared to their sustained presence in the labor force, this data undermines the notion that women's board representation will improve with the passing of time.

39. *See supra* notes 1-2 and accompanying text.

40. *See infra* app. A, tbl.A1.

41. *See Who Are the Women in the Board Rooms?*, BUS. & SOC'Y REV., Winter 1975-76, at 5, 5 (finding 237 companies with women directors in 1975).

42. *Id.* at 6-10. Those companies were American Telephone and Telegraph Co. (AT&T); E.I. du Pont de Nemours & Co. (DuPont); International Business Machines Corp. (IBM); J.C. Penney Corp.; Merck & Co. (Merck); Metropolitan Life Insurance Co. (MetLife); Nationwide Corp.; New York Life Insurance Co.; Sears, Roebuck & Co.; Walt Disney Co.; and Wells Fargo & Co. (Wells Fargo). *Id.* While certainly both the name and the structure of these companies have changed throughout the years, they each have had boards of directors governing the company during those changes. *Id.*

43. Every company but Wells Fargo (which now has five women directors), Merck, and MetLife (both of which now have three) have only increased the number of women directors serving on their boards by two. *Compare id. with infra* app. B.

44. CATALYST CENSUS OF DIRECTORS, *supra* note 21, at 5.

45. *See* Carolyn M. Janiak, *The "Links" Among Golf, Networking, and Women's Professional Advancement*, 8 STAN. J.L. BUS. & FIN. 317, 320 (2003) (noting that women held one percent of board seats in 1977).

C. *The Impact of Sarbanes-Oxley on Gender Diversity on the Board*

Because women directors tend to be independent directors, some believed that Sarbanes-Oxley's focus on increasing independent directors on corporate boards would lead to a rise in the number of women directors. That Act requires every member of a board's audit committee to be independent.[46] The various listing agencies, acting pursuant to the Act, require a majority of the entire board,[47] as well as each member of the audit committee, nominating committee, and compensation committee, to be independent.[48] Studies suggest that women are more likely to be independent directors than their male counterparts.[49] Illustrative of this point, only four women directors at Fortune 100 companies are insiders.[50] By requiring corporations to achieve greater board independence, Sarbanes-Oxley and related reforms could encourage an increase in women directors.

An examination of Fortune 100 companies reveals that Sarbanes-Oxley may have had a nuanced, but significant impact on women directors. For instance, twenty-three percent of women directors currently serving at Fortune 100 companies were appointed after the enactment of Sarbanes-Oxley.[51] That figure, representing almost a quarter of all women directors, does include many replacement direc-

46. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 776 (codified as amended at 15 U.S.C. § 78j-1 (Supp. II 2002)).

47. *See* AM. STOCK EXCHANGE (AMEX), AMEX COMPANY GUIDE § 802 (2005), *available at* http://wallstreet.cch.com/AmericanStockExchangeAMEX/AmexCompanyGuide/default.asp [hereinafter AMEX COMPANY GUIDE]; THE NASDAQ STOCK MARKET, INC., MARKETPLACE RULES 10, 38 (2004), *available at* http://www.nasdaq.com/about/Marketplace Rules.pdf [hereinafter NASDAQ MARKETPLACE RULES]; NEW YORK STOCK EXCHANGE (NYSE), NYSE LISTED COMPANY MANUAL § 303A.01 (2003), *available at* http://www.nyse.com/lcm/lcm_section.html [hereinafter NYSE LISTED COMPANY MANUAL].

48. *See* AMEX COMPANY GUIDE, *supra* note 47, §§ 803-805 (audit, compensation, and nominating committees); NASDAQ MARKETPLACE RULES, *supra* note 47, at 56-58 (same); NYSE LISTED COMPANY MANUAL, *supra* note 47, §§ 303A.06, 303A.04 (audit and nominating committees).

49. *See, e.g.*, David Carter et al., Corporate Governance, Board Diversity, and Firm Performance (March 2002) (unpublished manuscript, on file with the Oklahoma State University), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304499. This reflects a shift because historically, women directors gained admittance to the boardroom because their husbands or family members either founded the company or headed the company, and hence women were inside directors. *Who Are the Women in the Board Rooms?*, *supra* note 41, at 5. Indeed, this was the case with Mrs. Whitehead. *See supra* note 3. However, beginning in the 1970s, more women directors were appointed as outside directors. Some saw this shift as a positive development because it indicated that women were gaining board seats based on their own accomplishments rather than their familial connections. *See Who Are the Women in the Board Rooms?*, *supra* note 41, at 5.

50. *See infra* app. A, tbl.A5.

51. *See infra* app. A, tbl.A1.1. Fortune 100 corporations appointed forty-six women to their boards after Sarbanes-Oxley. *See infra* app. A, tbl.A1.1.

tors and hence does not reflect an aggregate increase in women directors. However, at the very least it suggests that Sarbanes-Oxley has encouraged corporations to seek out other women to serve on their boards and maintain the status quo. Then too, excluding replacement directors, ten percent of Fortune 100 women directors were appointed as new directors after the enactment of Sarbanes-Oxley.[52] This reveals some increase in the total number of women directors after Sarbanes-Oxley. Moreover, all but one of these new directors were appointed to boards that already had at least one other woman director.[53] Many scholars believe that women and people of color need a critical mass in order to overcome tokenism and ensure that such people feel comfortable voicing their diverse views and perspectives.[54] This belief suggests that critical mass may be an important component of women's effectiveness within the boardroom. The *Fortune 100 Study* indicates that by encouraging companies to add to their existing number of women directors, Sarbanes-Oxley also encourages companies to achieve a critical mass of women in the boardroom. If this is true, then Sarbanes-Oxley may have had an important impact on women board members.

Yet even the changes wrought by Sarbanes-Oxley do not significantly decrease the gap between women directors' percentages on the board and their percentages in the workforce. Korn/Ferry International (Korn/Ferry) reports that the number of Fortune 1000 companies with at least one woman on their board has only increased by three percent since the enactment of Sarbanes-Oxley.[55] This appears to be basically consistent with prior gains.[56] However, the percentage of available board seats held by women at top corporations has remained static. Catalyst reported that in 2003, women held 16% of board seats at Fortune 100 companies, while the *Fortune 100 Study* reveals that women now hold 16.4%, a statistically insignificant increase.[57] Ultimately then, the empirical data appears to reveal

52. *See infra* app. A, tbl.A1.1.

53. *Compare infra* app. A, tbl.A1.1. (noting twenty-one women directors elected as nonreplacements from 2003 to 2005), *with infra* app. A, tbl.1.2 (noting twenty nonreplacement directors elected to boards already having at least one woman director from 2003 to 2005).

54. *See infra* notes 81-84 and accompanying text.

55. *See* KORN/FERRY STUDY, *supra* note 14, at 12 tbl.B (indicating there were 79% of such companies in 2002—the year Sarbanes-Oxley was enacted—and 82% in 2004).

56. *See id.* at 12 (noting 74% of companies studied reported at least one woman on their board in 2000, 78% in 2001, 79% in 2002, 80% in 2003, and 82% in 2004).

57. CATALYST CENSUS OF DIRECTORS, *supra* note 21, at 1; *see infra* app. A, tbl.A1.

Sarbanes-Oxley may be insufficient on its own to facilitate significant changes in board composition.[58]

In sum, Part I suggests that women have made advancements into the boardroom and also may be experiencing changes at the margin, but have yet to achieve a level of board service commensurate with their presence within the labor force and school population. Instead, the large percentage of women in the workforce and school population and the length of time women have sustained that percentage, supports the notion that women's pipeline to the boardroom appears to be clogged and that this clog has persisted despite recent reforms.

II. EXAMINING THE SIGNIFICANCE OF WOMEN'S SERVICE ON THE BOARD

Before examining this clog in more detail, this Part evaluates some of the reasons we should care whether corporations enhance the number of women directors in the boardroom. This examination includes an analysis of the so-called business rationales for board diversity, which advance economic (as opposed to moral) justifications for increasing diversity in corporate America. The articulation of such rationales reflects a concern that moral justifications had proven insufficient to encourage greater diversity within corporations.

A. *The Impact of Gender Diversity on Corporate Performance*

Recently, several scholars have argued that gender diversity in the boardroom can improve the effectiveness of corporations in a variety of ways.[59] First, scholars contend that boards that include a significant number of women and directors of color not only may be better monitors of corporate affairs, but also may make higher quality decisions. Second, such scholars assert that increased gender diversity on

58. Predicting this result, Thomas Joo argued that while independence requirements and other Sarbanes-Oxley provisions may create opportunities for directors to increase board diversity, the fact that boards retain control of the nomination process may enable them to continue replicating the status quo. Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 747 (2003).

59. *See, e.g.*, Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1403–05 (2002) (noting that diversity on corporate boards may counter a corporate environment focused exclusively on stock price); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306–08 (2003) ("[D]iversity may enhance board effectiveness."); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 109-10 (2000) (outlining the business rationales for diversity on the board and within corporations more generally); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 494 (2002) (noting that "[d]iversity can enhance corporate governance" in a variety of ways).

the board may limit the number and severity of costly harassment and discrimination suits. Third, those scholars argue that gender diversity may improve the corporations' ability to reach out to diverse employees and customers, enhancing their overall profitability. This Section discusses both the merits and shortcomings of these arguments.

Indeed, there exists some support for such arguments. First, in asserting that diversity enhances a board's monitoring and decision-making capabilities, scholars rely on social science literature regarding group behavior as well as studies of board dynamics. This literature reveals that homogenous groups tend toward excessive conformity that undercuts their ability to sharply assess other group members.[60] In fact, studies of small group behavior reveal that groups comprised of solely one gender tend to stake out more extreme positions.[61] Social science literature further demonstrates that because members of homogenous groups share the same background and experiences, the group as a whole has a narrower perspective, which prevents the group from considering a fuller spectrum of alternatives when making decisions.[62] Adding greater diversity to the group counteracts these shortcomings.[63]

Applying this literature to boards, scholars insist that boards with gender and racial diversity may reduce the board's tendency to conform, thereby enhancing the board's ability to closely scrutinize board and managerial decisions.[64] In fact, studies of the Enron board suggest that its homogeneity (there was only one woman director) may have caused the board to gravitate towards excessive conformity, thereby impeding its ability to critically monitor and assess corporate affairs.[65] Scholars also maintain that the range of backgrounds and views associated with gender and racial diversity on boards enables the entire board to consider a wider range of options and solutions to corporate issues.[66] That consideration facilitates higher quality decisions. By improving the board's ability to monitor corporate conduct, as well as its tendency to generate high quality decisions, scholars argue that gender diversity enhances the board's overall effectiveness.

Second, scholars assert that diversity in the boardroom may reduce the social and economic costs associated with discrimination and

60. O'Connor, *supra* note 59, at 1261-62.

61. *Id.* at 1309.

62. *Id.* at 1262.

63. *See id.* at 1309 (noting that studies evaluating mixed-gender groups avoid problems associated with "groupthink").

64. *E.g.*, Ramirez, *supra* note 59, at 99.

65. O'Connor, *supra* note 59, at 1306 n.423.

66. *E.g.*, *id.* at 1308-09; Dallas, *supra* note 59, at 1403.

harassment in the workforce.[67] As several recent cases reveal, those costs include the possibility of hundreds of millions of dollars expended to settle racial or sexual harassment lawsuits.[68] Because there is a strong possibility that women may have experience with them, women directors may have a better understanding of the issues other women and people of color confront in the workplace.[69] Thus, a board that includes women may be better equipped to respond and resolve those issues, thereby reducing the incidences or at least the severity of diversity conflicts and the costly problems resulting from those conflicts.

Third, scholars assert that gender and ethnic diversity in the boardroom may enhance a corporation's bottom line by enabling corporations to reach out to the increasingly diverse customers, clients, and employees that today's corporations serve.[70] The world is becoming increasingly more diverse. Some argue that diverse boards will enable corporations to create employment policies that take such diversity into account, leading to increased employee satisfaction and hence less turnover.[71] One study found that corporations with a significant number of women in management and on their boards are more likely to adopt flexible work and family life policies.[72] Other studies demonstrate that employees with supportive workplaces are the most satisfied with their jobs.[73] This satisfaction translates into reduced

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67. *E.g.*, Ramirez, *supra* note 59, at 108-09.

68. *See, e.g.*, *id.* (discussing racial discrimination cases); Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1468-69 (2002) (same); Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213, 225 (2003) (discussing costs of discrimination to companies).

69. *See* Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 165-66 (2002) (suggesting women may empathize with other women and people of color, making them more sensitive to a diverse workforce); Sarra, *supra* note 59, at 479 (arguing that one result of corporate boards being dominated by men is that the gender implications of their decisions are not on their radar screens).

70. *See, e.g.*, Dallas, *supra* note 59, at 1403-05 (describing how corporations can use diverse board members, including women, to foster better relationships with various stakeholders); Sarra, *supra* note 59, at 489 (noting that gender diversity on boards may help corporations better assess the costs and benefits of corporate decisions).

71. *See, e.g.*, Dallas, *supra* note 59, at 1384-85 (stating that diversity on corporate boards may "sensitize the corporation to the interests of employees and consumers in an increasingly diverse, global society").

72. CAROLYN KAY BRANCATO & D. JEANNE PATTERSON, CONFERENCE BD., BOARD DIVERSITY IN U.S. CORPORATIONS: BEST PRACTICES FOR BROADENING THE PROFILE OF CORPORATE BOARDS 8 (1999).

73. *E.g.*, James K. Harter et al., *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. APPLIED PSYCHOL. 268 (2002).

turnover among such employees as well as a reduction in the costs associated with that turnover.[74] Diverse boards also may be better able to identify with different communities, enabling such boards to tap the market power of those communities.[75] Hence, it is reputed that the first woman director at Nike, Inc., Jill Kerr Conway, encouraged her fellow board members to begin marketing to women, a campaign that has proven to be extremely profitable.[76]

Buttressing these arguments, there is some empirical support for the proposition that gender diversity on boards enhances corporate performance. A recent Catalyst study found a link between companies with high representations of women in their management (defined as women corporate officers and top earners) and financial performance.[77] Measuring financial performance by return on equity and total return to shareholders, that study found that companies with the highest representation of women managers experienced better financial performance than those with a low number of women managers.[78] This result remained largely constant both for the total group of companies analyzed and when Catalyst analyzed companies by industry.[79] Although not specific to boards, this study provides important support for the notion that women directors may enhance a corporation's economic performance.

This study and arguments in support of gender diversity suggest that corporations should be concerned with the lack of such diversity on their board because it could have economic consequences.

However, there are some flaws in the business-related arguments for diversity, and those flaws suggest that advocates may have overstated women's ability to enhance corporate performance. First, a variety of factors may limit the impact women directors can have on improving the board's decision-making and monitoring functions. In fact, increased diversity may foster less cohesiveness on boards.[80] From this perspective, corporations must manage board diversity so that differences among directors do not undermine the entire board's

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74. *Id.* at 273-74.

75. *See* O'Connor, *supra* note 59, at 1308 (noting that corporations desire women directors for purposes of "market reciprocity").

76. Nike's female sports-apparel division now accounts for a significant segment of Nike's overall revenue. *See* Carol Hymowitz, *Corporate Boards Lack Gender, Racial Equality*, WALL ST. J. ONLINE, July 9, 2003, http://www.careerjournal.com/columnists/inthelead/20030709-inthelead.html.

77. CATALYST INC., THE BOTTOM LINE: CONNECTING CORPORATE PERFORMANCE AND GENDER DIVERSITY 1 (2004).

78. *Id.* at 2.

79. *Id.*

80. Joo, *supra* note 58, at 743.

ability to work together effectively.[81] Then too, a lack of critical mass of women board members may prevent such directors from expressing their diverse viewpoints.[82] Some studies reveal that gender does not impact group decision-making until the number of women in the group rises above twenty percent.[83] Indeed, a single woman board member may not feel comfortable expressing divergent views, undermining her ability to facilitate a consideration of broader perspectives in the boardroom.[84] In this regard, the possibility that Sarbanes-Oxley may encourage multiple directors on boards may buttress women's ability to enhance a corporation's effectiveness. Then too, the fact that most Fortune 100 boards have more than one woman director suggests that those companies may have a sufficient number of women on the board to ensure that those women feel comfortable exercising their voices. Even if this is true, however, corporations tend to draw their women directors from the same social and professional backgrounds as men.[85] This tendency limits the extent to which women directors' views or experiences will be significantly different from their male counterparts, thereby limiting the extent of their actual diversity.[86] These factors suggest that advocates may have overstated women's ability to facilitate diverse discussions and more critical thinking in the boardroom.

Also, women board members may be limited in their ability to reduce incidences of discriminatory or harassing behavior in the workforce and their attendant costs. Studies reveal that such reduction requires systematic changes in the corporate environment.[87] While certainly women directors may play a role in implementing those changes, directors (both male and female), whose roles are primarily limited to oversight of officers and their policies, cannot serve as the sole means for instituting such changes. Like those involving the benefits of diverse viewpoints, this observation suggests that advocates may have overstated, and even oversimplified, the ability of wo-

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81. *See, e.g.*, O'Connor, *supra* note 59, at 1310 ("[S]ome level of collegiality . . . promotes a well-functioning board.").

82. *See* Grutter v. Bollinger, 539 U.S. 306, 318 (2003) (observing that a critical mass of minorities ensures that students of color feel comfortable expressing their divergent views).

83. *E.g.*, O'Connor, *supra* note 59, at 1309.

84. *Id.*

85. *Id.* at 1310.

86. *See id.* at 1309-10 (explaining that boards appoint women with shared backgrounds, which fails to create heterogeneity); Sarra, *supra* note 59, at 487 (noting that women are likely to be drawn from the same privileged class as current directors and hence may not generate the wider diversity of views that enhance corporate governance).

87. *E.g.*, Sarra, *supra* note 59, at 485.

men directors to provide these litigation-related economic benefits to the corporation.

Additionally, some recent scholarship suggests that women who rise to the highest levels within the corporation may be the least likely to promote changes in the corporate environment, particularly changes related to diversity concerns. Indeed, Devon Carbado and Mitu Gulati explain that corporate officials tend to promote people of color who are racially palatable and demonstrate a willingness to subordinate their group identity.[88] These characteristics are particularly important for managers of color because they must be perceived as having the capacity to manage whites without making them uncomfortable.[89] In this way, the corporation's promotion system screens out those people of color who exhibit racial differences and a tendency to challenge the status quo.[90] Because of this system, Carbado and Gulati conclude that the type of people of color most likely to be promoted within corporations is not likely to promote the interests of other people of color.[91]

This conclusion appears applicable to women. Consistent with Carbado and Gulati's assessment of corporate promotions systems, studies reveal that while thirty-nine percent of women executives believe that men have difficulty being managed by women,[92] forty-seven percent of women claim they have succeeded into top positions by developing a management style that makes men comfortable.[93] This suggests that those women who get the farthest ahead may be most adept at generating such comfort and hence least likely to advance policies (such as those that realistically address racial and gender issues in the work place) that undermine or alter men's comfort zone. Certainly we should not discount those women who do get ahead and make important changes in the workforce. However, Carbado and

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88. *See* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1676-77 (2004) [hereinafter Carbado & Gulati, *Race to the Top*]; Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1798-1802 (2003) (book review) [hereinafter Carbado & Gulati, *The Law and Economics of Critical Race Theory*].

89. *See* Carbado & Gulati, *Race to the Top*, *supra* note 88, at 1675-76 (arguing that firms hire minorities based on their ability to work in a corporate team).

90. *See* Carbado & Gulati, *The Law and Economics of Critical Race Theory*, *supra* note 88, at 1802-03 (arguing that firms hire racially palatable minorities).

91. Carbado & Gulati, *Race to the Top*, *supra* note 88, at 1672-73, 1692.

92. CATALYST INC., WOMEN IN U.S. CORPORATE LEADERSHIP: 2003, at 10-11 (2003) [hereinafter WOMEN IN CORPORATE LEADERSHIP].

93. *Id.* at 13. This number is down from sixty-one percent. *Id.* Another forty-nine percent of those women maintain that they have succeeded by successfully managing others. *Id.*

Gulati suggest a need to be more cautious when assessing women's ability to alter discriminatory behavior in the workforce, particularly because that alteration involves significant costs and effort that women directors cannot be expected to bear on their own.[94]

This kind of suggestion reveals that arguments touting women's ability to contribute to corporate performance may have been exaggerated because they fail to account for those factors limiting women's ability to achieve some of the economic benefits of diversity. Nevertheless, these arguments do have some merit, indicating that under the right circumstances, gender diversity on the board can translate into economic advantages for the corporation. In fact, some boards may have obtained a critical mass of women directors, not only enabling those directors to express divergent views in the boardroom with comfort, but also allowing the entire board's decision-making responsibilities to benefit from considering those views. Then too, there is some evidence that women may generate supportive employment policies as well as marketing strategies that enable the company to tap into the market power of different consumers. Finally, it is possible that as more women assume management positions, their need to make other men comfortable may subside, lessening the notion that such women may not advance agendas that involve diversity measures. In fact, the number of women who believe that making men feel comfortable represents a key strategy for success declined from sixty-one percent in 1996 to forty-seven percent in 2003.[95] That kind of decline suggests that over time women may feel more comfortable addressing gender-specific issues in a way that reduces workforce conflicts involving race or gender. If this occurs, women directors could have a significant impact on the corporation's profitability. These advantages suggest that when corporations fail to capitalize on women board members, that failure may negatively impact their economic bottom line.

B. *The Moral Importance of Gender Diversity*

Aside from the possibility that gender diversity will enhance corporate performance, ensuring a more representative number of women directors in the boardroom has an important moral significance. At base, having a boardroom that better reflects women's participation in the workforce is the right thing to do. Further, it sends a posi-

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94. *Cf.* Carbado & Gulati, *Race to the Top*, *supra* note 88, at 1692-93 (urging legal reform in light of the struggles racial minorities face while rising within a corporation).

95. WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 13.

tive message to other women in the workforce. For women in the rank and file as well as the broader society, when corporations have a significant number of women board members, those numbers suggest the attainability of such positions. Given the historical barriers (discriminatory and otherwise) to women in the workforce, and the continued gender gap in pay, particularly among top executives,[96] there is certainly a need for corporations to signal such attainability. Then too, when the number of women on boards better reflects their representation in society it suggests that women directors are not mere tokens, but rather are being valued for their individual contributions. In this regard, the failure of boards to better reflect the representation of women in the workforce is especially problematic because it suggests the continued strength of discriminatory barriers and that women are being treated as tokens.

C. *Some Evidence on Women's Contributions to Corporate Boards*

Assessing women's roles on Fortune 100 boards indicates that women do make meaningful contributions to the corporate boards on which they serve. Indeed, women serve on some of the most work-intensive committees of the board.[97] The *Fortune 100 Study* indicates that the audit committee is the most common committee on which women serve.[98] Sixty percent of Fortune 100 companies have at least one woman serving on their audit committee.[99] The significance of women's tendency to serve on audit committees should not be minimized. Indeed, the audit committee is the only board committee spe-

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96. Studies reveal that women executives earn about forty-five percent less compensation than men. *See, e.g.*, Marianne Bertrand & Kevin F. Hallock, *The Gender Gap in Top Corporate Jobs*, 55 INDUS. & LAB. REL. REV. 3, 3 (2001). A lot of this is attributed to the fact that women manage smaller companies and were less likely to be the president or CEO. *Id.* at 17. When those title differences are taken into account, the gap falls to less than five percent. *Id.*

97. Because corporations use a variety of different names to refer to their committees, the *Fortune 100 Study* uses specific committee names to refer to the committee's primary function, rather than the actual committee name a corporation uses. For example, even when some corporations use the name "audit and finance committee," the *Fortune 100 Study* will deem such committee an audit committee if its primary function is to oversee accounting, auditing, and financial reporting of a company with a focus on ensuring compliance with Sarbanes-Oxley.

98. *See infra* app. A, tbl.A3. Thus, the greatest number of women, seventy-four, serve on the audit committee, while sixty-five women serve on the compensation committee. *See infra* app. A, tbl.A3. This same pattern holds true for the next 150 Fortune companies where 116 women serve on the audit committee and seventy-one serve on the compensation committee. *See infra* app. C, tbl.C3.

99. *See infra* app. A, tbl.A3.1.

cifically regulated by Sarbanes-Oxley.[100] That Act focuses on the audit committee because of that committee's perceived importance to ensuring a corporation's financial accountability. The Act makes audit committee members responsible for overseeing the work of their company's outside auditors, including resolving disputes between the auditors and management.[101] Reflecting this responsibility, audit committee members report the highest increase in time commitment resulting from Sarbanes-Oxley relative to other committee members. In fact, audit committee members have almost doubled the average number of hours spent in committee meetings.[102] This reflects the greater time and responsibility such members must devote to their jobs relative to other committee members. When viewed in this context, the fact that the audit committee is the most common committee on which women sit illustrates the importance of their contribution to the board.

The *Fortune 100 Study* also reveals that women have leadership roles on the board. More than a quarter or twenty-seven percent of Fortune 100 women directors chair a committee on the board.[103] Committee chairs preside over committee meetings and receive a retainer for their service as a chair in addition to the standard committee retainer and fee other committee members receive.[104] Their role as chairs further reflects women's contribution to the boards on which they serve.

Unfortunately, only two women serve in "top" leadership positions on the board. The *Fortune 100 Study* revealed one woman chair of the board,[105] and one woman lead director—the director who eval-

100. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775-77 (2002) (codified as amended at 15 U.S.C. § 78j-1 (Supp. II 2002)).

101. *Id.*

102. KORN/FERRY STUDY, *supra* note 14, at 14. According to the *Korn/Ferry Study*, audit committee members meet an average of eight times per year, while other committee members only tend to meet four or five times a year. *Id.* at 15 tbl.E.

103. *See infra* app. A, tbl.A3.1. Women hold fifty-four chairs of board committees. *Id.* Similarly, women hold fifty-five chairs of board committees within the next 150 Fortune companies. *See infra* app. C, tbl.C3.

104. KORN/FERRY STUDY, *supra* note 14, at 18. By far the chair of the audit committee receives the largest. The average audit committee chair received a retainer of $10,317 in 2004, up from $5,779 in 2002. *Id.* at 18 tbl.H. Hence, retainers for such chairs have doubled since the enactment of Sarbanes-Oxley, presumably reflecting the increased amount of work and responsibility such chairs must undertake.

105. *See infra* app. A, tbl.A5. The *Fortune 100 Study* found that Hewlett-Packard Co. is the only Fortune 100 company with a woman as chair of the board. *See* Hewlett-Packard Co., Definitive Proxy Statement (Form 14A), at 16 (Feb. 11, 2005) (identifying Patricia C. Dunn as non-executive chairman of the board since February 8, 2005). Of course Hewlett-Packard Co. is also the only current Fortune 100 company previously headed by a woman. *See*

uates the CEO and presides over the board in executive sessions.[106] These miniscule numbers indicate that women directors have not yet ascended to the top ranks of the board.

Taken together, however, this Part reveals that when women serve on boards, they can and do make their presence felt. There is some, albeit controvertible, evidence that having women directors improves a corporation's corporate performance because gender diversity generates economic advantages both to the board and the corporation as a whole. Then too, ensuring that corporations have a sufficient number of women directors has a moral significance for other women employees and women within the broader society. Finally, through their service on critical committees, women make important contributions to the board. Corporations miss out on these contributions when they overlook women directors. More importantly, these contributions illustrate the need to ensure that women have greater access to corporate boards.

III. CLOGS IN THE PIPELINE AND POSSIBLE SOLUTIONS FOR UNCLOGGING THEM

Part I reveals that women represent about half of the labor force and managerial positions and that representation has been relatively constant for almost a decade.[107] They also appear to be relatively well represented in professional schools. Yet they have not found their way onto corporate boards in sufficiently high numbers, apparently experiencing a barrier to that ascension. Part II demonstrates why corporations and society in general should be concerned with that barrier. This Part pinpoints one significant reason for the clog in the pipeline to more women directorships and offers some solutions to dissolving that clog.

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infra note 120 and accompanying text (discussing former Hewlett-Packard CEO Carly Fiorina).

106. *See* KORN/FERRY STUDY, *supra* note 14, at 27 (documenting that eighty percent of companies have a lead director—a dramatic rise from thirty-two percent prior to Sarbanes-Oxley). Carla A. Hills at Chevron/Texaco Corp. served as its lead director. Chevron, Board of Directors, Carla A. Hills, http://www.chevron.com/about/company_profile/board_bio_hills.asp (last visited Jan. 20, 2006).

107. *See* WOMEN IN THE LABOR FORCE, *supra* note 11, at 8 tbl.2. In 1995, women accounted for 46.1% of the labor force, while they accounted for 46.4% in 2004. *Id.* at 7-8, 8 tbl.2. Similarly, women held 43.8% of managerial and professional jobs in 1996 and now hold 50.3%. *Id.* at 28; Adams, *supra* note 69, at 147-48.

A. *Impediments to Women Directors' Success*

Corporations tend to draw their board members from particular portions of corporate America. By statute, corporations are free to determine their own qualifications for directors,[108] and most corporations delegate this function to the board's nominating committee.[109] Hence, corporate statutes grant nominating committees the freedom to determine the criteria of each board member. Despite this freedom, most corporations appear to adopt the same general criteria when selecting directors. Illustrative of this similarity, ninety-five percent of Fortune 1000 companies report having a retired executive on their board, while eighty-two percent of such companies have a CEO or chief operating officer (COO) of another company on their board.[110]

This dominance of executives as board members applies, though to a lesser extent, regardless of the director's gender. Sixty percent of Fortune 100 companies with women directors have at least one woman who was a current or former CEO, COO, or president.[111] Then too, such executives are by far the most common occupation of women directors. Indeed, forty-seven percent of Fortune 100 women directors are either current or former CEOs, COOs, or presidents.[112] This data reveals that the search for women directors involves a search for women executives.

Unfortunately, that search will not yield significant results. One might presume that if women account for fifty percent of all managerial positions, then corporations would have ample candidates from which to choose. However, that percentage is deceptive because it accounts for positions ranging from an administrator to a CEO.[113] Indeed, studies reveal that women who serve as managers within various companies tend to occupy a disproportionate share of lower-level

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108. *See* MODEL BUS. CORP. ACT § 8.02 (2002) (allowing corporations to identify requirements for directors in their articles of incorporation or their bylaws).

109. Since Sarbanes-Oxley's enactment, the percentage of corporations with formal nominating committees has increased from eighty-seven percent to ninety-six percent. KORN/FERRY STUDY, *supra* note 14, at 12. This represents an increase from seventy-three percent in 1995. *Id.* at 13 tbl.C.

110. *Id.* at 12. The *Korn/Ferry Study* notes that the number of current executives has decreased slightly, suggesting that such current officers may be less suited to board membership because of the increased time commitments required by Sarbanes-Oxley. *Id.*

111. *See infra* app. A, tbl.A4.1.

112. *See infra* app. A, tbl.A4; *see also infra* app. C, tbl.C4 (indicating that forty-six percent of women directors of Fortune 101-250 boards are either current or former CEOs, COOs, or presidents).

113. Adams, *supra* note 69, at 147-48.

managerial positions.[114] A more tailored assessment of women at the highest levels of the corporation reveals a more limited pool. In 2002, only 15.7% of corporate officers in the Fortune 500 were women.[115] Additionally, women hold only 9.9% of line position corporate offices in Fortune 500 companies, positions which involve jobs with profit and loss responsibility.[116] Only 7.9% of women hold the highest titles within a corporation such as CEO, president, COO, and Executive Vice President.[117] Then too, only 5.2% of women represent top earners, whose earnings serve as a key indicator of executive status.[118] Finally, *Fortune*'s 2005 survey revealed nine Fortune 500 companies run by women and nineteen Fortune 1000 companies headed by women.[119] With the ousting of Carleton Fiorina as CEO of Hewlett-Packard,[120] none of those women head companies in the current Fortune 100.[121] Because boards rely on this pool to select directors, this dearth of women in the executive ranks explains the relatively low level of women serving on boards. Indeed, the fact that the percentages of women in top offices better reflects their percentage in the boardroom reveals that once women reach the top of the corporate ladder they make a relatively smooth transition onto boards. This revelation underscores the notion that women's failure to reach the top impedes their ability to improve their numbers of directorships.

Scholars point to many reasons for this failure. Possibly the dominant reason identified is women's lack of requisite experience. Indeed, a 2003 study of executives in Fortune 1000 companies found that forty-seven percent of women executives believed they were held

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114. *E.g.*, Bertrand & Hallock, *supra* note 96, at 7-9.

115. CATALYST INC., 2002 CATALYST CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS OF THE FORTUNE 500, at 3 (2002) [hereinafter CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS]. This reflects a 7% increase from 1995 when women held 8.7% of such positions. *Id.*; WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 1.

116. WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 1-2.

117. *See* CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS, *supra* note 115, at 12.

118. *Id.* at 8.

119. Fortune 500, Women CEOs of Fortune 500 Companies, http://money.cnn.com/magazines/fortune/fortune500/womenceos/ (last visited Jan. 20, 2006). The nine women are Brenda C. Barnes at Sara Lee Corp. (#114), S. Marce Fuller at Mirant Corp. (#424), Susan M. Ivey at Reynolds American, Inc. (#321), Andrea Jung at Avon Products, Inc. (#278), Anne Mulcahy at Xerox Corp. (#132), Patricia F. Russo at Lucent Technologies, Inc. (#247), Mary F. Sammons at Rite Aid Corp. (#128), Marion O. Sandler at Golden West Financial Corp. (#435), and Eileen Scott at Pathmark Stores, Inc. (#467). *Id.*

120. *See* John Markoff, *Shake-Up at Hewlett: The Departing Chief; When + Adds Up to Minus*, N.Y. TIMES, Feb. 10, 2005, at C1 (noting that Fiorina was the first woman to head one of the nation's top twenty public companies); Gary Rivlin & John Markoff, *Tossing Out a Chief Executive*, N.Y. TIMES, Feb. 14, 2005, at C1.

121. Fortune 500, *supra* note 119. At a company ranked #114, Brenda C. Barnes of Sara Lee Corp. heads the highest ranked Fortune 500 company. *Id.*

back by lack of significant general management or line experience, which refers to revenue generating or profit and loss responsibility.[122] Moreover, this statistic has remained constant since 1996 when the exact same percentage of women reported that the lack of such experience undermined their ability to advance.[123] By comparison, sixty-eight percent of CEOs contend that women are impeded by their lack of significant general management or line experience.[124] While their perceptions may differ, it still represents the primary reason identified by both (mainly male) CEOs and women as holding women back from top management jobs. As Catalyst points out, "line experience is widely considered essential for rising to the rank of CEO."[125]

Another reason identified by both women and CEOs as impeding women's ability to make it to the top of the corporate ladder is the lack of mentoring relationships and networking opportunities.[126] These concepts are linked because networking opportunities "facilitate[ ] the development of mentoring relationships."[127] Also, developing important relationships through network and mentoring opportunities can aid women in getting assignments that will enhance their managerial experience, and hence these opportunities may mitigate that lack of experience for women employees.[128] However, forty-one percent of women executives contend that exclusion from informal networks hold women back from top management positions.[129] Thirty-seven percent of CEOs believe women are held back by the failure of senior leadership to assume accountability for women's advancement.[130] Both of these statements essentially reflect the notion that women have not had access to networks or mentors that can facilitate their success within the corporation. Moreover, Catalyst insists that the lack of key mentoring relationships acts as a significant barrier to women's advancement.[131]

Executives also pinpoint stereotyping regarding women's roles and positions as impairing women's success.[132] Indeed, forty-six percent of women contend that gender-based stereotypes about their

122. *See* WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 16.

123. *Id.*

124. *Id.* at 25.

125. CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS, *supra* note 115, at 2.

126. WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 16, 25.

127. Janiak, *supra* note 45, at 324. Janiak also notes that networking can reduce stereotyping. *Id.*

128. *Id.*

129. WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 16.

130. *Id.* at 25.

131. *Id.* at 7.

132. *Id.* at 16; Janiak, *supra* note 45, at 322.

roles in the corporation hindered their own advancement.[133] Thirty-three percent of women believe that such stereotypes reflect a barrier to women's advancement more generally.[134] Interestingly, only twelve percent of CEOs believe that stereotypes and preconceptions about women hinder women's ability to advance.[135] Arguably this gap in the opinions of CEOs and women may reflect part of the problem because it suggests that (mainly male) CEOs may be unaware of the stereotypes they harbor.[136] Such lack of awareness makes addressing the problem especially difficult.[137]

Regardless of the reason, because corporations rely on the executive pipeline to fill their board seats, women's failure to achieve meaningful representation within the top levels of corporate America hampers their progress onto corporate boards.

B. *Possible Solutions for Enhancing Women Directors*

This Section considers several methods for increasing the number of women directors. These methods are offered with the recognition that the problems women face in advancing within the corporate ranks and onto boards are complex and hence need to be attacked on a multitude of fronts.

1. *Removing Impediments to Success.*—

a. *Antidiscrimination Laws.*—One solution for enhancing the number of women directors may be to rely on antidiscrimination laws to reduce barriers in their advancement to higher levels within the corporation. Given that women pinpoint stereotyping as one barrier to their success, reliance on such laws may serve to remove that barrier. The Supreme Court has identified sex stereotyping as an impermissible form of discrimination.[138] Moreover, scholars assert that promotion decisions are uniquely vulnerable to stereotyping because they rely on subjective considerations.[139] This assertion confirms the

133. WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 19.

134. *Id.* at 25.

135. *Id.*

136. Janiak, *supra* note 45, at 321.

137. *Id.*

138. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (explaining that in forbidding sex discrimination, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes").

139. *See, e.g.*, Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 494 (1990) (noting that women are associated with negative stereotypes); Tracy Anbinder Baron, Comment, *Keeping Women out of the Executive Suite: The Court's Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 275 (1994) (arguing that women must deal with stereotyping to succeed at upper-level jobs).

notion that such stereotyping may impede women's ability to reach the upper levels of corporate America. However, reliance on antidiscrimination laws may prove ineffective in getting to the root of the problem. In fact, scholars claim that these laws have experienced limited success in combating sex discrimination in the workforce.[140] Such scholars pinpoint many reasons for that limited success including difficulties with proof of such claims.[141] Moreover, while such laws may eradicate the more obvious forms of gender discrimination, they may be ill-suited to combat the more subtle forms of bias that serve to hinder women's promotion into executive jobs.[142] There are also those who contend that strategies to eradicate discrimination based on litigation may be ineffective not only because women may be reluctant to bring discrimination claims,[143] but also because litigation may make the work environment more hostile for women.[144] Finally, litigation as a strategy is reactionary and we need to be proactive in addressing problems associated with women's progress. In this regard, reliance on antidiscrimination laws may be an unsuitable (or at least limited) solution for unclogging the pipelines for women board members.

b. Mentoring and Networking Opportunities.—Another solution for increasing the number of women directors may involve focusing on enhancing mentoring and networking opportunities for women. Women continually cite the absence of informal networks and influential mentors as a key stumbling block to their success.[145] Indeed, Catalyst found that only twenty-three percent of women executives report being satisfied with the availability of mentors, while another fifty-seven percent of women executives contend that they are not satisfied with their opportunities to network with influential clients and colleagues.[146] Moreover, sixty percent of the women in the Catalyst study

140. *E.g.*, Michele Hoyman & Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61 (1986); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311 (1989); Baron, *supra* note 139; *see also* Carlo A. Pedrioli, *A New Image in the Looking Glass: Faculty Mentoring, Invitational Rhetoric, and the Second-Class Status of Women in U.S. Academia*, 15 HASTINGS WOMEN'S L.J. 185, 192-96 (2004) (noting limits in anti-discrimination laws in furthering progress of women in academia).

141. *E.g.*, Hoyman & Stallworth, *supra* note 140, at 61; Baron, *supra* note 139, at 288-98.

142. Baron, *supra* note 139, at 271-80.

143. Hoyman & Stallworth, *supra* note 140, at 61.

144. Linda Stamato, *Dispute Resolution and the Glass Ceiling: Ending Sexual Discrimination at the Top*, DISP. RESOL. J., Feb. 2000, at 25, 29.

145. WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 7-8; Janiak, *supra* note 45, at 322-24.

146. WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 7.

had no mentor.[147] This lack of mentors is especially problematic for women because they often do not have access to other informal networks that may enhance their ability to advance.[148] In addition to helping women advance up the ladder, mentoring relationships may assist with counteracting gender stereotypes, thereby facilitating in the reduction of other barriers to women's success.[149] Unfortunately, generating those networks and mentor relationships involves a host of problems that have not yet been resolved. Of particular concern are the difficulties with cross-gender mentoring, which obviously need to be overcome given that most top-level executives are men.[150] Although it is beyond the scope of this Article to pinpoint the various methods for generating mentoring and networking opportunities, there is considerable literature with regard to such issues.[151]

With respect to board membership, this Article would add to that literature by noting that women must develop strategies for including within their circle of mentors men and women who have served or are currently serving as a director. Such mentors are particularly important because directors control the nomination process and hence can be instrumental in ensuring that people they know are allowed to serve on a board. Indeed, directors appear to share the same social and professional backgrounds. Hence, women must be part of that background in larger numbers if they hope to gain entry onto corporate boards.

c. Women Entrepreneurs.—Alternatively, we may consider more stringently encouraging women to start their own businesses in an effort to buttress the executive pipeline. Admittedly, encouraging women to embark on their own business ventures may undermine any efforts to increase the presence of women in the highest ranks of major corporations. However, it also creates an alternative pipeline for women directors. While they may not necessarily have exposure to issues involving large public companies, women who operate their own businesses may gain the kind of line experience necessary to

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147. *Id.* at 8.

148. *Id.*

149. Janiak, *supra* note 45, at 322-24.

150. *See id.* at 325 (identifying this difficulty as the "similarity principle").

151. *See id.* at 328 (suggesting golf as a networking opportunity); *see also* SHEILA WELLINGTON & CATALYST, BE YOUR OWN MENTOR: STRATEGIES FROM TOP WOMEN ON THE SECRETS OF SUCCESS (2001); Kathy E. Kram, *Phases of the Mentor Relationship*, 26 ACAD. MGMT. J. 608 (1983); Pedrioli, *supra* note 140, at 199-201 (explaining the benefits of institutional mentoring); Pamela J. Smith, *Failing to Mentor Sapphire: The Actionability of Blocking Black Women from Initiating Mentoring Relationships*, 10 UCLA WOMEN'S L.J. 373, 381-88 (2000) (describing the mentoring relationship).

make them viable board candidates. Statistics suggest that women-owned businesses reflect a fertile pipeline. In 2004, forty-seven percent of privately held companies in the United States were fifty percent or more owned by women.[152] The increase in women-owned businesses may reflect a conscious strategy. Catalyst studies reveal that women tend to move out of corporations and begin their own businesses because they experience a glass ceiling or are seeking a more flexible and better work environment.[153] If diversity advocates focus corporations' attention on these women as potential board candidates, they may be able to overcome the contention that women have insufficient executive experience to parlay into board representation. This means that reliance on this strategy depends upon women's ability to network so that this other pipeline can come to the attention of corporations and their nominating committees.

2. *Expanding the Criteria for Directors.*—Given that corporations have the flexibility to determine the characteristics of their board members, another solution for increasing the number of women available to serve as directors could involve pressuring corporations to expand the criteria they use to ascertain qualified board members.

Some presumed that Sarbanes-Oxley would encourage an expansion of the characteristics for directors in a manner that could have positive repercussions for increasing women board members. Sarbanes-Oxley and related reforms require particular directors to have financial background and experience. Thus, the NYSE, NASDAQ, and AMEX all require each audit committee member to be "financially literate."[154] In addition, Sarbanes-Oxley requires public corporations to disclose whether their audit committee includes a financial expert, and if it does not, to explain why such an expert is not a member of the committee.[155] Such disclosure essentially ensures that public corporations appoint a financial expert to the audit committee of their board. Under SEC guidelines, a director can qualify as

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152. Press Release, Ctr. for Women's Bus. Research, Privately-Held, 50% or More Women-Owned Business in the United States, 2004: A Fact Sheet (2004), http://www.womensbusinessresearch.org/mediacenter/nationalstatetrends/total.htm (last visited Jan. 20, 2006).

153. *E.g.*, WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 9; CATALYST INC., WOMEN OF COLOR IN CORPORATE MANAGEMENT: THREE YEARS LATER 2 (2002).

154. *See* AMEX COMPANY GUIDE, *supra* note 47, § 121(B)(2)(a)(ii); NASDAQ MARKETPLACE RULES, *supra* note 47, at 58; NYSE LISTED COMPANY MANUAL, *supra* note 47, § 303A.07(a).

155. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 407(a), 116 Stat. 745, 790 (codified as amended at 15 U.S.C. § 7265 (Supp. II 2002)). This requirement is now embodied in Item 401(h) of Regulation S-K of the Exchange Act. 17 C.F.R. § 229.401(h) (2005).

a financial expert if she has served as a CFO or in a position with similar functions.[156] This emphasis on financial experience could have had positive repercussions for women because women appear to be better represented in the financial industry. Indeed, women accounted for nearly sixty percent of the accountant and auditor workforce in 1999.[157] Then too, there are certainly more CFOs than CEOs at major corporations. Catalyst revealed that seven percent of Fortune 500 companies have women CFOs, which compares favorably to the little over one percent of women holding CEO titles.[158] Similarly, 8.7% of S&P 500 companies have women CFOs.[159] Moreover, the number of CFOs has grown more than twenty percent within the past few years.[160] Women in financial industries therefore appear to reflect a significant pipeline.[161]

Unfortunately, the strong representation of women in financial fields has not translated into greater board representation. Thus, only nine women directors at Fortune 100 companies are CFOs.[162] Moreover, only one woman Fortune 100 director serves as a financial expert.[163] Hence, the emphasis on financial experience does not appear to have translated into increased board seats for women.

Interestingly, corporations already tend to expand their criteria when searching for women directors, suggesting that such an expansion may be a necessary, but not sufficient, solution. Hence, both women and people of color tend to have more varied backgrounds than their white male counterparts.[164] The *Fortune 100 Study* indicated that only sixty percent of companies with women directors have at least one woman who is a current or former executive, as compared to ninety-five percent and eighty-two percent respectively for men direc-

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156. *Id.* § 229.401(h)(3)(i).

157. Jennifer Caplan, *The Glass Ceiling Continues to Shatter for Women CFOs*, CFO.COM, Feb. 1, 2001, http://www.cfo.com/article.cfm/2986994/c_2984338/?f=archives.

158. CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS, *supra* note 115, at 12-13.

159. Matt Krantz, *More Women Take CFO Roles*, USA TODAY, Oct. 13, 2004, at 3B.

160. *Id.* (citing Catalyst study).

161. *See* Sarra, *supra* note 59, at 487 (noting that the post-Enron focus on financial literacy may be positive for women because they are better represented in the financial industry).

162. *See infra* app. A, tbl.A4. Similarly, only six women within the next 150 Fortune companies are CFOs. *See infra* app. C, tbl.C4.

163. *See infra* app. A, tbl.A5. Northrop Grumman Corp. identified Aulana Peters, former SEC Commissioner and a woman of color, as its financial expert. Northrop Grumman Corp., Proxy Statement (Form 14A), at 10-11 (Apr. 12, 2005).

164. Dan Ackman, *Black Directors: Diversity Without Diversity*, FORBES, Aug. 8, 2002, *available at* http://www.forbes.com/2002/08/08/0808blackdirectors.html.

tors.[165] Instead, many women directors are either academics or heads of nonprofit organizations.[166] Thus, corporations already have relaxed their over-reliance on executives when searching for women directors. Therefore, focusing on expanding director qualifications as a solution for increasing women directors may not yield significant results.

Also, de-emphasizing executive experience for women directors may have drawbacks. If a significant number of women have backgrounds distinct from their male counterparts, they may be perceived as less qualified, playing into stereotypes that may undermine their ability to be effective. Indicative of this problem, studies of boardroom dynamics indicate that directors with executive experience command greater respect from other directors.[167] If women do not have such experience, then they may not be able to command such respect thereby undermining their ability to be effective. Also, women may actually benefit from executive experience, especially in the new corporate governance era. While we may question the wisdom of having boards comprised almost entirely of current or former executives, studies suggest that with regard to some circumstances, greater executive experience and expertise may enhance the corporation's effectiveness.[168] Then too, board members, particularly today's board members, need an understanding of complex financial transactions that people from the nonprofit or academic sector may not be equipped to understand. While certainly companies can invest resources to educate directors, these observations indicate that women directors may be handicapped if they stem exclusively or primarily from nonbusiness-oriented backgrounds. In this regard, while encouraging corporations to expand their criteria for directors may prove a useful method of increasing women directors, that expansion must be tempered so that it does not do more harm than good.

165. *See infra* app. A, tbl.A4; *cf.* KORN/FERRY STUDY, *supra* note 14, at 12 (documenting the board composition of the Fortune 1000 companies).

166. *See infra* app. A, tbl.A4. Indeed, twenty women were heads of nonprofits, while twenty were academics, mainly professors or deans of business schools. *See infra* app. A, tbl.A4. Similarly, within the next 150 Fortune companies, twenty served as heads of nonprofits, while thirty were academics and another twenty-three were former government officials. *See infra* app. C, tbl.C4.

167. *E.g.*, Laura Lin, *The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence*, 90 NW. U. L. REV. 898, 951 (1996).

168. *Id.*

C. *Encouraging Corporations to Promote from Within*

Another possible reform for increasing women directors is to encourage corporations to promote directors from their own managerial ranks. Indeed, studies indicate that there are a considerable number of women managers below the top level.[169] Because corporations tend to rely upon top-level executives, these managers tend to be overlooked by other corporate boards. However, while such managers may not have the experience to serve as directors on other companies' boards, they do have some business knowledge and expertise regarding their own company that could make them significant contributors to that board. Hence, encouraging corporations to promote from within may counteract the over-reliance on executives without sacrificing the experience women need for their board service. This strategy also makes mentoring and networking a less significant stumbling block because, by virtue of their promotions within the company, executives are already familiar with these women managers and apparently already believe that such managers have business expertise.

Another advantage to this strategy is that it can create an alternative pipeline into other boards. Board memberships beget other board memberships. This is underscored by the fact that most board members tend to hold multiple directorships. Hence, promoting women managers to directorships within the corporation can serve as a pipeline of outside directors for other boards, informally training them for those outside responsibilities. In this way, corporations can harness the gender diversity that already appears to exist within the corporation, increasing the ranks of women directors on their own board, while operating as a springboard for other boards.

However, given the current emphasis away from inside directors, it may be difficult to encourage corporations to promote from within. Based on the notion that independent/outside directors serve as better monitors of corporate affairs, possibly reducing corporate misconduct, reforms have focused on ensuring greater director independence within various committees and on the board as a whole.[170] In response, corporations have not just a majority, but a super-majority of independent directors.[171] Korn/Ferry reveals that the average corporation only has two inside directors.[172] This pattern holds true for women directors. Indeed, the *Fortune 100 Study* re-

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169. *E.g.*, WOMEN IN CORPORATE LEADERSHIP, *supra* note 92, at 1.
170. *See supra* notes 46-50 and accompanying text.
171. KORN/FERRY STUDY, *supra* note 14, at 11.
172. *Id.*

vealed that only four women directors at Fortune 100 companies were insiders.[173] Such a pattern may make it more difficult to implement a promotion-from-within strategy.

Then too, this strategy could have the effect of marginalizing women directors. Indeed, because such committee membership requires independence,[174] being an inside director would automatically disqualify women from serving on key committees within the corporation, including the audit committee. Moreover, if inside directors are viewed as less desirable and women tended to be inside directors, then they may be viewed as less desirable, undercutting their effectiveness. These observations reflect significant drawbacks in this solution.

On the other hand, encouraging companies to promote from within could enhance the pool of available women candidates and significantly open up the pipeline for women directors. Because of this possibility, this strategy may represent an important component of the solution for increasing women's board service. Indeed, even if women inside directors cannot serve on certain committees, there are others such as the corporate governance committee, finance committee, or executive committee on which such women directors could serve that are also important to a corporation's effectiveness. Then too, corporations can balance out the exclusion of inside women directors from certain committees by relying upon outside women directors for those committees, ensuring a more robust representation on all committees.

Each of the solutions identified in this Part have both merits and drawbacks. Hence, this Part demonstrates not only that the implementation of any strategy requires a careful balance of the risks and rewards, but also that unclogging the pipelines requires a combination of strategies. Regardless of which one or ones we rely upon, corporations and diversity advocates need to be proactive if they want to ensure a better representation of women on the board.

IV. CONCLUSION

Considering how it began, the story regarding women directors may be more positive than negative. Most companies have at least one woman director, and their presence is even greater at the top public companies. Many of those companies have multiple women directors. Then too, it appears that those women directors are not being

173. *See infra* app. A, tbl.A5.

174. *See supra* notes 46-50 and accompanying text.

marginalized, but act as chairs and serve on some of the most powerful committees on the board.

However, evidence suggests that there remains work to be done in order to ensure that women's percentages on boards better reflect their presence in the workforce as a whole. Indeed, women account for about half of the labor force and at least one third of the college and graduate school population. From this perspective, the fact that they hold only about thirteen percent of board seats is troubling.

This evidence is more troubling when we consider that women directors bring important economic and moral benefits to the board. Indeed, women do not simply perform well, but they also may enhance a corporation's profitability by encouraging marketing and employment strategies that reach out to a corporation's more diverse employment and customer base as well as contributing to the diversity of views in the boardroom, which enhances the board's decision-making and monitoring capabilities. While there are certainly factors that inhibit women's ability to deliver these economic benefits to the board, they do not detract from the notion that gender diversity is an advantage in the boardroom. The empirical evidence on women's board membership reveals that corporations are not doing enough to ensure that they harness this advantage.

This Article reveals that the lack of women directors stems in significant part from corporations' reliance on executives to fill their board seats, and the fact that women do not have a significant presence at the executive level. This lack of executive presence generates a clog in the pipeline from women's labor participation to their board participation. As Part III indicates, there are many possible solutions to enhancing women directorships, all of which have drawbacks and merits. However, possibly the most important solution may be bringing these problems to light so that men and women can have an open and honest dialogue about the ways to resolve them.

APPENDIX A

STUDY OF FORTUNE 100 BOARDS

RESEARCH METHODOLOGY

This study reflects data regarding women directors at Fortune 100 companies. The Fortune 100 companies were identified from the April 2005 list of Fortune 100 companies in *Fortune Magazine*. Data on board members was gathered from the most recent proxy statements and other relevant SEC filings of such corporations as well as corporate websites and corporate press releases. Data is based on information collected from all Fortune 100 companies. TIAA-CREF has four boards: TIAA has a board of trustees and a board of overseers while CREF has a board of overseers and a board of trustees. The board of overseers is comprised of the same directors for both entities and includes one woman elected in 2000. The board of trustees, however, is comprised of two different sets of members. However, since the board of trustees at both companies performs tasks most similar to a traditional board of directors, this study includes data from each of those boards of trustees. In addition, because the data on TIAA-CREF reflects information on both boards, this study actually encompasses 101 corporate boards.

KEY FINDINGS

- Women hold 199 or approximately 16% of the total available board seats at Fortune 100 companies (Table A1)
- Forty-five percent of women directors currently serving at Fortune 100 companies were elected in the last five years (Table A1.1)
- Ninety-seven percent or all but three Fortune 100 companies have at least one woman director on their board (Table A2)
- Women are most likely to serve on the audit committee and the compensation committee of their board (Table A3)
- Roughly one third of all women directors are current CEOs or presidents, while close to half of all women directors are either current or former CEOs or presidents (Table A4)

TABLE A1: BOARD COMPOSITION BY GENDER

Gender	Total Seats Held[175]	% of Total Seats
Men	1008	83.6%
Women	199	16.4%
Total Men and Women	1207	100.0%

TABLE A1.1: WOMEN DIRECTORS ELECTED WITHIN PREVIOUS FIVE YEARS

Election Years	Number of Women Directors Elected	Number of Women Elected as Nonreplacement Directors[176]	Recently Elected Directors % of Total Women Directors	Recently Elected Nonreplacement Directors % of Total Women Directors
2000-2002	44	18	22.2%	9%
2003-2005	46	21	23.1%	10.6%

TABLE A1.2: MOST RECENTLY ELECTED WOMEN DIRECTORS

Election Years	Number of Directors Elected to Boards Already Having at Least One Woman Director	Number of Nonreplacement Directors Elected to Boards Already Having at Least One Director
2003-2005	33	20

175. Because several women hold multiple seats both on boards within the Fortune 100 and on boards within the Fortune 500 and other corporations, the number of seats held by women does not reflect the actual number of women who serve on boards. For example, Shirley Ann Jackson, president of Rensselaer Polytechnic Institute, sits on six boards, including three boards of corporations in the Fortune 100—Marathon Oil Corp. (#31), AT&T Corp. (#56), and FedEx Corp. (#78). Similarly, Carla A. Hills, chairman and CEO of Hills & Co., sits on three Fortune 100 boards including ChevronTexaco Corp. (#6), American International Group, Inc. (#9), and Time Warner Inc. (#32).

176. "Nonreplacement directors" refer to women directors whose election does not correspond with the retirement of another woman director on the board.

TABLE A2: NUMBER OF WOMEN DIRECTORS BY COMPANY[177]

Number of Women Directors	Number of Companies
0	3[178]
1	29
2	48
3	15
4	2
5	2
6	2

TABLE A2.1: CORPORATIONS WITH LARGEST NUMBER OF WOMEN DIRECTORS

Corporation	Total Number of Board Seats	Number of Women Directors	% of Women Directors on Board
Johnson & Johnson	12	4	33.3%
TIAA-CREF	13	4	30.7%
Wells Fargo & Co.	14	5	35.7%
WellPoint Inc.	17	5	29.4%
SBC Commc'ns Inc.	14	6	42.8%
Albertson's, Inc.	11	6	54.5%

TABLE A3: MOST PREVALENT COMMITTEE MEMBERSHIP OF WOMEN DIRECTORS

Committee Type	Number of Women Serving on Committee
Audit	74
Compensation	65
Nominating	56
Corporate Governance	41
Finance	31
Executive	26

177. Includes both boards of TIAA and CREF, totaling 101 corporate boards.

178. Includes Honeywell International, News Corp., and Plains All American Pipeline, LLC, the corporate general partner of Plains All American Pipeline, L.P. *See* app. B.

TABLE A3.1: ADDITIONAL COMMITTEE DATA

Companies with at least One woman on the audit committee	60
Number of committee chairs held by women	54

TABLE A4: MOST COMMON OCCUPATIONS OF WOMEN DIRECTORS

Occupations	Number of Women	% of Women in Occupation
Current CEO/COO/president	67	33.6%
Former CEO/COO/president	28	14.1%
Nonprofit manager/director	20	10%
Academic	20	10%
Former government official	16	8%
CFO	9	4.5%

TABLE A4.1: ADDITIONAL OCCUPATIONAL DATA

Companies with at least One woman current or former CEO/COO/president	60

TABLE A5: OTHER BOARD CHARACTERISTICS

Characteristic	Number of Women
Inside Director	4
Lead Director	1
Chair of Board	1
Financial Expert	1

APPENDIX B

STUDY OF FORTUNE 100 BOARDS

LIST OF FORTUNE 100 COMPANIES

Rank	Company Name	Total Number of Directors	Total Number of Women Directors
1	Wal-Mart Stores, Inc.	14	2
2	Exxon Mobil Corp.	11	2
3	Gen. Motors Corp.	12	2
4	Ford Motor Co.	15	3
5	Gen. Elec. Co.	16	3
6	ChevronTexaco Corp.	12	1
7	ConocoPhillips	13	3
8	Citigroup Inc.	16	3
9	Am. Int'l Group	18	2
10	IBM Corp.	13	2
11	Hewlett-Packard Co.	10	2
12	Berkshire Hathaway	11	1
13	Home Depot, Inc.	12	1
14	Verizon Commc'ns	11	1
15	McKesson Corp.	10	3
16	Cardinal Health, Inc.	13	1
17	Altria Group, Inc.	12	1
18	Bank of Am. Corp.	17	2
19	State Farm Ins. Cos.	13	3
20	JPMorgan Chase & Co.	16	1
21	The Kroger Co.	14	2
22	Valero Mktg. & Supply Co.	9	1
23	AmerisourceBergen Corp.	9	1
24	Pfizer Inc.	14	2
25	The Boeing Co.	11	2
26	The Procter & Gamble Co.	15	2
27	Target Corp.	11	3
28	Dell, Inc.	10	1
29	Costco Wholesale Corp.	13	2
30	Johnson & Johnson	12	4
31	Marathon Oil Corp.	11	1
32	Time Warner Inc.	13	1
33	SBC Commc'ns Inc.	14	6

Rank	Company Name	Total Number of Directors	Total Number of Women Directors
34	The Dow Chem. Co.	14	2
35	Albertson's, Inc.	11	6
36	Morgan Stanley	11	1
37	MetLife, Inc.	15	3
38	Walgreen Co.	10	1
39	United Techs. Corp.	12	3
40	UnitedHealth Group	12	2
41	Microsoft Corp.	9	1
42	United Parcel Serv. of Am., Inc.	10	3
43	Lowe's Cos.	12	1
44	Archer Daniels Midland Co.	9	1
45	Sears, Roebuck & Co.	10	2
46	Safeway Inc.	9	2
47	Lockheed Martin Corp.	13	2
48	Medco Health Solutions, Inc.	9	1
49	Motorola, Inc.	12	2
50	Intel Corp.	10	2
51	The Allstate Corp.	13	2
52	Wells Fargo & Co.	14	5
53	Merrill Lynch & Co., Inc.	10	3
54	The Walt Disney Co.	12	2
55	CVS Corps.	9	2
56	AT&T Corp.	10	2
57	Caterpillar Inc.	14	1
58	Northrop Grumman Corp.	10	1
59	Goldman, Sachs & Co.	10	2
60	SYSCO Corp.	12	3
61	PepsiCo, Inc.	13	3
62	Am. Express Co.	12	2
63	Delphi Corp.	12	1
64	Prudential Fin., Inc.	11	1
65	Wachovia Corp.	18	2
66	E. I. du Pont de Nemours & Co. (DuPont)	11	2
67	Sprint Nextel Corp. (Sprint)	13	2
68	N.Y. Life Ins. Co.	15	2
69	Viacom Int'l Inc.	12	1
70	Int'l Paper Co.	9	1

Rank	Company Name	Total Number of Directors	Total Number of Women Directors
71	Johnson Controls, Inc.	12	1
72	Tyson Foods, Inc.	9	2
73	Caremark Inc.	12	2
74	J.C. Penney Co.	10	2
75	Honeywell Int'l Inc.	14	0
76	Ingram Micro Inc.	10	2
77	Best Buy Co., Inc.	12	1
78	FedEx Corp.	13	2
79	Alcoa Inc.	9	2
80	HCA Inc.	14	2
81	TIAA[179]	13	4
81	CREF	6	2
82	Sunoco, Inc.	11	2
83	Mass. Mut. Life Ins. Co.	13	2
84	Merck & Co.	12	3
85	The St. Paul Travelers Cos.	13	3
86	Duke Energy Corp.	10	1
87	BellSouth Corp.	10	2
88	The Hartford Fin. Serv.	10	1
89	Weyerhaeuser Co.	11	2
90	MCI, Inc.	9	1
91	Cisco Sys., Inc.	13	2
92	The Coca-Cola Co.	14	2
93	Bristol-Myers Squibb Co.	11	2
94	Lehman Bros. Holdings Inc.	10	2
95	Elec. Data Sys.	12	1
96	Plains All Am. Pipeline, L.P.[180]	8	0
97	WellPoint, Inc.	17	5
98	News Corp.	14	0
99	Nationwide Mut. Ins. Co.	12	2
100	Abbott Labs.	14	2

179. TIAA-CREF is ranked 81. For purposes of this study, the two boards of trustees for TIAA-CREF are analyzed separately.

180. Reflects the number of board members of its general partner, Plains All American Pipeline, LLC.

APPENDIX C

ADDITIONAL DATA ON FORTUNE 101-250 BOARDS

RESEARCH METHODOLOGY

This study reflects data regarding women directors at Fortune companies from 101-250 as identified from the April 2005 list of Fortune 500 companies in *Fortune Magazine*. Data on board members was gathered from the most recent proxy statements and other relevant SEC filings of such corporations as well as corporate websites and corporate press releases. Data was located on all companies other than The Northwestern Mutual Life Insurance Co., for which no public data was available. Thus, the study actually encompasses data on 149 boards.

TABLE C1: BOARD COMPOSITION BY GENDER

Gender	Total Seats Held	% of Total Seats
Men	1367	84.3%
Women	255	15.7%
Total Men and Women	1622	100.0%

TABLE C2: NUMBER OF WOMEN DIRECTORS BY COMPANY[181]

Number of Women Directors	Number of Companies
0	10
1	59
2	53
3	18
4	9
5	0
6	0

181. Excludes information on The Northwestern Mutual Life Insurance Co. (#124) for which no public data was available.

TABLE C3: MOST PREVALENT COMMITTEE MEMBERSHIP OF WOMEN DIRECTORS AND WOMEN CHAIRS

Committee Type	Number of Women Serving on Committee
Audit	116
Compensation	71
Nominating	65
Corporate Governance	49
Finance	43
Executive	16
Chairs	55

TABLE C4: MOST COMMON OCCUPATIONS OF WOMEN DIRECTORS

Occupations	Number of Women	% of Women in Occupation
Current CEO/COO/president	89	34.9%
Former CEO/COO/president	30	11.7%
Nonprofit manager/director	20	7.8%
Academic	30	11.7%
Former government official	23	9%
CFO	6	2.3%

TABLE C5: LIST OF FORTUNE 101-250 COMPANIES

Rank	Company Name	Total Number of Directors	Total Number of Women Directors
101	Halliburton Co.	9	1
102	Comcast Corp.	12	1
103	Raytheon Co.	11	2
104	Supervalu Inc.	10	2
105	3M Co.	11	3
106	Deere & Co.	13	2
107	Cendant Corp.	15	4
108	Aetna Inc.	11	3
109	Ga.-Pac. Corp.	14	2
110	Tech Data Corp.	8	1
111	Liberty Mut. Ins. Co.	15	2
112	AutoNation, Inc.	7	1
113	Sears Holdings Corp.	10	1
114	Sara Lee Corp.	13	4
115	Gen. Dynamics Corp.	12	0
116	McDonald's Corp.	13	2
117	Publix Super Markets, Inc.	10	4
118	Visteon Corp.	9	2
119	Am. Airlines, Inc. (AMR)	13	2
120	Goodyear Tire & Rubber Co.	11	3
121	ConAgra Foods, Inc.	13	1
122	CIGNA Corp.	10	4
123	Coca-Cola Enters. Inc.	13	1
124	The Nw. Mut. Life Ins. Co.	No information available	
125	Wyeth	10	2
126	Amerada Hess Corp.	12	2
127	Lear Corp.	11	1
128	Rite Aid Corp.	10	1
129	United Air Lines, Inc. (UAL)	12	1
130	Gap Inc.	13	3
131	Washington Mut., Inc.	13	3
132	Xerox Corp.	11	2
133	Federated Dep't Stores, Inc.	9	2

Rank	Company Name	Total Number of Directors	Total Number of Women Directors
134	Emerson Elec. Co.	14	1
135	Kimberly-Clark Corp.	10	3
136	Premcor Inc.	8	1
137	Express Scripts, Inc.	11	1
138	Delta Air Lines, Inc.	9	2
139	Anheuser-Busch Cos.	15	2
140	Manpower Inc.	11	2
141	TJX Cos.	11	2
142	Computer Scis. Corp.	10	0
143	U.S. Bancorp	12	1
144	Loews Corp.	11	1
145	Exelon Corp.	15	2
146	Staples, Inc.	12	2
147	The May Dep't Stores Co.	10	3
148	Am. Elec. Power Co.	11	1
149	U.S. Steel Corp.	12	1
150	Countrywide Fin. Corp.	12	1
151	Dominion Res., Inc.	15	1
152	Eli Lilly & Co.	12	3
153	Eastman Kodak Co.	13	3
154	Qwest Commc'ns Int'l, Inc.	11	1
155	The Progressive Corp.	11	1
156	Office Depot, Inc.	12	3
157	Nextel Commc'ns, Inc.	8	2
158	AFLAC Inc.	17	2
159	OMX, Inc.	13	4
160	Whirlpool Corp.	11	2
161	The Chubb Corp.	13	3
162	Humana Inc.	7	1
163	FirstEnergy Corp.	13	3
164	Solectron Corp.	9	1
165	Williams Cos.	11	2
166	Tex. Instruments Inc.	12	4
167	Constellation Energy Group, Inc.	13	2
168	Waste Mgmt., Inc.	8	1

Rank	Company Name	Total Number of Directors	Total Number of Women Directors
169	Tenet Healthcare Corp.	9	2
170	Masco Corp.	9	1
171	MBNA Corp.	9	2
172	PacifiCare Health Sys., Inc.	10	2
173	Nike, Inc.	11	2
174	Union Pac. Corp.	11	1
175	Sanmina-SCI Corp.	8	1
176	Marsh & McLennan Cos.	11	2
177	Tesoro Corp.	8	0
178	TRW Auto. Inc.	9	1
179	The Directv, Inc.	10	0
180	Southern Co.	10	1
181	Pulte Homes, Inc.	10	1
182	Winn-Dixie Stores, Inc.	10	1
183	Ill. Tool Works Inc.	9	1
184	Kohl's Corp.	13	2
185	Health Net, Inc.	8	1
186	Occidental Petroleum Corp.	12	1
187	Edison Int'l	10	1
188	PACCAR Inc.	9	0
189	Nucor Corp.	8	1
190	Nw. Airlines Corp.	14	1
191	USAA	15	2
192	Toys "R" Us, Inc.	10	3
193	TransMontaigne Inc.	8	0
194	Sun Microsystems, Inc.	9	1
195	TXU Corp.	10	1
196	PG&E Corp.	10	2
197	Gen. Mills, Inc.	12	4
198	CHS Inc.	17	0
199	Pub. Serv. Enter. Group Inc.	9	2
200	Burlington Nor. Santa Fe Corp.	10	1
201	Dana Corp.	10	2
202	The Pepsi Bottling Group, Inc.	11	4
203	D.R. Horton, Inc.	7	1

Rank	Company Name	Total Number of Directors	Total Number of Women Directors
204	Centex Corp.	10	1
205	Dean Foods Co.	14	1
206	Capital One Fin. Corp.	7	1
207	Arrow Electronics, Inc.	9	2
208	UnumProvident Corp.	12	2
209	CenterPoint Energy Inc.	8	0
210	Colgate-Palmolive Co.	9	3
211	Nat'l City Corp.	12	2
212	Amgen Inc.	13	1
213	FPL Group, Inc.	11	1
214	Lennar Corp.	9	1
215	The Gillette Co.	11	2
216	Textron Inc.	12	1
217	Avnet, Inc.	9	2
218	Aon Corp.	13	2
219	ARAMARK Corp.	11	1
220	Oracle Corp.	11	1
221	Entergy Corp.	13	3
222	Smithfield Foods, Inc.	8	1
223	First Data Corp.	11	2
224	Marriott Int'l, Inc.	11	2
225	UnitedAuto Group, Inc.	12	1
226	The AES Corp.	11	2
227	Eaton Corp.	10	1
228	Consol. Edison Inc.	11	3
229	Progress Energy, Inc.	12	2
230	Omnicom Group Inc.	11	2
231	Circuit City Stores, Inc.	11	4
232	Continental Airlines, Inc.	11	1
233	Navistar Int'l Corp.	10	1
234	Kellogg Co. Int'l	12	2
235	Sempra Energy	12	1
236	PPG Indus., Inc.	10	2
237	Baxter Int'l Inc.	11	2
238	Am. Standard Cos.	8	1

Rank	Company Name	Total Number of Directors	Total Number of Women Directors
239	Clear Channel Commc'ns, Inc.	10	1
240	Limited Brands Inc.	13	3
241	Fluor Corp.	10	2
242	Calpine Corp.	9	3
243	Devon Energy Corp.	11	0
244	ArvinMeritor, Inc.	14	2
245	Genuine Parts Co.	11	2
246	Medtronic, Inc.	10	2
247	Lucent Techs. Inc.	10	2
248	Int'l Steel Group, Inc.	6	0
249	Yum! Brands, Inc.	12	2
250	Reliant Energy Inc.	7	1