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A FLAW IN THE SARBANES-OXLEY REFORM: CAN DIVERSITY IN THE BOARDROOM QUELL CORPORATE CORRUPTION?

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INTRODUCTION

Why talk about the intersection of race and corporate law? Because that is literally where the money is. Corporations produce ninety percent of our total gross domestic product.[1] The top 500 corporations control seventy-five percent of our nation's most productive assets.[2] In a society that is as materialistic as ours, to talk about any systemic racial reform without discussing corporate governance misses this central point.[3] In short, if our society continues to be permeated by the consequences of yesteryear's apartheid, it is axiomatic that corporate governance

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† Professor of Law and Director, Business and Transactional Law Center, Washburn University School of Law. Courtney T. Kennedy and Brian Perkins provided excellent research assistance for this Article. Professors Mary Ramirez, Bill Rich, and Alex Glashausser each provided helpful insights. I wish to thank Professor Leonard M. Baynes of St. John's University School of Law for extending the opportunity to participate in this Symposium and write this Article.

1 JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA xxii, n.11 (2003).

2 WILLIAM L. CARY & MELVIN ARON EISENBERG, CORPORATIONS 243–44 (7th ed. 1995).

3 *See* Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 40–46 (2001) [hereinafter Ramirez I] (and authorities cited therein). Because "skin color and other racial markers have about the same significance as shoe size," *id.* at 41, from a biological, scientific, and genetic perspective, all material racially based inequalities, including representation on corporate boards, stem from conditions of "pervasive social oppression." *Id.* at 46, n.76 (quoting Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE. & L. 127, 151 (2000)). This is not to say that the lack of cultural diversity on the boards of corporate America is due to racist decision making by those selecting board directors. There may well be many complex factors, other than overt racism, giving rise to the glaring racial and gender inequalities at the highest levels of corporate America.

plays a role.[4] This Article will address one of the most glaring flaws plaguing corporate governance.[5] Specifically, this Article will focus on the relative absence of diversity at the highest levels of the American corporate governance structure.

Today, corporate America is still largely governed by white males. Of the 11,500 Fortune 1000 board seats, African Americans hold 388 and Hispanics hold only 86.[6] In other words, these two groups, which together comprise about 30% of the United States population, hold a combined 4.1% of all Fortune 1000 board seats.[7] Women hold only 14% of the seats.[8] Worse yet, 90% of all senior executives at Fortune 1000 companies are white males.[9] Whatever glacial progress was occurring is now giving rise to signs of retrenchment; since 1999, Hispanic board members declined by 9%.[10] "More than three decades after diversity became a buzzword in the upper tiers of corporate America, corporate boards remain bastions of aging white males."[11]

This Article is not premised on the patent unfairness of the predominance of white males; instead, this Article demonstrates

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[4] Unfortunately, race continues to function in our society to create measurable social chasms based upon racial identification. Thus, there is still today a vastly different cultural experience based upon race. *See* Ramirez I, *supra* note 3, at 45–46. "This difference in cultural experience has a wide range of consequences that may be manifested in anything from scores on so-called intelligence tests to criminal incarceration rates." *Id.* at 46.

[5] There are many vexing flaws in America's system of corporate governance, and ranking them is impossible. Some flaws are inherent in the nature of the corporation, such as the corporation's exclusive focus on profitability and shareholder enrichment under law. Some have argued that consequently corporations are essentially soulless institutions. *See* MICKLETHWAIT, *supra* note 1, at 33. As a result, corporations may engage in any profitable activity without moral constraint. For example, chartered companies were among the pioneers of the African slave trade. *Id.* at 33, 40, 177. Similarly, if corporations are given political rights to combine with concentrated economic power, governments may be subject to the influence of corporate special interests. Thus, President Rutherford B. Hayes complained long ago that America had devolved into a "government of corporations, by corporations and for corporations." *Id.* at xiv.

[6] Gary Strauss, *Good Old Boys' Network Still Rules Corporate Boards*, USA TODAY, Nov. 1, 2002, at B1.

[7] *See id.* (stating that "[r]acial and ethnic minority groups represent 30% of the [United States]").

[8] *Id.*

[9] Microquest White Paper: Shattering the Glass Ceiling, *at* http://www.mqc.com/witepap.html (last visited Sept. 23, 2003).

[10] Strauss, *supra* note 6, at B1.

[11] *Id.*

the fact that this culturally monolithic domination of corporate America is bad business and bad economics.[12] Three years ago, I argued that the law should impose measures to facilitate corporate America's nascent efforts to embrace diversity.[13] One basis of my argument was that cultural diversity could enhance small group decision-making processes and diminish the inclination of small groups to devolve into a groupthink approach to issues.[14] This groupthink dynamic plagues decision making within groups that share a high degree of similar experiences and characteristics.[15] The result is mindless adherence to group norms and a failure to challenge implicit or underlying

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[12] *See* M. Andrew Fields & Phyllis Y. Keys, *The Emergence of Corporate Governance from Wall St. to Main St.: Outside Directors, Board Diversity, Earnings Management, and Managerial Incentives To Bear Risk*, 38 FIN. REV. 1, 12–13 (2003) (summarizing empirical evidence linking diversity to superior corporate performance).

[13] Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85, 133 (2000) [hereinafter Ramirez II] ("Our society must realize that diversity is a source of strength. Consequently, our legal system should respond to the challenge of diversity in a progressive manner and seek to facilitate the use of diversity to generate value."). Other scholars have recently argued that diversity can serve to enhance corporate governance in various ways. *See* Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1402, 1406 (2002) (illustrating that diversity may operate to counterbalance shareholder primacy norms); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 484–85, 496–97 (2002) (showing that gender diversity within corporations can add greater depth to corporate decision making to achieve enterprise wealth maximization rather than gendered shareholder maximization). This Article takes a different, more narrow approach, suggesting that the Sarbanes-Oxley reforms missed the mark by failing to consider cultural diversity as a potential tool to combat corporate misconduct. Consequently, this Article does not challenge the shareholder primacy norm. *See Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 54 MERCER L. REV. 789, 805 (2002) (asserting that directors should periodically evaluate "the diversity of experience of individual directors").

[14] Ramirez II, *supra* note 13, at 99–101; *see also* SUSAN F. SHULTZ, THE BOARD BOOK 128 (2001) (discussing board diversity and stating that "[a]ny CEO who has ten or eleven people just like him sitting around the board table will end up essentially talking to himself"); David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 36 (2003) ("[D]iversity produces more effective problem-solving. While heterogeneity may initially produce more conflict . . . the variety of perspectives that emerges causes decision makers to evaluate more alternatives and more carefully explore the consequences of these alternatives.").

[15] Ramirez II, *supra* note 13, at 99 n.72 ("Groups of individuals showing a preponderance of certain personality and social attributes may prove to be the ones that succumb most readily to groupthink." (quoting IRVING L. JANIS, VICTIMS OF GROUPTHINK 192 (1972) [hereinafter JANIS I])).

assumptions.[16] Group members are seduced into compliant conduct by the need to achieve approval from the group as a whole.[17] Scholars in a wide range of disciplines and in a wide variety of contexts have documented the operation of groupthink and the key role that group homogeneity plays in "groupthink," as well as the key role that cultural diversity plays in reducing "groupthink."[18] Similarly, cultural diversity enjoys strong support as a means of combating "groupthink" in the context of the boardroom.[19] There is every reason to believe that these tendencies toward groupthink plague the boardrooms of corporate America.[20] As one scholar suggests, boards enjoying cultural diversity should perform better because board homogeneity leads to a boardroom culture that "avoids conflict, avoids impoliteness and as a result does not permit hard

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[16] *See id.* at 99–100 n.73 (citing IRVING L. JANIS, GROUPTHINK 250 (2d ed. 1982) [hereinafter JANIS II] (concluding that group heterogeneity can trigger "constructive multiple advocacy" stemming a premature consensus and leading to deeper consideration of alternatives.).

[17] JANIS II, *supra* note 16, at 245 ("The more amiability and esprit de corps among members of an in-group of policy makers, the greater is the danger that independent critical thinking will be replaced by groupthink . . . .").

[18] *See e.g.* Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 252, 257 (1996) (finding that diverse workgroups enjoyed decision-making advantages over homogenous work groups); *see also* Karen A. John et. al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict and Performance in Workgroups*, 44 ADM. SCI. Q'RTLY. 741 (1999) (finding that cultural diversity may lead to increased relationship conflict but that benefits in performance resulting from informational diversity led to higher morale and satisfaction).

[19] Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, HARV. BUS. REV., Sept. 2002, at 106. "I'm always amazed at how common groupthink is in corporate boardrooms. . . . If you put [directors] into a group that discourages dissent, they nearly always . . . conform." *Id.* at 111. Jeffrey Sonnenfeld, Associate Dean of the Yale School of Management, also contends that Enron did not encourage dissent and dissenting voices resigned. *Id.* at 111.

[20] JANIS II, *supra* note 16, at 242 ("Some chief executives, for example, probably become more dependent than others on an inner circle of advisers and set up group norms that encourage unanimity."). Very recently, one corporation beset by weak corporate governance, Westar Energy, Inc., found, through an investigation conducted by a Special Committee of the Board of Directors, that a lack of diversity contributed to less than ideal standards of corporate governance. *See* Westar Energy, Inc., Report of the Special Committee to the Board of Directors, April 29, 2003, at 256–58, *at* http://media.corporate-ir.net/media_files/nys/wr/reports/custom_page/WestarEnergy.pdf (last visited on Sept. 23, 2003). "[A] board comprised of directors from varied backgrounds may be more likely to engage in robust thought and debate." *Id.* at 257.

questioning."[21] Diversity can be a tool to assure boards are " 'bold enough to ask management the tough questions.' "[22]

By the summer of 2002, the problems of groupthink in the boardroom had become manifest.[23] Compensation for senior executives had become excessive, with boards passively permitting senior executives to harvest billions in options compensation while the companies they managed went bankrupt.[24] Some of the largest companies in America, like Enron Corporation, seemed to exist only to enrich their top executives and to deceive public investors. Nor was Enron an isolated circumstance. WorldCom, NiCor, Global Crossing, Sprint, and Merck all contributed to the drumbeat of corporate scandals.[25] It was increasingly apparent that corporate

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[21] Jyoti Thottam, *Crashing the Boards*, TIME.COM, Feb. 10, 2003, (statement of Harvard Business School Professor Rakesh Khurana), http://www.time.com/time/insidebiz/article/0,9171,1101030210-418568,00.html; *see also* RAKESH KHURANA, SEARCHING FOR A CORPORATE SAVIOR 82–86 (2002) (showing that a variety of norms and social connections, including racial and gender homogeneity renders boards "high cohesion" groups, which leads to "a strong emphasis on politeness and courtesy, and an avoidance of direct conflict and confrontation"); Susan S. Boren & Julie H. Daum, *Raising the Bar in the Boardroom: New Expectations and Standards Warrant a Best Practices Review*, DIRECTORS & BOARDS, June 22, 2002, at 55 ("The advantages of a board composed of directors who offer diversity of backgrounds, expertise, and outlook cannot be underestimated. Directors should not only bring a variety of knowledge and skills, but should differ enough intellectually from each other and management to encourage a culture of scrutiny and debate.").

[22] Matt Golosinski, *Who Will Lead?*, KELLOGG WORLD (2002), (quoting James H. Lowery, adjunct professor and member, Dean's Advisory Board, Kellogg School of Management, Northwestern University), *available at* http://www.kellogg.northwestern.edu/kwo/win02 /indepth/whowilllead.htm.

[23] According to Dean Sonnenfeld, the Enron board was a prime example of the perils of "groupthink." Dean Sonnenfeld contends that Enron's board discouraged dissent, seemed unwilling to ask difficult questions, and valued congeniality instead of learning the truth. In short, Enron was plagued by "groupthink." Jeffrey Sonnenfeld, *How Go-Along Boards JamUp Firms*, USA TODAY, Feb. 6, 2003, at A15.

[24] *See* Steven A. Ramirez, *Fear and Social Capitalism: The Law and Macroeconomics of Investor Confidence*, 42 WASHBURN L.J. 31, 59–62 (2002) [hereinafter Ramirez III] (arguing that the radical deregulation of director duties in the 1980's and 1990's created a reality which permitted management and associated professionals to harvest excessive compensation while shareholders lost billions).

[25] *Id.* at 31–32 (showing the parade of scandals that led to the enactment of the Sarbanes-Oxley Act of 2002). It does not appear that the cycle of corporate corruption that started with the bankruptcy of Enron in 2001 has ceased. Very recently, the government accused HealthSouth Corporation of inflating profits by $1.4 billion since 1999. For the ten years between 1987 and 1997, HealthSouth's stock price rose an average of 31% per annum. Apparently, according to the government, the company simply made up numbers to give the illusion of profitability. Charles Haddad et al., *Too Good To Be True*, BUS. WK., April 14, 2003,

governance in America was seriously dysfunctional.[26] Public confidence sank to historic lows, and the value of the dollar slid as foreign investors fled the newly perceived riskiness of American equity markets.[27] The crisis demanded government action.

Congress responded with the Sarbanes-Oxley Act of 2002, which President Bush quickly signed into law.[28] The Act was a wide-ranging effort to restore investor confidence.[29] As ultimately implemented by various administrative agencies, the Act restructured the regulation of auditors of public companies,[30] enhanced criminal penalties for corporate crimes,[31] and enhanced disclosure requirements applicable to publicly held companies.[32] One key purpose of the Act was to secure the independence of auditors of publicly held companies by restricting the ability of auditors to consult for audit clients.[33] Arguably, however, the most significant impact of the Act was the effect it had and will have on corporate governance. For

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at 70. It seems that HealthSouth's auditors, Ernst & Young, missed a number of red flags. Dean Foust, *Missing the Red Flags*, BUS. WK., April 14, 2003, at 72. Ironically, Ernst & Young did not do any consulting work for HealthSouth nor did it receive any premium payments for its auditing work. *Id.*

[26] *See* Ramirez III, *supra* note 24, at 31–32 (illustrating that authoritative business voices had concluded that the system of corporate governance was flawed by the scandal-ridden summer of 2002).

[27] *Id.* at 31–35 (demonstrating the erosion of investor confidence and decline of the dollar).

[28] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745.

[29] The year 2002 witnessed the public exposure of corporate accounting irregularities at some of the most well-respected U.S. companies. As a result . . . the U.S. Congress . . . enacted sweeping legislative . . . changes designed to alter the fundamental manner in which public companies are governed and operated. The changes are intended to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the federal securities laws.

Annual Review of Federal Securities Regulation, 58 BUS. LAW. 747, 748 (2003) [hereinafter *Annual Review*] (providing a detailed overview of the changes wrought by the Sarbanes-Oxley Act).

[30] *See* Sarbanes-Oxley Act of 2002 §§ 101–109, 15 U.S.C.A. §§ 7211–19 (West Supp. 2003) (creating a new "Public Company Accounting Oversight Board" to regulate accounting practices for publicly held companies).

[31] *See id.* §§ 801–807, 11 U.S.C.A. § 523, 18 U.S.C.A. §§ 1501, 1519–20, 1341, 1348, 1514A, 28 U.S.C.A. §§ 994, 1658 (creating new shareholder fraud crimes, expanding penalties for alteration of documents, and instructing the United States Sentencing Commission to review penalties for corporate misconduct).

[32] *See id.* §§ 401–409, 15 U.S.C.A. §§ 78m, 78p, 7262–66 (enhancing financial disclosure practices for publicly held companies).

[33] *See id.* § 201, 15 U.S.C.A. § 78j-1(g).

example, the Act essentially strips management of the power of oversight over the audit function.[34] Similarly, the Act imposes new, more burdensome, reporting obligations upon counsel for publicly held companies.[35] The Act also imposes an enhanced role for independent directors.[36] In this respect, the Act dovetails with parallel reforms at the New York Stock Exchange and the NASDAQ marketplace.[37] Both of these self-regulatory organizations have power over the companies that choose to list

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[34] *See id.* § 204, 301, 15 U.S.C.A. §§ 78j-1(k), (m) (vesting control over the audit function in an independent committee of the board for publicly held companies). An independent director may not receive any compensation from the issuer other than board fees and may not otherwise be affiliated with the issuer. *Id.* § 301, 15 U.S.C.A. § 78j-1(m).

[35] *See id.* § 307, 15 U.S.C.A. § 7245 (directing the SEC to promulgate rules requiring attorneys representing publicly held companies and appearing or practicing before the SEC to undertake new reporting obligations for a "material violation" of law).

[36] *Id.* § 301, 15 U.S.C.A. § 78j-1(m) (requiring each member of a publicly held company's audit committee to be "independent"). In addition to requiring the independence of the audit committee, the Act also created pressure for more independent directors as a result of the SEC's implementation of section 307. *See generally* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296 (Feb. 6, 2003) (to be codified at 17 C.F.R. § 205) (prescribing minimum standards of professional conduct for attorneys representing issuers before the SEC). As part of its rule making under section 307 of the Sarbanes-Oxley Act, the SEC created an innovation called the "[q]ualified legal compliance committee." *Id.* at 6296, 6321 (to be codified at 17 C.F.R. § 205.2 (k)). A qualified legal compliance committee (QLCC) is a committee of the board that is comprised entirely of independent directors, charged with investigating a material violation that is reportable under Section 307 and the rules promulgated thereunder. *Id.* The advantage of a QLCC is that once an attorney reports credible evidence of a material violation to the QLCC, then the attorney has discharged his or her obligations under the SEC's new rules of professional responsibility. *Id.* at 6296, 6321 (to be codified at 17 C.F.R. § 205.3). Without a QLCC, the attorney must monitor the response of the corporate representative to assure the response is appropriate, and report further up the corporate ladder if the response is not appropriate. *Id.* at 6296, 6321–22 (to be codified at 17 C.F.R. § 205.3(b)). Moreover, if the SEC adopts its pending "noisy withdrawal"—so-called because it would require an attorney to withdraw if the issuer did not respond appropriately to a report from the attorney and notify the SEC of the withdrawal—provisions, then a report to a QLCC eliminates the prospect of a "noisy withdrawal." *Id.* at 6296, 6297 (to be codified at 17 C.F.R. pt. 205). Consequently, there is a significant incentive to form a QLCC, which enhances the role of independent directors on the board.

[37] *See generally* NASDAQ, Summary of NASDAQ Corporate Governance Proposals (Feb. 26, 2003), *at* http://www.nasdaq.com/about/Web_Corp_Gov_Summary%20Feb-revised.pdf (last visited April 14, 2003); NYSE, New York Stock Exchange Corporate Accountability and Listing Standards Committee, *available at* http://www.nyse. com/pdfs/ corp_govreport.pdf (last visited April 14, 2003) (proposing a listing rule that would require all companies listed on the NASDAQ to have a majority of independent directors).

their securities at these facilities.[38] Each has proposed new requirements relating to independent directors.[39]

All of this corporate governance reform has a common theme. It is aimed at undermining the grip of senior management, particularly the CEO, over all aspects of the business of publicly held companies.[40] The initiative does very little to undermine management's control over core business functions. Instead, the Act generally focuses on the monitoring functions, such as the audit function or the legal function, insofar as monitoring of misconduct is concerned.[41] Moreover, the initiative imposes enhanced independence requirements in the boardroom to improve its monitoring function.[42] This Article posits that diversity on corporate boards would have served this very purpose. In other words, Sarbanes-Oxley seems to have missed an opportunity to harness diversity as a tool to combat corporate corruption. This Article concludes that the failure of Sarbanes-Oxley to explicitly use diversity in this way is not only an important flaw in the government's reform efforts, it also speaks loudly to the continued sway of the construct of race in our society and our inability to recognize diversity as a source of strength.

Part I of this Article demonstrates the utility of diversity in the boardroom, with a view towards showing that properly

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[38] The listing requirements are subject to the SEC's oversight authority, like all self-regulatory organization rules in the securities industry. *See* 15 U.S.C. §§ 78f, 78o-3 (2000).

[39] *See* Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78-j(i) (2002); *see also Annual Review*, *supra* note 29, at 761–65 (providing a detailed overview of the NYSE and NASDAQ reforms). Proposed Rule 4200 of the NASDAQ Stock Market provides that a director will not be independent if (1) the director is an employee of the issuer or related to an employee of the issuer; (2) the director receives fees or payments, other than board fees, in excess of $60,000; (3) the director is an executive officer of a company where an executive officer of the company also served on the compensation committee within the last three years; or (4) the director is a partner or employee of the issuer's auditor and worked on the issuer's audit within the last three years. *Annual Review*, *supra* note 29, at 762. The NYSE defines an independent director in a similar fashion but also would exclude any director who the board decides has a material relationship to the issuer. *Id.* at 763–64.

[40] Michael Weiser & Jeff Zilka, *Nader for CEO: Sarbanes-Oxley Makes Running a Corporation Like Campaigning for Elective Office*, BARRON'S, Jan. 27, 2003, at 33 (recognizing that the upshot of the Sarbanes-Oxley Act is a shift of power away from the CEO, who must now curry the favor of a variety of newly empowered, decentralized sources of checks and balances on CEO power).

[41] *See supra* notes 34–35.

[42] *See supra* notes 36–37.

managed diversity at the board level could improve board functioning and the quality of board decision making, as well as enhance independent thinking that could serve as a check on management prerogatives. Implicit in this is that diversity could be expected to serve as an additional voice in the boardroom that could prevent corporate corruption at an earlier stage. Part II illustrates that while the current efforts at reform are laudable on many fronts, the Sarbanes-Oxley reform initiative[43] failed to properly comprehend the potential of diversity to stem corporate corruption and fails to even mention it as a tool.[44] Indeed, it is even possible that the net effect of the current reform efforts will be to *diminish* diversity in the boardrooms of America. Part II demonstrates that racial thinking is manifest in Sarbanes-Oxley in that the politicians providing the energy behind the Act failed to even consider diversity as a potential tool in the battle against corporate corruption. The Article concludes that this entire episode of corporate corruption and the reform efforts that followed attest to the continued power of race in our society and the inability to see diversity as strength, notwithstanding political rhetoric and attitudes of tokenism to the contrary.

I. CAN BOARD DIVERSITY CREATE A NEW CULTURE OF SCRUTINY?

Ironically, authorities from the world of business already recognize the importance of diversity in the boardroom and specifically link the lack of diversity in corporate America to the recent corporate corruption crisis.[45] For example, expert

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[43] For purposes of this Article, I define the "Sarbanes-Oxley reform initiative" to include the Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745, the accompanying reform initiatives of the New York Stock Exchange, and the NASDAQ Stock Market. *See generally Annual Review*, *supra* note 29, and the related regulations of the SEC.

[44] I have previously criticized the Sarbanes-Oxley Act for failing to restore private securities litigation to its 1934–1995 vigor, when it appeared to operate to secure investor confidence effectively, from its weakened effect following the Private Securities Litigation Reform Act. *See* Ramirez III, *supra* note 24, at 59–65 (stating that private enforcement of the securities laws is largely immune to political influence, does not depend upon the political caprice of the budgetary process, and creates broader incentives for ferreting out wrongdoing). Other commentators have critiqued the Act on a variety of other grounds. *See, e.g.*, Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 377–81 (arguing that real reform of white collar crime sentencing requires that departures be restricted).

[45] Recent corporate failures among the likes of Enron, Tyco, WorldCom, and Adelphia have turned the spotlight more intensely than ever before on boards. The

consultants in the business of advising corporations with respect to the best practices for board selection recognized in advance of Sarbanes-Oxley that cultural diversity in the boardroom can act to create a culture of scrutiny instead of a culture of greed.[46] The American Management Association recently published *The Board Book*,[47] a volume strongly endorsing diversity in the boardroom for the specific purpose of broadening perspectives and decision making.[48] Indeed, even before the onset of the corporate corruption scandals of 2001 and 2002, prominent voices in the business community articulated best practices in corporate governance that recognized the important role that cultural diversity plays in enhancing board functioning.[49] As early as 1999, the Conference Board, a leading global business organization that allows business leaders to exchange ideas regarding best business practices[50] endorsed diverse boards as a means of enhancing shareholder value and assuring that boards

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failures suggest that inattentive and clubby boards have resulted in a kind of groupthink that thwarts the independent thought necessary to assure good governance. That is because good governance depends on a culture of open dissent and members' ability to challenge assumptions and beliefs. If good governance is to prevail, such clubby boards must give way to more engaged, skeptical, and diverse boards.

Sally Stetson, *Women on Boards*, PHIL. BUS. J., Jan. 20, 2003, *available at* http://philadelphia.bizjournals.com/philadelphia/stories/2003/01/20/editorial2.html. Of course, embracing diversity at the board level is about much more than bringing additional people with different morphological features into the boardroom. Diversity is not about skin color; it is about broadening an organization's perspectives, experiences, and cultural facilities. *See* Ramirez II, *supra* note 13, at 122–23. Thus, even proponents of enhanced boardroom diversity recognize that the cognitive benefits of enhanced diversity will not accrue in companies that suppress dissent. *See* Elisabeth Marx, *Bring Diversity to the Boardroom*, FIN. TIMES, Jan. 8, 2003, at 14.

[46] *See* Boren & Daum, *supra* note 21, at 55 (statement from senior representatives of Spencer Stuart, a firm specializing in the placement of directors and advising companies with respect to director searches, that diversity can help assure that "important questions are raised" and that the Enron Corporation lacked this kind of diversity); Marx, *supra* note 45, at 14 (stating that companies in the Unites States that value diversity seem to perform better and that more diverse boards are able to deal more effectively with business complexities).

[47] SCHULTZ, *supra* note 14.

[48] *Id.* at 128.

[49] HARVARD BUSINESS REVIEW ON CORPORATE GOVERNANCE 187–94 (2000) (statement of Chairman of the Board of General Motors, regarding the GM core principles of corporate governance, which include valuing board diversity for the purpose of adding valuable perspectives).

[50] Ramirez II, *supra* note 13, at 97 n.57 (explaining the purpose and goals of the Conference Board).

can act in a constructively critical manner.[51] In that report, leading American voices termed diversity at the board level a strategic imperative.[52] Thus, it is clear that the basic idea that diversity can add "vital, diverse perspectives" that could serve as an element of increased independence was well understood in the world of business at the very time that incipient political pressure was gathering to reform corporate governance.[53] In fact, at many companies, proxy battles raged over this issue at the insistence of sophisticated institutional investors.[54]

Institutional shareholders have long sought to encourage more diverse boards in corporate America. In the early 1990s, TIAA-CREF, one of the nation's largest institutional investors, issued its "Policy Statement on Corporate Governance" that emphasized the desirability of diverse boards.[55] More recently, TIAA-CREF highlighted that it considered diversity in "experience, gender, race and age" as a director qualification.[56] TIAA-CREF believes that more diversity will cause boards to be less beholden to management.[57] CalPERS, a large institutional investor representing the financial interests of California state employees, also values board diversity.[58] Other institutional

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[51] CAROLYN KAY BRANCATO & D. JEANNE PATTERSON, BOARD DIVERSITY IN U.S. CORPORATIONS: BEST PRACTICES FOR BROADENING THE PROFILE OF CORPORATE BOARDS 7 (1999) (The Conference Bd., Research Report No. 1230-99-RR, 1999) (quoting John H. Bryan, Chairman and CEO of Sara Lee Corp.).

[52] *Id.* (quoting John H. Bryan, Chairman and CEO of Sara Lee Corp.).

[53] For example, the Conference Board's articulation of the business case in favor of diversity in the boardroom had been reviewed and analyzed by management resources on the internet as of October 8, 2001. *See* Management First, *Diversity in the Boardroom?* (Oct. 8, 2001), *at* http://www.managementfirst.com/management_styles/articles/boardroom.php?pv=1.

[54] *See, e.g.*, Ross Kerber, *Board Battle Heats up at EMC: Shareholder Activists Urge Directors To Be More Independent, Diverse*, BOSTON GLOBE, Jan. 24, 2002, at E1; *see also* Carter et al., *supra* note 14, at 34 (recounting board diversity battles at Texaco, First Data, Unocal, Circuit City Stores, Sprint, and York International).

[55] *See* CARY & EISENBERG, *supra* note 2, at 253.

[56] TIAA-CREF, Policy Statement on Corporate Governance (March 2000), *available at* http://www.tiaacref.org/ libra/governance.

[57] *Id.* It is noteworthy that women acted as whistleblowers both at Enron and WorldCom and were able to overcome cultures riven with groupthink. *See* Geoffrey Colvin, *Wonder Women of Whistleblowing*, FORTUNE, Aug. 12, 2002, at 56.

[58] CAL. PUB. EMPLOYEES RET. SYS., CORPORATE GOVERNANCE CORE PRINCIPLES & GUIDELINES: THE UNITED STATES 6 (Apr. 13, 1998) ("With each director nomination recommendation, the board [should] consider[] the *mix of director characteristics, experiences, diverse perspectives and skills* that is most appropriate for the company."), *available at* http://www.calpers-governance.org/principles/domestic/us/downloads/us-corpgov-principles.pdf.

investors have similarly recognized the value of cultural diversity.[59]

The support that enhanced board diversity recieves from sophisticated institutional investors stems from a powerful theoretical basis.[60] Specifically, diverse groups have superior cognitive skills in relation to homogenous groups.[61] Diversity can lead to enhanced creativity, group flexibility, and deeper insights.[62] Naturally, this results in the ability to better manage environmental complexity.[63] Such group action should

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[59] *See, e.g.*, Calvert Online, Issue Brief, *Board Diversity*, (Oct. 2002) ("Diverse boards offer expanded perspectives and have been shown to improve the quality of corporate deliberations and policymaking."), *at* http://www.calvert.com/SRI_newsArticle.asp?article=946&image=ib.jpg&keepleftnav=Issue+Briefs. Calvert uses diversity as an investment screen because "diversity is crucial to a well-functioning board and . . . companies that value diversity at every level of the organization tend to fare better than those that do not." *Id.* Recently, the State of Connecticut launched a "Board Diversity Initiative" specifically to promote diversity on the boards of the companies in which its $20 billion state retirement funds invest. *See* Laurie Ledgard, *Nappier Fights for Diversity, Independence Issues in Boardrooms*, HARTFORD BUS. J., May, 20, 2002, http://www.state.ct.us/ott/morenews/morenews052002.pdf (last visited Aug. 26, 2003).

[60] *See* Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 494–99 (1999) (stating that heterogeneous boards benefit from cognitive conflict that results in a more thorough consideration of problems and solutions).

[61] One study of the advantages of ethnically diverse work groups found that heterogeneous workgroups produced ideas that were superior to those of homogenous work groups. *See* McLeod et al., *supra* note 18, at 256–57 ("The ideas produced by the heterogeneous groups were judged as significantly more feasible . . . and more effective . . . than the ideas produced by the homogenous groups."); *see also* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 336–39, 352 (2002) (finding that a diverse educational environment encourages "active thinking and intellectual engagement" instead of "mindless" or "automatic thinking").

[62] *See* Deborah H. Gruenfeld et al., *Cognitive Flexibility, Communication Strategy, and Integrative Complexity in Groups: Public Versus Private Reactions to Majority and Minority Status*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 202, 219–20 (1998) (finding that minority influence enhances the integrative complexity of majority decision makers); *see also* Charlan Jeanne Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCHOL. REV. 23, 28 (1986) ("Those exposed to minority viewpoints . . . are in fact stimulated to think in more divergent ways. They are more original, they use a greater variety of strategies, they detect novel solutions, and importantly, they detect correct solutions."); Harry C. Triandis et al., *Member Heterogeneity and Dyadic Creativity*, 18 HUM. REL. 33, 52 (1965) (finding that diverse groups are more creative).

[63] *See* Carter et al., *supra* note 14, at 36 ("The result of diversity at the top is a better understanding of the complexities of the environment and more astute decisions.").

discourage groupthink and create an additional check on management prerogative as the board achieves superior monitoring ability.[64] "In terms of manager-monitoring, diversity 'may promote the airing of different perspectives and reduce the probability of complacency and narrow-mindedness in a board's evaluation of executive proposals.' "[65] Diversity theory, however, predicts additional benefits beyond monitoring ability.[66] Diverse boards should enhance a variety of important stakeholder relationships for the corporation and improve the corporation's access to a deeper pool of human talent.[67] The same cognitive skills that lead to the benefits of enhanced monitoring should improve board functioning across the entire range of its responsibility. In other words, the deployment of diversity at the board level will likely lead to broad benefits, including enhanced monitoring skills.[68] Separating the benefits of board diversity in a way that highlights its utility in enhancing the board's cognitive ability as a tool against corporate misconduct is therefore problematic.[69]

The most recent empirical evidence is a study on the effects of diversity on group interaction which shows that board diversity can enhance cognitive skills in a way that can be useful

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[64] *See infra* note 66 (discussing the benefits of board diversity).

[65] Dallas, *supra* note 13, at 1400 (quoting Jerry Goldstein et al., *The Effects of Board Size and Diversity on Strategic Change*, 15 STRATEGIC MGMT. J. 241, 243 (1994)).

[66] *See* Carter et al., *supra* note 14, at 36. The full case for diversity at the board level has been summarized to include the following benefits: (1) diversity should provide additional insights that may be helpful for superior international market penetration, (2) diversity sparks innovation and creativity, (3) diversity leads to greater problem solving skills, (4) diversity broadens corporate perspectives, and (5) diversity provides for more effective relationships with global constituencies. *Id.*

[67] *See* Margaret L. Williams & Talya N. Bauer, *The Effect of a Managing Diversity Policy on Organizational Attractiveness*, 19 GROUP & ORG. MGMT. 295, 305–06 (1994) (finding that firms that manage diversity well will achieve advantages in attracting employees).

[68] *See supra* notes 45, 66–67.

[69] This lack of severability of the benefits yielded by enhanced cultural diversity at the board level causes little hesitancy among international business leaders. They continue to recommend cultural diversity in the boardroom, for the express purpose of achieving superior cognition to improve governance. International Business Leaders Forum & Sustainability, The Power to Change: Mobilizing Board Leadership to Deliver Sustainable Value to Markets and Society, Executive Summary (2001) *available at* http://www.iblf.org/csr/csrwebassist. nsf/content/ fld2a3b4c5.html ("Access to a diversity of nationalities, skills, professional experiences, genders, ethnicities and ages can enable a board to have better radar, better decision-making and better governance.").

in the battle against corporate wrongdoing.[70] The study attempted to explain why diversity had previously been associated with positive intellectual outcomes for college students.[71] Significantly, the study concluded that group interactions benefited from increased integrative complexity when racial diversity was increased.[72] This benefit was enhanced if group members were exposed to less racial diversity in prior, pre-study interactions.[73] Integrative complexity allows groups to approach problems from multiple perspectives and with enhanced critical thinking.[74] This can be a critical element to combat "groupthink."[75] The authors of the study concluded that increased racial diversity lead to "increased integrative complexity" particularly in a context where subjects had "less contact with members of other racial groups and if they [were] older."[76] They also concluded that while their study involved only a single experimental session, "[l]ogically we would expect that sustained exposure to a diverse environment would lead to even larger effects."[77] Certainly, it would be ideal to have more compelling studies that demonstrate the ability of cultural diversity to specifically stem corporate corruption in the specific context of the boardroom. Nevertheless, this study contributes to a number of similar studies broadly showing that cultural diversity enhances group cognitive functioning by combating the kind of groupthink that has allowed the boardrooms of corporate

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[70] Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, http://siher.stanford.edu/documents/pdfs/racial_diversity.pdf (last visited Sept. 23, 2003).

[71] *Id.* at 2 (citing DARYL G. SMITH ET AL., DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT (1997) (stating that overall diversity initiatives positively affect students and enhance academic growth); ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE?: FOUR CRITICAL YEARS REVISITED (1993); Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Radically Diverse Undergraduate Population*, 40 J.C. STUDENT DEV. 377, 391 (1999) (finding that a racially diverse student body contributes to the education of all students); Patricia Gurin, *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 364 (1999) ("Diversity of all forms in the student body—including racial diversity—is crucially important in helping students become conscious learners and critical thinkers, and in preparing them for participation in a pluralistic, diverse society.").

[72] Antonio, *supra* note 70, at 9–10.

[73] *Id.* at 10–11.

[74] *Id.* at 5.

[75] *Id.* (citing JANIS I, *supra* note 15).

[76] *Id.* at 11.

[77] *Id.*

America to devolve into quiescent instruments of corporate corruption.[78]

The most insightful study of the direct relationship between board diversity and corporate corruption is from the experience of Canada with respect to diverse boards. The Conference Board of Canada conducted a study of differences in corporate governance outcomes between firms with diverse boards and firms without diverse boards.[79] The study utilized the number of women on the board for the purposes of testing the outcomes of diverse boards.[80] It found that 94% of boards with three or more women ensured compliance with internal conflict of interest guidelines, while only 68% of all male boards ensured such compliance.[81] Eighty-six percent of boards with three or more women imposed a code of conduct upon their corporations, while only 66% of non-diverse boards undertook this basic step in corporate governance.[82] The diverse boards also assumed the corporate governance responsibilities recommended to boards by the Toronto Stock Exchange at a greater frequency than non-diverse boards.[83] The study concluded that "[d]iversity on boards, here represented by the presence of women on boards, does change the functioning and deliberative style of the board in clear and consistent ways."[84] Thus, this study directly

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[78] JANIS II, *supra* note 16; *see also* Carter et al., *supra* note 14; Carol Hymowitz, *What's Your Solution? We Asked Some Experts and Here's What They Said*, WALL ST. J., Feb. 24, 2003, at R8 (statement of Dr. Kenneth Eisold, a New York psychoanalyst and President of the International Society for Psychoanalytic Study of Organizations, discussing that boards too often tend towards groupthink and fail to dissent as a means of avoiding uncomfortable confrontations and preserving group cohesion); Joe Stephens & Peter Behr, *Enron's Culture Fed Its Demise; Groupthink Promoted Foolhardy Risks*, WASH. POST, Jan. 27, 2002, at A1 (recounting how the corporate culture at Enron insisted upon a degree of loyalty that led to groupthink).

[79] DAVID A. BROWN ET AL., WOMEN ON BOARD: NOT JUST THE RIGHT THING . . . BUT THE BRIGHT THING, CONFERENCE BOARD OF CANADA i–ii (The Conference Bd. of Canada, Report, May, 2002).

[80] *Id.* at 6.

[81] *Id.*

[82] *Id.*

[83] *Id.* at ii (using a measure of diversity of two or more women on a board; diverse boards assumed 94% of the recommendations, while non-diverse boards assumed only 72% of the recommendations).

[84] *Id.* "By bringing distinct perspectives to the attention of the organization's board and executive, diverse board members serve to create constructive dissent and to ensure due diligence. It is the homogeneous board that lacks both diversity and unity because it lacks meaningful dissent and deliberation." *Id.* at 14.

supports the conclusion that board diversity can instill a culture of scrutiny.[85] A similar study focusing on corporations in the Unites States recently considered the effects of gender diversity on corporate governance.[86] This study found that boards with greater gender diversity tended to meet more often than non-diverse boards and were more likely to link director pay to performance.[87] Unfortunately, both of these studies are somewhat limited due to the fact that each uses a narrow proxy for cultural diversity, specifically gender diversity.[88]

Nevertheless, it is fairly clear that cultural diversity on boards adds shareholder value.[89] One recent study specifically

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[85] *Id.* "When all board members are 'cut from the same cloth,' the board can become an 'old boys network,' widely-acknowledged as a major contributing cause to ineffective boards, poor governance and some of the most spectacular failures we have witnessed in . . . [the] corporate . . . sector[] in the past decade." *Id.* at 5.

[86] *See* Renee B. Adams & Danial Ferreira, *Diversity and Incentives in Teams: Evidence from Corporate Boards*, at 1, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=321095 (July 2001).

[87] *Id.* The authors of this study utilized data from 1,462 publicly traded firms in the United States during 1998. *Id.* at 3, 11. The study concluded that board homogeneity and incentive pay for directors were substitutes, meaning that firms that found diversity cost-prohibitive would substitute homogeneity for the enhanced incentive pay necessary to assure team loyalty. *Id.* at 2–4. To the extent that this study implies that diversity is costly relative to board homogeneity, it seems at odds with the authors' further finding that diversity enhances firm market valuations. *Id.* at 15 ("While it is not the goal of this study to interpret this finding, it is interesting to register the fact that higher market valuation is associated with more women on boards."). Indeed, given the authors' central finding that stock volatility, incentive pay for directors, and diversity are related, it could be that the authors have shown that companies that value board diversity also are interested in incentive-pay for directors and that this coincidence serves to fuel superior financial performance while minimizing risk. *See id.* at 4, 21. After all, authorities have deemed both incentive pay and board diversity as best practice and both are seemingly associated with superior performance. SHULTZ, *supra* note 14, at 105–09, 128–38.

[88] For purposes of this Article, when I use the term "cultural diversity," I mean to include both gender diversity and racioethnic diversity. Both of these dimensions of diversity inject a different perspective into the boardroom, as evidenced by the various empirical analyses showing a difference in outputs when either form of diversity is present. *See* BROWN ET AL., *supra* note 79; McLeod et al., *supra* note 18. Individuals offering either type of diversity are clearly not in the "club" and have been historically deprived of the ability to actualize their full potential. *See supra* text accompanying notes 6–11. Thus, it seems both groups break-up the tradition of gender and racioethnic homogeneity. Nevertheless, in an abundance of caution, I pause before applying the learning from gender diversity to racioethnic diversity, even though I cannot think of a good reason to do so.

[89] *Infra* note 97 and accompanying text; *see also* BROWN ET AL., *supra* note 79, at 12 (correlating diversity to enhanced financial performance in Canada, measuring diversity by two or more women on the board, and controlling for

examined "the relationship between board diversity and firm value for *Fortune 1000* firms."[90] For purposes of the study, the authors defined board diversity to mean the degree of inclusion of women, African-Americans, Asians, and Hispanics at the board level.[91] The study compared the financial performance between firms with significant diversity at the board level—two or more women or minorities—with those with no diversity, after controlling for a series of potentially exogenous factors.[92] The authors concluded: "After controlling for size, industry, and other corporate governance measures, we find statistically significant positive relationships between the presence of women or minorities on the board and firm value."[93] This conclusion finds broad support in a number of similar studies, from such ethnically diverse places as South Africa.[94]

Another study found that if a firm was selected to *Fortune* magazine's diversity elite, it subsequently exhibited a significantly higher return on equity relative to peers.[95] This diversity elite generally is selected based upon the degree to which the firm implements practices in hiring, retention, and compensation that create and sustain a diverse workforce.[96] Such firms are associated with abnormally high shareholder returns and higher return on assets, as well as higher return on equity.[97] Notably, however, the study found that "greater value

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industry).

[90] Carter, *supra* note 14, at 33.

[91] *Id.* at 36 ("Overall, we find a positive significant relationship between board diversity and firm value.").

[92] *Id.* at 44.

[93] *Id.* at 51.

[94] *See* S. Mitchell Williams, Relationship Between Board Structure and a Firm's Intellectual Capital Performance in an Emerging Economy 2 (demonstrating a positive correlation between board diversity and financial performance based upon a study of 84 publicly held companies listed in South Africa), *at* http://www.measuring-ip.at/English/papers.html (last modified Nov. 11, 2000); *see also* Amy J. Hillman & Albert A. Cannella, Jr., Diversity on the Board and Firm Performance: The Mediating Role of Stakeholder Management, (finding a positive correlation between board diversity and 242 S&P 500 firms from 1997–1999; concluding that "our evidence suggests that diversity is not merely media hype or public sentiment, but that quantifiable and positive results can come from a diverse board of directors") (working paper on file with author).

[95] Phyllis Y. Keys et al., Shareholder Benefits of Diversity 4–5 (Apr. 2002), *at* http://www.blackfinancialeconomist.org/bfenmaterials/working%20papers/keys/diversity.PDF (working paper on file with author).

[96] *Id.* at 4.

[97] *Id.* at 5.

is added when diversity promoters include individuals of various ethnic backgrounds in higher level positions . . . where decision-making authority and influence are greater."[98] The authors acknowledge that it is not clear why diversity adds value.[99] Still, their finding that diversity at the senior levels of corporate governance is associated with particularly strong gains in shareholder value is entirely consistent with a finding that board diversity enhances board functioning.[100] Thus, a diverse board adds shareholder value and assures better corporate governance whether tested in South Africa, Canada, or the United States; the empirical evidence in support of this conclusion is mounting and persuasive.[101]

The case for diversity in the boardroom is strong, even allowing for the lack of direct and exacting empirical proof that cultural diversity would serve to quell corporate corruption. Respected authorities within the business world posit that cultural diversity in the boardroom, properly managed, should

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[98] *Id.* at 22–23.

[99] *Id.* at 23.

[100] *Id.* at 22–23. This study is consistent with prior studies that also positively correlated stock market performance with the disclosure of positive events tending to show that a company had embraced diversity. *See* Janine S. Hiller & Stephen P. Ferris, *Separating Myth from Reality: An Economic Analysis of Voluntary Affirmative Action Programs*, 23 MEM. ST. L. REV. 773, 795 (1993) (finding that stock market price reacts positively to efforts to embrace diversity and negatively to news indicating companies have not embraced diversity); Peter Wright et al., *Competitiveness Through Management of Diversity: Effects on Stock Price Valuation*, 38 ACAD. MGMT. J. 272, 280–84 (1995); *see also Women and Profits*, HARV. BUS. REV., Nov. 2001, at 30 (reporting on a study by Professor Roy Adler finding that firms that most effectively shattered the glass ceiling for women also beat industry peers in profitability).

[101] Each of the above-discussed studies also supports the broader point that corporate governance matters to financial performance. This has been a surprisingly controversial point, but recent evidence seems to increasingly suggest that corporate governance does indeed influence financial performance. *See, e.g.*, Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1295, 1317–18 (1998) (finding that "superior performance is a result of activist corporate governance," as measured, *inter alia*, by adherence to the CalPers principles of corporate governance); *see also* BROWN ET AL., *supra* note 79, at 1–2 (finding that recent research has linked corporate performance to corporate governance practices such as a high degree of activist monitoring of management). Moreover, in light of recent corporate governance failures, capital markets are very likely to begin to enhance the degree to which effective corporate governance is impounded into the market prices of stocks; indeed, recently Standard & Poors began to rate companies based upon the quality of their corporate governance. *S&P Unveils 'Transparency' Study*, L.A. TIMES, Oct. 16, 2002, at C5.

act to create a culture of scrutiny and displace a culture of "groupthink."[102] These authorities increasingly suggest that cultural diversity is the best corporate governance practice.[103] In addition, a growing body of empirical evidence in related contexts strongly suggests that cultural diversity in the boardroom would enhance cognitive group functioning in a way that is inconsistent with a culture of corporate corruption and, therefore, supports authorities' conclusions.[104] Thus, the theoretical case for cultural diversity as a tool for greater corporate integrity is sound. Moreover, strong empirical evidence suggests a link between firm financial performance and cultural diversity in the boardroom.[105] While these studies cannot pinpoint the source of enhanced value to be the creation of a culture of scrutiny, shareholder value in the end is shareholder value, regardless of the precise source of enhanced value.[106] In other words, even if cultural diversity does not enhance corporate governance integrity with the anticipated degree of efficacy, it is still likely to produce other benefits.[107] In sum, there is little risk to facilitating increased board diversity and likely significant gains in doing so, including the prospect of quelling corporate corruption.

Therefore, the case for proactive measures to encourage greater cultural diversity in the boardroom of corporate America has been made. This is particularly so when the case for cultural diversity is measured against the case in support of the actual reforms undertaken pursuant to the Sarbanes-Oxley Act, as the next section of this Article demonstrates. It is also noteworthy that the case for increased cultural diversity in the boardroom is now a high profile corporate governance issue internationally, explicitly for the purpose of creating an additional safeguard against corporate misconduct. The case for increased board

[102] *See supra* notes 14–23.

[103] *See supra* notes 21, 46–47.

[104] *See supra* notes 18, 79, 90.

[105] *See supra* notes 66, 68–69.

[106] *See supra* note 100.

[107] Indeed, in addition to the studies cited above showing the general value of board diversity on corporate financial performance, *see supra* notes 89–101, there are additional studies showing that corporations that generally embrace diversity sufficiently to be named to the "diversity elite" by Fortune are associated with superior shareholder wealth as measured by stock performance after publication of the ranking. *See supra* note 95.

diversity is strong enough internationally that several advanced economies are ahead of the United States in terms of the actual steps taken to facilitate more diversity in the boardroom, as the next section also demonstrates.

II. WILL THE SARBANES-OXLEY ACT OF 2002 LEAD TO LESS BOARD DIVERSITY?

Given the compelling nature of the case for diversity at the board level, it is unclear why the commanding heights of corporate America seem to lag in diversifying themselves, relative to a society that is generally on the cusp of an era of rapid diversification.[108] At its most basic level, the cause of the problem is simple: Board directors select corporate officers, and corporate officers select directors.[109] In a publicly held company, it takes a proxy fight for shareholders to nominate and elect a director, and this is an expensive process.[110] Thus, directors are

[108] *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. OF PERSONALITY & SOC. PSYCHO. 797 (1997) (demonstrating how racial disparities in intelligence tests are attributable to stereotype threat, which acts to compromise performance in areas where groups of individuals are subjected to negative stereotypes). *Compare* Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley*, 93 NW. U. L. REV. 215, 219 (1998) (arguing that a free market is not likely to eradicate unfair discrimination because the market will permit actors to exercise negative elements of human nature, including self-destructive and oppressive tendencies, perpetuating a legacy of discrimination), *with* GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 8–9 (2002) (showing the continuing power of racial stereotypes and racial stigma to perpetuate and legitimate inequalities through self-confirming social interactions, e.g., when a bank is less likely to extend funds to African-American borrowers because of the assumption that blacks have higher default rates). Perhaps the only point that seems clear is that corporate managers are generally not acting as rational maximizers striving to enhance shareholder value as a means of achieving higher compensation in the corporate manager market. *See generally supra* notes 6–11, 89–101.

[109] Although there has been some progress, CEOs generally dominate the director selection process. *See* SHULTZ, *supra* note 14, at 26–27 (stating that CEOs typically select directors, that the board rubber-stamps the CEO's selection and that shareholders are given little voice in the process); *see also* BRANCATO & PATTERSON, *supra* note 51, at 20 ("In the United States, the CEO has traditionally been the . . . the main driver of the recruitment process for new board members."). Formalistically, the shareholders elect the board. *See, e.g.*, DEL. CODE ANN. tit. 8, § 211(b) (2001). In a publicly held company, however, the shareholders are not permitted to nominate directors, short of a proxy contest. *See* 17 C.F.R. § 240.14a-8(i)(8) (2002). Thus, elections for directors typically look like elections in the former communist bloc, with only one candidate running. *See* SHULTZ, *supra* note 14, at 27.

[110] *See Designed by Committee: Corporate Governance*, ECONOMIST, June 15,

selected by management and not elected by shareholders.[111] The net effect of this system of corporate governance is a mutually reinforcing mechanism by which elites perpetuate an exclusive tradition.[112] In particular, the perpetuation of the tradition of gender and race exclusion finds ready explanation in the club-like atmosphere permeating most corporate boards and the desire of most business executives to stock their boards with known individuals who are unlikely to prove to be a wild card.[113] In short, those at the helm of the American corporate governance structure are given little incentive to stop replicating themselves in the boardroom and the executive suite.[114] Slow progress has been the result.[115] It seems as though the corporate boardroom has a long racial half-life, in that entrenched exclusivity is structurally embedded at the pinnacle of American corporate governance through the operation of corporate law and the preexisting power structure from the bygone era of American apartheid.[116] The erosion of this racial and gender homogeneity has proven slow indeed.[117]

Unfortunately, it is uncertain whether the Sarbanes-Oxley Act will serve to increase diversity or diminish diversity in the

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2002, at 71 (recounting a proxy contest at Hewlett-Packard in which the company spent $150 million to fend off a proxy challenge brought by the company founder, Walter Hewitt).

[111] *See id.* ("The CEO puts up the candidates, no one runs against them and management counts the votes.") (quoting shareholder activist Nell Minow of the Corporate Library).

[112] *See* Michael L. Diamond, *Women Still Make up Only a Small Percentage of Corporate Boards*, KNIGHT-RIDDER TRIB. BUS. NEWS, Sept. 29, 2002, *available at* 2002 WL 101157423. "Historically, executives appointed directors with whom they felt comfortable. They retained their power and rarely heard dissent." *Id.* (quoting Rutgers University Business Professor Briance Mascaranhas). Of course, this leads to a rubber-stampped board that is prone to abuse. *See id.* Professor Mascaranhas recommends more diversity to combat this tendency towards homogeneity and groupthink. *Id.*

[113] *See* Strauss, *supra* note 6, at B1.

[114] *See* SHULTZ, *supra* note 14, at 129 (stating that diversity is being "shortstopped" because "we all want to clone ourselves" and "we put people on boards because we trust them; we know them; we admire them; we identify with them," and "[w]e play golf with them").

[115] For example, women have made more progress than people of color. *See supra* notes 6–8, 10–11 and text accompanying notes. Nevertheless, at the current pace experts expect women to reach parity on boards in no less than five decades. *See* Diamond, *supra* note 112.

[116] *See supra* notes 6–8, 10–11 and accompanying text.

[117] *See supra* note 112.

boardrooms of corporate America.[118] It is certain that the Act does not mention diversity, notwithstanding its wide-ranging, even revolutionary, federalization of corporate governance for publicly held companies. The regulations that the SEC has promulgated under the Act also do not mention the term "diversity" or make any reference to the benefits of a diverse board. Similarly, the legislative history of the Act fails to support any inference that Congress intended the Act to foster diversity in the boardroom. It is therefore clear that diversity in the boardroom was not something that Congress considered or intended to further. It simply was not on the legislative radar.

For example, in the legislative activity leading up to the enactment of Sarbanes-Oxley, the Senate specifically investigated the causes of the Enron debacle.[119] The Senate found that the Enron board "fail[ed] to recognize its fiduciary obligations . . . oversee management, and ensure responsible financial reporting;"[120] "knowingly allowed Enron to conduct billions of dollars in off-the-books activity to make its financial condition appear better than it was;"[121] "approved excessive compensation;"[122] and even waived compliance with the company's own code of conduct.[123] In short, the board at Enron failed to monitor management, failed to question management, and failed to critically analyze the fundamental nature of Enron's business. One corporate governance authority has termed these failures "almost inconceivable."[124] According to this expert, the directors at Enron viewed management through "heavily tinted . . . rose-colored lenses," in that they "consistently failed to question [Enron's] transactions or . . . accounting

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[118] *See* Lisa Girion, *Corporate Scandals Put Directors in the Hot Seat*, L.A. TIMES, Sept. 17, 2002, at C1 ("[E]fforts to achieve racial and gender diversity are taking a back seat these days to the pursuit of independence and expertise, according to recruiters and corporate governance experts."); Tannette Johnson-Elie, *Scandals May Hamper Efforts To Boost Board Diversity*, MILWAUKEE. J. SENTINEL, Dec. 18, 2002, at D1 (stating that with the focus on meeting the new requirements of the Sarbanes-Oxley Act, some companies may further neglect board diversity).

[119] *See* S. REP. NO. 107-70 (2002).

[120] *Id.* at 14.

[121] *Id.* at 38.

[122] *Id.* at 52.

[123] *See id.* at 24–25.

[124] Janis Sarra, *Rose Colored Glasses, Opaque Financial Reporting, and Investor Blues: Enron as Con and the Vulnerability of Canadian Corporate Law*, 76 ST. JOHN'S L. REV. 715, 723 (2002).

practices," even though they had access to information and storm warnings suggesting much was amiss.[125] In short the problem at Enron was "groupthink."[126]

This same expert, Professor Janis Sarra of the University of British Columbia, concludes that one of the fundamental problems leading to Enron's downfall was the lack of diversity on its board.[127] The directors exhibited many of the symptoms of "groupthink." The culture created a need for conformity and diverse views were not brought to bear.[128]This led to an inability to raise important questions and to a failure to challenge group decisions.[129] Thus, corporate governance scholars suggest that "shared backgrounds, financial incentives to bond together, and a board culture promoting unquestioning loyalty to Enron officers, prevented the Enron board from critically evaluating decisions, and led to a sense of invulnerability in risk-taking decisions."[130] All of this may smack of hindsight, except that this analysis of what was wrong at Enron mirrors the best practices developed by leading and authoritative business management and corporate governance experts long before Enron went bust in November of 2002.[131] Simply put, Enron ignored all of the evidence supporting the potential of diversity and predictably suffered the ill effects of doing so.[132]

On the other hand, Enron, as well as many of the other headline-grabbing participants in the parade of corporate corruption that occurred beginning in 2001, complied with many of the reform efforts passed in the wake of its implosion.[133] For

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[125] *Id.* at 720.

[126] *See* Thomas R. Horton, *Groupthink in the Boardroom*, DIRECTORS & BOARDS, Jan. 1, 2002, at 9 (associating Enron's downfall with groupthink in its boardroom).

[127] Sarra, *supra* note 124, at 728.

[128] *See id.*

[129] *Id.*

[130] *Id.* at 729 (citing Marlene O'Connor, Address at the American and Canadian Law and Society Joint Conference (June 2002)); *see also* Lynne Dallas, *Developments in Corporate Governance in U.S. Boards of Directors and the Multiple Roles of Corporate Boards, in* CORPORATE GOVERNANCE IN GLOBAL CAPITAL MARKETS (2003).

[131] Empirical data suggested that embracing diversity would enhance stock performance as early as 1993. *See supra* note 100. The theoretical business case for diversity was developed throughout the early and mid-1990s. Ramirez II, *supra* note 13, at 90–109.

[132] *See supra* notes 119–24.

[133] *See* Ramirez III, *supra* note 24, at 31–32.

example, the most recent culprit, HealthSouth, did not have any consulting relationship with its auditing firm, and the audit function appeared to be central to its failing.[134] In many ways, the boards of many of the most notorious corporate failures call into question the very idea of whether structural and procedural rules regarding boards are the solution to the problem of corporate governance at all. Dean Sonnenfeld contends that many of the victims had highly independent boards, and it is difficult to discern between well managed companies and poorly managed ones on the basis of this criterion.[135] Instead, Dean Sonnenfeld contends that the reform focus should be on the social dynamics of the board.[136] Dean Sonnenfeld cites empirical evidence showing that the highest performing companies have "extremely contentious" boards.[137] These companies create a board culture that "regard[s] dissent as an obligation and . . . treat[s] no subject as undiscussable."[138] This evidence fully supports the theoretical and empirical basis for diversity in the boardroom; diverse boards will break down the social homogeneity that gives rise to groupthink.[139] Thus, this is further evidence of the power of diversity and suggests that Sarbanes-Oxley has failed to address the root cause of the recent spate of corporate corruption.

Despite all of the evidence in support of the need for greater diversity in America's boardrooms, the Sarbanes-Oxley Act takes only a modest approach at enhancing the cognitive skills of the boardroom. Specifically, the Act imposes relatively limited independence requirements.[140] The Act mandates that the audit committee be independent[141] and that the chair of the audit committee be a financial expert.[142] In addition, if a corporation

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[134] *See* Foust, *supra* note 25; Haddad et al., *supra* note 25.

[135] *See* Sonnenfeld, *supra* note 19, at 106–08.

[136] *See id.* at 106 ("Viewing the breakdowns through the lens of my 25 years studying board performance . . . [w]e need to consider not only how we structure the work of a board but also how we manage the social system a board actually is.").

[137] *Id.* at 111 (referring to data complied by Eisenhardt and L.J. Bourgeois); *see* John et. al., *supra* note 18 (showing that cultural diversity is associated with high relationship conflict as well as better performance and higher group satisfaction).

[138] *Id.*

[139] *Id.* ("I'm always amazed at how common groupthink is in corporate boardrooms.").

[140] *See supra* notes 28–39.

[141] *See supra* note 34.

[142] *See supra* note 34.

opts to have a qualified legal compliance committee, at least a majority of the members of such committee must be independent.[143] Certainly, these are positive steps. Nevertheless, Enron had thirteen of fifteen directors that would likely have fit the modest independence[144] definition that is the linchpin of these requirements, and it had an apparently independent financial expert chairing its audit committee.[145] On the other hand, it had only one woman on the board and only one person of color: Wendy Gramm, the wife of Texas Senator Phil Gramm, represented both of these people.[146] Rather than impose any regulatory mandate or incentive for boards to diversify themselves, Congress essentially prescribed rules that Enron itself adhered to in order to stem any prospect of recurring Enrons.[147]

This approach should be contrasted to the approach of other developed economies. Israel has required government companies

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[143] *See supra* note 36.

[144] *See* Sarra, *supra* note 124, at 728.

[145] *See* Dan Feldstein, *The Fall of Enron*, HOUS. CHRON., Feb. 4, 2002, at 1 (discussing the fact that the chair of the Enron audit committee was a former Dean of the Stanford Business School). While at least one Enron director had a consulting agreement with the company, it does not appear that a significant number would have been deemed not to be independent in accordance with the SEC's definitions of independence. *See id.* In fact, many had conflicts that are still permitted under the new definition of "independence." For example, at least two directors were affiliated with charitable organizations that received significant donations from Enron. *Id.* This would not run afoul of the SEC's definition. *See supra* note 36. There is some likelihood that a few of the Enron directors would not be deemed independent under the NYSE rules, but a majority would under those rules. Thus, Enron would have been in compliance with the NYSE requirement that a majority of directors be independent. *See supra* note 39.

[146] *See* Sonnenfeld, *supra* note 19, at 111 (discussing the resignation of Rebecca Mark, another female director, because she was uncomfortable with the paths the company had taken); *see also* Feldstein, *supra* note 145, at 1 (noting that while the Enron board did have three foreign nationals and was thus internationally diverse, having elites from other nations can hardly be expected to create the kind of contentious board atmosphere that would create a culture of scrutiny).

[147] In particular the requirement that publicly held companies have boards with a majority of independent directors, in itself, has a weak empirical basis for enhancing corporate financial performance. *See* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 263–65 (2002) (finding that board independence does not seem to influence corporate financial performance); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 937 (1999) (suggesting that factors other than mere independence influence financial performance).

to pursue gender diversity at the board level since 1993.[148] If gender representation is deemed inadequate, the government is given power to appoint female directors.[149] Norway recently mandated enhanced diversity for its system of corporate governance, specifically in response to the corporate corruption crisis in the United States. It did so in order to harness diversity in order to quell any outbreak of such a crisis in Norwegian corporations.[150] Norway now requires that women fill forty percent of board positions by 2005.[151] Sweden seems poised to break the self-replicating cycle of homogenous boards as well.[152] The United Kingdom has also recently studied the underlying causes of corporate misconduct, and it has undertaken an effort to enhance racial, ethnic, and gender diversity at the highest levels of its corporate governance structure.[153] It concluded that, left to its own devices, board selection would continue to be driven by personal contacts of those already in the club, which would naturally tend to create more homogenous boards; this would "implicitly discriminate" against those with more diverse backgrounds.[154] In the United Kingdom, as elsewhere, lawmakers and other authorities have addressed recent

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[148] *See* Israeli Government Companies Law, §18A (1975) (requiring appropriate gender representation on boards and empowering the government to make appointments if such representation does not occur).

[149] *See id.*

[150] *See* Lizette Alvarez, *Norway Is Set To Compel Boardrooms To Let More Women In*, N.Y. TIMES, July 14, 2003, at A3; Charles Goldsmith, *Norway Plans To Require Greater Gender Equality in Boardrooms*, WALL ST. J., July 19, 2002, at A9 ("Norway's plan has ushered in a broader debate about the need for more boardroom diversity—of every stripe. The recent corporate scandals in the U.S., say leading business figures here, illustrate the need to have board members with varied experience and insight in order to keep close tabs on company executives.").

[151] *See* Goldsmith, *supra* note 150, at A9.

[152] *See* Christopher Brown-Humes, *Sweden To Engender Top-Level Change in Its Companies*, FIN. TIMES, Jan. 27, 2003, at 7.

[153] The government of the United Kingdom referred the task of studying the role of outside directors and making recommendations to increase the effectiveness of outside directors to Derek Higgs. Derek Higgs, *Review of the Role and Effectiveness of Non-Executive Directors*, Jan. 2003, at 17, *available at* http://www.dti.gov.uk/cld/non_ exec_review /pdfs/higgsreport.pdf. Higgs specifically found that boards in the United Kingdom would benefit from enhanced diversity and encouraged efforts to find board members with more diverse backgrounds. *Id.* at 42–45. As a result, the private sector specifically undertook to identify 100 persons of more diverse backgrounds for potential board membership. *Id.* at 44.

[154] *Id.* at 43.

corporate turbulence by thinking about the use of diversity as a tool to enhance corporate governance.[155]

Compared to the efforts of the United States to harness diversity, these other advanced nations appear to be far ahead of our society in appreciating the potential of diversity. The Sarbanes-Oxley Act can only be considered a disappointment both in terms of creating a truly independent board culture and in terms of wasting an excellent opportunity to use our diverse human resources positively. Indeed, it may well be that in the end, Sarbanes-Oxley will reduce diversity in the boardroom. I base this on three facts. First, it would be hard to conclude that board diversity was an urgent concern of the leaders within corporate America before the corporate corruption crisis.[156] Second, Sarbanes-Oxley did nothing to alter this deep ambivalence.[157] Third, Sarbanes-Oxley will pose challenges to corporate leaders just to meet the Act's mandates.[158] They will be hard pressed to divert resources to locating additional diverse candidates who fit the requirements of the Sarbanes-Oxley Act.[159] Therefore, it appears that Sarbanes-Oxley will probably extend the racial half-life needed to fully overcome exclusive traditions within the boardroom. This will, in turn, harm our business sector as well as stunt our nation's quest for racial progress.

The failure of the Sarbanes-Oxley reforms to address diversity will ultimately also hurt the ability of American business to attract capital in international markets.[160] Business has a collective interest in assuring that American corporate governance standards are perceived as rigorous.[161] There are

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[155] *See id.* at 3, 13, 39–44.

[156] *See supra* text accompanying notes 6–11.

[157] *See supra* text accompanying notes 28–38 (describing the Act without mentioning the diversity issue).

[158] *See* Johnson-Elie, *supra* note 118, at D1.

[159] *See, e.g.*, Girion, *supra* note 118, at C1 (quoting a director search expert as stating that "[s]earch committees are no longer saying, '[they] need a woman' ").

[160] The entire Sarbanes-Oxley reform initiative had its genesis in the summer of 2002 when corporate governance deficiencies raised the cost of capital in America and contributed to the declining dollar, as eroding investor confidence among international investors caused a flight of capital out of American businesses. *See* Ramirez III, *supra* note 24, at 35.

[161] The reform process in the United Kingdom, where diversity has been viewed as a potential tool to quell corporate corruption, appears to be pulling ahead of the United States in terms of the perceived integrity of its corporate governance system in the international press. *See* Janet McFarland, *Across the Board: Governing Rules*

indications that American corporate governance standards may not be measuring up.[162] In fact, there are emerging signs that the United States capital markets have not regained their attractiveness to foreign investors, notwithstanding the enactment and implementation of the Sarbanes-Oxley reform initiative.[163] If the thesis of this Article is correct, specifically that racial thinking is so imbedded in our culture that we cannot think of diversity as a strength or as a tool, then the prospect of suffering from flawed corporate governance is particularly distressing. It means that we are not only blind to the potential of diversity, but we are so wedded to racial thinking that we will sacrifice the performance of corporate America and our general economy on the altar of yesteryear's racial and gender hierarchy.[164]

All of this is simply inconsistent with a society that is striving to overcome its racist hangover and embrace the potential of its culturally diverse human resources. It is well established that race has no biological basis and operates only as a social construct.[165] On the other hand, it is also well established that cultural diversity can lead to gains in small group interaction, deeper thinking, and more creative problem solving skills when properly deployed in accordance with an increasingly clear set of best practices.[166] I have argued in the past that if our society is indeed serious about unleashing the potential of our diverse human resources, and incidentally assisting us in overcoming our racist hangover, then we should

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in U.K. Worth a Look, GLOBE & MAIL, Jan. 29, 2003, at B2 (stating that Higgs's approach "sets the governance bar a major leap higher" and that its voluntary standards are more rigorous than the mandatory requirements of the Sarbanes-Oxley Act); Andrew Parker & Tony Tassell, *Higgs Calls for Greater Boardroom Diversity*, FIN. TIMES, Jan. 21, 2003, at 1 (quoting Derek Higgs and questioning the efficacy of Sarbanes-Oxley reforms).

[162] *See supra* note 161.

[163] *See* Rachel Beck, *Where Has Foreign Money Gone?*, SEATTLE TIMES, Apr. 23, 2003, at E2 (quoting an economist as stating that foreign investors are wary of United States stocks because of concerns regarding corporate corruption).

[164] There is currently an initiative pending that seeks to motivate lawmakers to consider addressing diversity in the boardroom.

[165] *See* Ramirez I, *supra* note 3, at 40–46 (2001) (canvassing the lack of scientific validity to notions of race and concluding that "[i]n sum, if race is defined as some arbitrary level of statistically significant genetic divergence between population groups, such variability is provided by insular local populations instead of visible morphological features").

[166] *See id.* at 59–60.

take steps to facilitate the incipient movements in certain sectors of our society to embrace diversity.[167] We as a society must begin to look for opportunities to harness diversity. Before we can be fully successful in this task, however, we need to appreciate diversity and purge all remnants of the racial mythology of yesteryear.[168] Unfortunately, the episode of corporate corruption and reform culminating in the Sarbanes-Oxley Act suggests that we still think in terms of race and racial problems and not in terms of the potential for diversity.[169] Our political leaders seemed to assume that corporate corruption was not a race issue, and therefore, it appears not to have occurred to them that diversity in the boardroom could have been a tool in the war on corporate corruption.

CONCLUSION: LESSONS ON RACE AND DIVERSITY IN AMERICA

Despite lip service and political rhetoric to the contrary, it is clear that our legal community and political leaders lag behind the world of business in understanding the potential of diversity and the archaic nature of race. Instead, the failure to even discuss enhanced board diversity as a means of enhancing board monitoring and breaking the grip of groupthink in the boardroom is emblematic of a governing elite that still believes in racial mythology. The most compelling proof of the extent of our collective racial dementia is the failure to follow other societies that enhance board diversity, specifically in the service of enhanced board vigilance against the temptations of corruption. Even though our scandals have been more disturbing, our discussion of diversity has been more scanty than other developed societies.

This is certainly not a vindication of the business community. There is no doubt that the most progressive elements of the business community have embraced diversity, and this is reflected in the cultural and gender diversity on many corporate boards. It is not clear why some corporations have apparently embraced diversity and others seem to resist it. Overall, it is clear that there seem to be more laggards than there are diversity models. Much more work needs to be done to

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[167] *See* Ramirez II, *supra* note 13, at 132–33.

[168] *See supra* note 3.

[169] *See supra* text accompanying notes 28–38; *see also* discussion *supra* Part I.

understand the barriers preventing increased diversity in the boardrooms of corporate America. Once the causes of corporate resistance are identified, then the law can react in an appropriate manner. Specifically, the law can address the apparent problems in a manner that maximizes the benefits to the business community while minimizing the disruption of market forces and corporate functioning.