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Sex, Trust, and Corporate Boards

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I. INTRODUCTION

Many have indicated, directly or indirectly, that the highly publicized corporate fraud at Enron, WorldCom, HealthSouth, Adelphia, and other public companies represents or reflects a crisis of trust in corporate America.[1] Directors of these corporations trusted corporate executives and each other, corporate executives trusted each other, and investors trusted both corporate directors and executives; in each case to his or her respective detriment. The result? Distrust of and among corporate constituencies.[2]

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1. E.g., TAMAR FRANKEL, TRUST AND HONESTY 9-24 (2006); andre douglas pond cummings, *"Ain't No Glory in Pain": How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979, 1072 (2005) ("The litany of corporate fraud cases has undermined the public trust and generated support for more regulations."); Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211, 223, 259-63 (2006) ("Today, we are once again in the throes of a crisis in corporate trust."); Gregory Todd Jones, *Trust, Institutionalization, & Corporate Reputations: Public Independent Fact-Finding From A Risk Management Perspective*, 13 U. MIAMI BUS. L. REV. 121, 124 (2005) ("In recent times . . . , we have witnessed an avalanche of corporate wrongdoing or incompetence that has led to widespread 'cris[es] of social legitimacy and [a] loss of public trust.'").

2. *See* Ramon Casadesus-Masanell & Daniel F. Spulber, *Trust and Incentives in Agency*, 15 S. CAL. INTERDIS. L.J. 45, 45-46 (2005); Duggin & Goldman, *supra* note 1, at 223. Two key corporate governance scholars explain this phenomenon well when they note,

> signs of lack of trust and trustworthiness tend to be self-fulfilling. Once players in a social dilemma game come to believe that their fellows intend to defect, they themselves defect, and distrust prevails . . . .

Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PENN L. REV. 1735, 1776 (2001).

The Sarbanes-Oxley Act of 2002, related federal administrative rulemaking and market regulation, and informal corporate governance principles and guidelines have all been constructed as means of addressing this perceived crisis.[3] Among the specific corporate governance reforms introduced in these initiatives are directives and suggestions relating to board composition. These reforms especially focus attention on the need for, and the role of, independent directors on public company boards of directors and board committees.[4] "Independence" is defined for these purposes in a narrow manner to include a lack of financial and other formal ties with the corporation outside the board room.[5] Independent directors commonly are perceived as being less automatically trusting of corporate management and incumbents.[6] (This, despite the fact that director prospects — including candidates for independent director positions — may be first identified or in some way vetted as potential nominees by the

3. *See, e.g.*, Duggin & Goldman, *supra* note 1, at 261; Laurie A. Morin, *Broken Trust and Divided Loyalties: The Paradox of Confidentiality in Corporate Representation*, 8 D.C. L. REV. 233, 240 (2004) ("As one story after another hit the press, lawmakers felt compelled to take action to restore public trust and confidence. The resulting legislation, the Sarbanes-Oxley Act of 2002 . . . , enacted sweeping reforms to rein in the corporate excesses exemplified by Enron." (footnote omitted)); Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77, 86-90 (2003) (describing the regulatory reaction to the corporate fraud at the turn of the century); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 IOWA J. CORP. L. 1 (2002) (describing both perceived problems involving trust and honesty and the regulatory and nonregulatory reforms) [hereinafter *Market*]; Tom D. Snyder, Jr., *A Requiem for Client Confidentiality?: An Examination of Recent Foreign and Domestic Events and their Impact on the Attorney-Client Privilege*, 50 LOY. L. REV. 439, 452 (2004) ("The Public Company Accounting Reform and Investor Protection Act of 2002, also referred to as the 'Sarbanes-Oxley Act,' was enacted, in part, to help restore trust in the U.S. financial markets . . . .").

4. 15 U.S.C. § 78j-1(m)(3) (Supp. 2003); New York Stock Exchange Listed Company Manual § 303A (November 3, 2004), http://www.nyse.com/pdfs/section303Afinalrules.pdf; The NASDAQ Stock Market Inc., Corporate Governance, Rules 4200, 4200A, 4350, 4350A, 4351 & 4360 and Associated Interpretive Material (April 15, 2004), http://www.nasdaq.com/about/CorporateGovernance.pdf; American Stock Exchange Enhanced Corporate Governance Rules Approved by the Securities and Exchange Commission (December 1, 2003), http://www.amex.com/?href=/atamex/news/amCorGov.htm. *See* Erica Beecher-Monas, Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby? 1-3 (unpublished paper, on file with author); Ribstein, *Market*, *supra* note 3, at 11-12.

5. Beecher-Monas, *supra* note 4, at 5-6, 12. *See also, e.g.*, Lisa M. Fairfax, *Sarbanes-Oxley, Corporate Federalism, and the Declining Significance of Federal Reforms on State Director Independence Standards*, 31 OHIO N.U. L. REV. 381, 389 (2005) ("Sarbanes-Oxley narrowly defines independence with respect to compensation and a director's affiliation with the company.").

6. *See* Beecher-Monas, *supra* note 4, at 4, 15 (describing independence as a mechanism employed to prevent directors from reflexively rubber-stamping management proposals). *Cf.* Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1310 (2003) (noting scholarly fears that "too many independent directors on a board may weaken the trust needed among the CEO and board members"). *But see* O'Connor, *supra*, at 1250 (indicating that an independent director often assesses whether he or she can trust a CEO before accepting a board seat).

chief executive officer of the corporation.[7]) Moreover, independent directors may be perceived as more trustworthy than their insider counterparts.[8] However, scholars are, at best, mixed in their assessments of the value of this limited form of independence in fully resolving the crisis of trust represented by the corporate fraud scandals of the late twentieth and early twenty-first century.[9] In fact, the board of directors of Enron — the veritable "poster child" for our most recent spate of corporate fraud — had a board of directors largely composed of outside directors.[10]

Accordingly, attributes other than this narrowly conceived variety of independence may be important in addressing perceived lapses of trust through the composition or mechanics of the corporate board.[11] The

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7. *See* Beecher-Monas, *supra* note 4, at 13 ("CEOs, even where firms have independent nominating committees, still heavily influence board selection."); *id.* at 15 ("[D]irectors are initially selected for consideration by the CEO."); Janice Kay McClendon, *Bringing the Bulls to Bear: Regulating Executive Compensation to Realign Management and Shareholders' Interests and Promote Corporate Long-Term Productivity*, 39 WAKE FOREST L. REV. 971, 987 (2004) ("[I]t is often the corporation's CEO who selects board members, including 'independent directors' who serve on the board's compensation committee."); Randall S. Thomas, *Explaining The International CEO Pay Gap: Board Capture Or Market Driven?*, 57 VAND. L. REV. 1171, 1195 n.99 (2004) ("Board members are obligated to the CEO even where the board has a nominating committee of independent directors because a nomination will not proceed without the CEO's approval.").

> Recent corporate governance reforms attempt to make nominations for board election less subject to the influence of the CEO, such as through the use of nominating committees comprised exclusively of independent directors or by implementing the SEC's proposal to require certain companies to include shareholder nominees for director slots in the company's proxy materials.

Richard S. Saver, *Medical Research Oversight from the Corporate Governance Perspective: Comparing Institutional Review Boards and Corporate Boards*, 46 WM. & MARY L. REV. 619, 651 (2004). *See also* DOUGLAS M. BRANSON, NO SEAT AT THE TABLE 179-80 (2006).

8. *See, e.g.*, Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants*, 55 STAN. L. REV. 885, 900 (2002) (noting that "Delaware case law has given more weight to board decisions that are approved by independent, disinterested directors"); Daniele Marchesani, *The Concept of Autonomy and the Independent Director of Public Corporations*, 2 BERKELEY BUS. L.J. 315, 321-25 (2005) (describing factors indicating the perceived trustworthiness of independent directors); Rachel A. Fink, Note: *Social Ties In The Boardroom: Changing the Definition of Director Independence to Eliminate "Rubber-Stamping" Boards*, 79 S. CAL. L. REV. 455, 469 (2006) ("The reputational capital theory maintains that shareholders can trust independent directors to execute their monitoring duties effectively because if they do not, the market will punish them by hindering their ability to receive future directorships.").

9. *See* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 239 (2002); Beecher-Monas, *supra* note 4, at 15-23; Lawrence E. Mitchell, *Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance*, 70 BROOK. L. REV. 1313, 1319 n.23 (2005).

10. *See* Beecher-Monas, *supra* note 4, at 5; Jones, *supra* note 1, at 128-29.

11. A noted Delaware Chancery Court jurist intimates this in a 2002 article.

> Assuming that there are such things as truly "independent" directors, when and to what extent are we willing to trust their judgment? Is there some basis to believe that we should defer (i.e., give business judgment rule

possibility exists, for example, that the sex — male or female status[12] — of a director may be an attribute to consider when looking at restoring trust in and within the corporation through the board of directors. To explore that possibility, this Article first summarizes recent works by nonlegal scholars on sex and trust, focusing most closely on three studies of populations within the United States.[13] Then the Article makes observations and suggestions about the impact of these works on overall corporate decision making and draws related conclusions about board composition.

II. RESEARCH ON GENDERED TRUST

Trust is a significant area for psychological, sociological, anthropological, and economic study, in general and across cultural and gender-based lines.[14] This is not surprising. Trust significantly impacts and reflects economic and social interactions in a cultural context; a lack of trust can have serious deleterious effects on society.[15] Gender also has been an active, even if not fully accepted, area for scholarly inquiry in the

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> deference) to decisions made by a board comprised of a majority of independent directors, but not those made by a board minority? Do we believe that deference should only be given if the independent directors are empowered to act on their own, with the active advice of financial and legal advisors, and without participation and involvement by insiders?
>
> These issues raise interesting psychological and sociological questions. What are the motivations that drive most directors? Are independent directors likely to behave in a more trustworthy and effective manner when they are in the majority? Or specifically charged as a separate committee to act only for the minority?

Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 505 (2002).

12. The word "gender" (together with derivatives of that word), which is based on social construction, sometimes is used in lieu of the more strictly biologically referential term "sex" (or its derivative forms) in this Article.

13. Some of the referenced supporting studies test populations outside the United States in addition to or instead of populations inside the United States. Because of cultural differences in trust behaviors, the author has not relied on the findings of these studies in drawing her conclusions in this Article about U.S. corporate directors.

14. *See, e.g.*, Nava Ashraf et al., Is Trust a Bad Investment? 7 (Nov. 2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=478881; William M. Maddux & Marilynn B. Brewer, *Gender Differences in the Relational and Collective Bases for Trust*, 8 GROUP PROC'S & INTERGROUP REL'NS 161 (2005).

15. *See, e.g.*, Beecher-Monas, *supra* note 4, at 14 ("Without trust in the corporate governance system, the economy will stagnate. It is a truism that economic growth and financial development depend on the willingness of investors to trust their funds to the management of others."); Michele P. Claibourn & Paul S. Martin, *Trusting and Joining? An Empirical Test of the Reciprocal Nature of Social Capital*, 22 POLITICAL BEHAVIOR 267, 268-69 (2000); Duggin & Goldman, *supra* note 1, at 256; Kessely Hong & Iris Bohnet, Status and Distrust: The Relevance of Inequality and Betrayal Aversion 2 (Sept. 2004), http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=600642; Jones, *supra* note 1, at 123-24, 146, 159-60; Alan S. Miller & Tomoko Mitamura, *Are Surveys on Trust Trustworthy?*, 66 SOCIAL PSYCH. QUARTERLY 62, 62 (2003).

social sciences.[16] Accordingly, social science scholars from a wide variety of fields have begun to explore the extent to which trust may be gendered. Legal scholars also have contributed to this emerging body of work.[17] The following portion of this article describes key findings of some of the recent scholarly explorations relating to sex and trust.

A. SEX AND TRUSTING[18]

Trust, variously defined in the literature,[19] exposes the trusting person to vulnerability.[20] Both men and women manifest trusting behavior in their relationships with others. In fact, research tends to indicate, to varying extents, that men and women exhibit trusting behaviors equally.[21] Scholarly work in this area, however, continues to be refined and expanded. Studies of sex and trust now are more nuanced, and the outcomes and interpretations of these studies therefore have become increasingly valuable.[22]

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16. *See. e.g.*, Kelley Hays-Gilpin, *Feminist Scholarship in Archaeology*, 571 ANNALS 89 (2000); Beth B. Hess, *Beyond Dichotomy: Drawing Distinctions and Embracing Differences*, 5 SOCIOLOGICAL FORUM 75 (1990); Maureen J. Lage & Michael Treglia, *The Impact of Integrating Scholarship on Women into Introductory Economics: Evidence from One Institution*, 27 J. ECON. EDUC. 26 (1996); Gretchen Ritter & Nicole Mellow, *The State of Gender Studies in Political Science*, 571 ANNALS 121 (2000); Rachel A. Rosenfeld, *What Do We Learn about Difference from the Scholarship on Gender?*, 81 SOCIAL FORCES 1 (2002).

17. LYNNE L. DALLAS, LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH 254-57 (2005).

18. So as to avoid confusion over the use of the word "trust," the author uses the term "trusting" to evidence a person's trust in another and "trustworthiness" to signify a person's capacity to engender the trust of others. The concept of "trust" encompasses both.

19. *See* DALLAS, *supra* note 17, at 246-48; Blair & Stout, *supra* note 2, at 1745 n.16; Kurt T. Dirks & Donald L. Ferrin, *The Role of Trust in Organizational Settings*, 12 ORGANIZATIONAL SCIENCE 450, 451 (2001); Jones, *supra* note 1, at 132-39; Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 529-32 (2004); Susan P. Shapiro, *The Social Control of Impersonal Trust*, 93 AMER. J. OF SOCIOLOGY 623, 625-26 (1987).

20. Ashraf et al., *supra* note 14, at 2; Dirks & Ferrin, *supra* note 19, at 451; Hong & Bohnet, *supra* note 15, at 3-11. "We describe trust as a willingness to make oneself vulnerable to another . . . ." Blair & Stout, *supra* note 2, at 1739-40. *See id.* at 1746.

21. *See* Rachel Croson & Nancy Buchan, *Gender and Culture: International Experimental Evidence from Trust Games*, 89 AMER. ECON. REV. 386, 389-90 (May 1999); Hong & Bohnet, *supra* note 15, at 24; Jana Vyrastekova & Sander Onderstal, The trust Game behind the Veil of Ignorance: A Note on Gender Differences 3-4, 11 (Aug. 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=807724. Some studies find that men are more trusting than women or that women are more trusting than men. *See* Hong & Bohnet, *supra* note 15, at 24; Alessandro Innocenti & Maria Grazia Pazienza, Altruism and Gender in the Trust Game 2-3, 11-12 (May 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=884378.

22. Many of the empirical studies referenced in this article use "trust games" as their principal tool. These tests admittedly may be limited in predictive value because of test parameters, including those involving the nature of the participants. *See generally* Edward H. Hagen & Peter Hammerstein, *Game Theory and Human Evolution: A Critique of Some Recent Interpretations of Experimental Games*, 69 THEORETICAL POPULATION BIOLOGY 339 (2006). For example, most trust games are run in university research settings, so the

For example, a recent study (the "Maddux & Brewer study") indicates that men and women may differ in the bases for their trusting behavior.[23] Specifically, the Maddux & Brewer study indicates that men base their trust in others most prominently on shared group status (collective trust), while women base their trust in others on *both* shared group status *and* the existence of personal relationships (relational trust). This research follows on earlier work identifying two forms of "self" — collective and relational — that correlate with gender. The Maddux & Brewer study extends that earlier work further into the area of interdependent relationships by focusing on depersonalized trust.[24]

The Maddux & Brewer study involves the online decisions of 147 students at Ohio State University.[25] Specifically, the students were asked to choose between receipt of a fixed financial payment (three dollars) from the researchers and receipt of an unfixed share of a larger amount (eleven dollars) from — and as allocated by — an unknown person. Each student was given this option three independent times. The difference in each case was the limited information given to the decision maker about the unknown allocator. In one trial, the allocator was described as another student at Ohio State University. In another, the allocator was described as a student from another university at which the decision maker has an acquaintance (as indicated by previous responses to survey questions). In the third trial, the allocator was described as a student from another university at which the decision maker has no acquaintance. The three trials were randomly ordered for each participant.

Confirming prior research,[26] men and women did not differ in the extent to which they chose the unknown allocation over the fixed payment.[27] Moreover, both men and women trusted the student from their

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subjects are students. Test subjects that have retired from the work force also are becoming more common. However, studies involving trust games using working middle class subjects, which may be the most relevant population for purposes of gauging director behaviors, are rare.

23. Maddux & Brewer, *supra* note 14, at 159-71.

24. *Id.* at 159-61.

25. The discussion in this paragraph is derived from the text *id.* at 163-65.

26. *See* Croson, *supra* note 21 and accompanying text.

27. Although Maddux and Brewer hypothesized that men would choose the fixed payment over the unknown allocation more often than women (which proved *not* to be the case), Maddux and Brewer theorize that male risk-taking preferences may have offset the expected result. Maddux & Brewer, *supra* note 14, at 168. Another set of researchers offers the same and other explanations for similar results in other studies, Vyrastekova & Onderstal, *supra* note 21 at 4, although not all research corroborates the existence of gender-related risk preferences. *See* Renée B. Adams & Daniel Ferreira, Gender Diversity in the Boardroom 11-12 (Aug. 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594506. The design and findings of studies indicating that men sometimes trust more than women may provide other answers. *See* Croson, *supra* note 21 and accompanying text. Moreover, it is interesting to note that a cross-cultural study found that a woman's decision whether to trust also may have a different basis than a man's decision whether to trust. Ashraf et al., *supra* note 14, at 24, 30 ("We find that women are motivated differently than men when

own university about equally. However, women trusted the student from another university at which they had an acquaintance significantly more often than men did. From these outcomes, Maddux and Brewer conclude that "cross-group relationships had a greater impact on trust for women, while the categorical distinction between ingroup and outgroup was more important for men."[28]

B. SEX AND TRUSTWORTHINESS

Trustworthiness, like trusting behavior, is variously defined and construed in the literature.[29] The term often is seen as exclusively or primarily related to trusting behavior as a reciprocal trait.[30] (In other words, one trusts another who one believes to be trustworthy, and one who is trustworthy receives trust from another.) However, many scholars now believe that both trust and trustworthiness may be at least somewhat independently motivated.[31] Research has begun to bear out this belief; trustworthiness may, but need not always, be positively correlated with trusting behavior.[32] Accordingly, this Article treats the concepts of trust and trustworthiness as conceptually, but not necessarily or always practically, linked.

Many social science scholars have focused on other-regarding preferences[33] (such as unconditional kindness[34] or altruism[35]) and risk-aversion[36] as determinants of trustworthiness. Assessments of

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deciding about whether to trust or not, independent of their race or the country of origin: They trust conditional on their expectations of return.").

28. Maddux & Brewer, *supra* note 14, at 168.

29. For a taste of this variety and related interpretations of trusting behavior, *see* Innocenti & Pazienza, *supra* note 21, at 1-5; Jones, *supra* note 1, at 139-41. "[T]rustworthiness . . . [may be seen as] an unwillingness to exploit a trusting person's vulnerability even when external rewards favor doing so." Blair & Stout, *supra* note 2, at 1740.

30. *See* Ashraf et al, *supra* note 14, at 2; Innocenti & Pazienza, *supra* note 21, at 3-4. One may trust because he or she may expect reciprocal trust from the trustee. *See* DALLAS, *supra* note 17, at 249 (hay baler example).

31. *See, e.g.*, DALLAS, *supra* note 17, at 247-48; Ashraf et al, *supra* note 14, at 2; Innocenti & Pazienza, *supra* note 21, at 3. The study of motivations underlying trust transactions allows for a socioeconomic definition of trust. Dallas, *supra* note 17, at 247.

32. Ashraf et al., *supra* note 14, at 2-5; Innocenti & Pazienza, *supra* note 21, at 13-14.

33. In general, these are behavioral attributes or actions that take into account or otherwise involve other people. Other-regarding preferences stand in stark contrast to purely selfish or self-centered actions.

34. Unconditional kindness here means the derivation of personal satisfaction by benefiting others. *See* Ashraf, *supra* note 14, at 2.

35. Although researchers do not tend to define this term in their work, we may assume that they are referencing "unselfish regard for or devotion to the welfare of others." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 34 (10th ed. 1993).

36. This term describes "a net effect — a person's willingness to accept the gamble of trust [that] depends on the costs she [a trustor] incurs if the worst possible outcome is realized and the benefits she derives from receiving the best possible outcome." Hong &

trustworthiness based on other-regarding preferences may be gendered and tend to be based on norms that are defined as valuations — internal to the strategic situation — of a certain choice. Women would tend to interpret the economic exchange more communally and empathically and thus to repay trust with trustworthiness in return more than men. Female behaviour would exhibit more trustworthiness because women's preferences are more other-regarding than men's.[37]

Risk-aversion derives meaning from behavioral economics[38] and is a self-protective, and therefore self-interested, behavior.[39] Although other-regardedness and risk-aversion are the focus of the trustworthiness observations made in this article, trustworthiness also can be explained by other attributes of trust relationships,[40] including inequity aversion,[41] betrayal aversion,[42] and warm-glow kindness.[43] Socioeconomic theory

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Bohnet, *supra* note 15, at 5.

37. Innocenti & Pazienza, *supra* note 21, at 5. *See also* Catherine E. Eckel & Philip J. Grossman, *Are Women Les Selfish than Men?: Evidence from Dictator Experiments*, 108 Econ. J. 732-33 (1998) (finding that women are less selfish than men in a double-anonymous dictator setting).

38. As one group of researchers notes,

> Risk aversion plays a central role in economic theory. It helps us understand why individuals insure and save, why investors do not place all their eggs in the basket offering the highest expected payoff, and why entrepreneurs earn a generous premium. But risk aversion alone may not account for people's willingness to take risk when the chance event is the action of other people rather than nature, for then additional considerations may enter.

Iris Bohnet et al., Betrayal Aversion on Four Continents 2 (Feb. 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902370.

39. The perceived risks may include risks of legal or market sanctions. *See* Blair & Stout, *supra* note 2, at 1747-50.

40. *E.g.*, Ashraf, *supra* note 14, at 2-3; Hong & Bohnet, *supra* note 15, at 4-7; Innocenti & Pazienza, *supra* note 21, at 1, 13-14.

41. "Inequity aversion," also known as "inequality aversion," references a person's strength of preference against being treated unequally by another and contrasts with the self-interest generally assumed by economic rationalists. *See* Avner Shaked, The Rhetoric of Inequity Aversion 4 (Mar. 1, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=675227; Hideshi Itoh, Moral Hazard and Other-Regarding Preferences 3 (Sep. 12, 2003), http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=454500.

42. "Betrayal aversion" represents a person's strength of preference against another's deceit or disloyalty. Iris Bohnet et al., The Elasticity of Trust: Evidence from Kuwait, Oman, Switzerland, the United Arab Emirates and the United States 13 (July 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=779484 ("a hesitancy to take on a trust risk because the agent may not be trustworthy."). "Betrayal aversion comes into play when the agent of uncertainty is another person rather than nature. That is, people may be more averse to being betrayed by another person than to losing in a gamble." Bohnet et al., *supra* note 38, at 11.

> Be you Shamus or Shakespeare, betrayal is a central theme of human behavior. Whether in the modern era or the ancient world, agents at times betray their principals. The executives of Enron and Tyco betrayed their shareholders, and Cassius betrayed Caesar. The implications of our strong findings on betrayal aversion are that shareholders would prefer a 1% chance of losing half their value due to a natural catastrophe than an equivalent chance and loss due to the malfeasance of corporate leaders; similarly, that

may be seen to classify these and other motivations underlying trustworthiness into three principal descriptive categories: normative, affective, and instrumental.[44] Significant ongoing empirical and theoretical work is being undertaken to better identify and define the bases for trustworthiness.

In general, the literature indicates with reasonable consistency that women are more trustworthy than men in a variety of test situations.[45] Current studies provide additional evidence of this and other sex-oriented differences in trustworthiness.[46] For example, in a number of trust-based and other studies, women test as more altruistic and more risk-averse or risk-perceptive than men.[47] (It should be noted here, however, that the trustor's *perception* of the trustee's altruism or risk-aversion may be more important than the *reality*.)[48] These sex-based differentiations, when viewed together with overall high levels of trusting behavior, reinforce the possibility of different (but potentially overlapping) motivators or biological, social, or psychological markers for trust and trustworthiness.

A psychological study reported in the late 1990s (the "Collins study") profiling women's psychological and biographical attributes supports the view that women have identifiable traits that may suited them well for positions of trust and security.[49] Most importantly, the Collins study

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> political leaders would rather risk a 1% chance of being killed by accident than by a subordinate. Betrayal costs are real and significant, and thus require attention in our understanding of decision-making.

Bohnet et al., *supra* note 38, at 14.

43. "Warm-glow kindness," as a basis for trustworthiness, has been described as "psychological benefits that an individual derives from being kind to others." Ashraf, *supra* note 14, at 3.

44. DALLAS, *supra* note 17, at 247.

45. *See, e.g.*, Crosan & Buchan, *supra* note 21 at 390; Innocenti & Pazienza, *supra* note 21, at 3-4; Vyrastekova & Onderstal, *supra* note 21 at 2-3.

46. Innocenti & Pazienza, *supra* note 21, at 11; Vyrastekova & Onderstal, *supra* note 21, at 11-12.

47. *See, e.g.*, Gary Charness & Uri Gneezy, Gender Differences in Financial Risk-taking 14 (Dec. 5, 2004), http://papers.ssrn.com/sol3/papers.cfm? abstract_id=648735 ("In *every* study that uses these simple investment choices, women make smaller investments than do men, and so appear to be financially more risk averse."); Innocenti & Pazienza, *supra* note 21, at 14 (asserting that women are more altruistic than men); Dan M. Kahan et al., Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety 1-3 (May 16, 2005), http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=723762 (describing research indicating that women are more risk-perceptive than men); Alexandra Niessen & Stefan Ruenzi, Sex Matters: Gender and Mutual Funds 3 (Mar. 2006), http://www.cfr-ologne.de/ downloads/workingpaper/cfr-06-01.pdf (finding that female mutual fund managers invest in "moderately less risky portfolios," "follow less extreme investment styles," and have lower turnover ratios); *id.* at 5-6 (citing to other research on gender-based risk-aversion and distinguishing the risk-aversion of female non-managers from that of female managers).

48. *Cf.* Charness & Gneezy, *supra* note 47, at 1.

49. Judith M. Collins & Michael D. Collins, Integrity in the Corporate Suite: Predictors of Female Fraud 7-25 (Nov. 1999), http://www.internationalmta.org/Documents/ 1999/Proceedings1999.pdf.

provides new profiling information about female white collar criminals.[50] The Collins study indicates that: (1) women may commit white collar crimes for reasons that are different from those motivating men;[51] and (2) women who commit white collar crimes have definable psychological traits that can be tested and vetted before they are employed or otherwise called to service by an organization.[52] Among other things, these differences and traits indicate other-regarding preferences consistent with the results of prior and subsequent research on trustworthiness.[53]

The Collins study analyzes the output from inventories administered to 243 women, seventy-one of whom were imprisoned for white-collar crimes and 172 of whom were high-level corporate administrators and managers.[54] These inventories measured various psychological and biographical variables, including socialization (compliance with social norms), self-control, empathy, responsibility, socioeconomic status, leadership activity, social involvement, parental relationship, sibling rivalry, and social dominance. The results of these inventories then were tabulated and assessed using statistical analyses. Interviews also were conducted.[55] Among the findings are two key observations relevant to trustworthiness: Female white collar criminals report criminal behavior that can be described as other-regarding in an altruistic sense; and female white collar criminals are empathetic.[56]

1. Female White Collar Criminals are Other-Regarding

Women in the Collins study who committed white collar crimes typically did so not to benefit themselves, but to benefit others.[57] Moreover, each of these female offenders expressed remorse for her

50. Female offenders, in general are an understudied population about which reliable data and analyses are just emerging. *See* Michelle S. Jacobs, *Loyalty's Reward—A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843, 848 (2006). This is particularly true in the area of white collar crime, where data is relatively scarce. NEAL SHOVER & ANDY HOCHSTETLER, CHOOSING WHITE COLLAR CRIME xv (2005) ("[T]he data available to investigators of white-collar crime pale in quality and comprehensiveness beside data available on street crime.").

51. Collins & Collins, *supra* note 49, at 20-21.

52. *Id.* at 21-22.

53. *See supra* notes 34-37 and accompanying text.

54. Except as otherwise noted, the description in this paragraph is derived from the text Collins & Collins, *supra* note 49, at 13-14.

55. *Id.* at 21.

56. A recent law review article submits that loyalty to a male wrongdoer may play a role in white collar crime offenses committed by women at high levels in corporate America. Jacobs, *supra* note 50, at 874-75. This thesis provides an interesting, and consistent, corollary to the Collins study findings.

57. Collins & Collins, *supra* note 49, at 21. One cannot help but contrast, from our vantage point in 2006, Martha Stewart's 2004 criminal conviction for obstruction of justice and false statements (which was based on actions taken by Stewart assertedly for her own benefit) with the convictions of the subject women offenders in the Collins study in this regard. *See* Jacobs, *supra* note 50, at 863-64.

crime.[58] Although the Collins study does not involve a direct comparison of the attributes of female and male offenders, the researchers note that this female white collar offender profile is quite different from that observed in other studies for male offenders.[59] It is significant to note that the other-regardedness exhibited by the female white collar criminals in the Collins study was directed toward constituencies outside the corporation (i.e., toward family members, rather than toward shareholders or other corporate constituents).[60] Collins and Collins suggest that this study is just a beginning and that more work is needed to test sex-based differences in white collar offenders.[61]

2. Female White Collar Criminals Exhibit Empathy

The Collins study also finds that certain distinct personality and biographical characteristics exist for female white collar offenders and female non-offender corporate executives. The researchers note that several of their findings relating to female offenders (notably, those regarding self-control and empathy) deviate from the results reported in then existing literature focusing on male offenders and support a sex-based distinction in the profiling of white collar criminals.[62]

Especially important among these results is the finding that *both* female white collar criminals *and* female executives are empathetic.[63] (Previous research indicates that male offenders lack empathy.)[64] As previously noted, empathy is a possible source of trustworthiness.[65] The empathy manifested by female white collar criminals may lead others to deem them trustworthy, even in circumstances where that trustworthiness may not be warranted (when viewed in concert with other psychological and biographical traits of these women).[66]

3. Bottom Line on Sex and Trustworthiness

Based on the foregoing and other related findings in the Collins study, the researchers express their view that, among other things, the results of their study provide employers and other organizations with information that

58. Collins & Collins, *supra* note 49, at 21.

59. *Id.*

60. *Id.* ("The structured interviews revealed a common theme for the commission of the crimes: husbands, parents, or children were in financial trouble. Several females said they committed the fraud because of health care and other problems for either parents or family.").

61. *Id.* at 21-22. Among other things, the authors note that the subjects of the study may not have responded honestly to the survey instrument. *Id.* at 21.

62. *Id.* at 21-22.

63. *Id.* at 21.

64. *Id.*

65. Specifically, empathy is an other-regarding trait associated with altruism. *See supra* notes 33-35 & 37.

66. *See supra* note 37 and accompanying text.

is useful in promoting and conducting the psychological and biographical testing of women to better ensure their suitability in positions of trust and security.[67] The traits predicting trustworthiness in female executives may be different from those predicting trustworthiness in male executives. Said another way, women and men may be untrustworthy for different reasons. In particular, although other-regarding preferences (including empathy) generally are labeled as determinants of trustworthiness, when taken alone, they may not be accurate indicators of trustworthiness in women.

C. SEX AND THE OVERALL TRUST RELATIONSHIP

Arguably, men and women both engage in trusting behavior (albeit on different bases) and women generally test as more trustworthy than men. Because women exhibit, and can be tested for, traits that indicate both actual trustworthiness and a lack of propensity for white collar crime, then why — especially during this post-Enron crisis of trust in corporate America — are there so few women in the corporate executive ranks and on public company boards of directors?[68] Of course, age-old group behaviors favoring homogeneous corporate boards persist.[69] Moreover, the pool of talent from which corporate directors typically are chosen includes few women.[70] Also, education of the relevant populations (corporate directors, in principle part) as to the positive attributes of, and available qualified numbers of, female directors (identified in emerging scholarly literature) may not have occurred to the extent necessary to make an impact.[71] However, the possibility also exists that there is a bias against women corporate leaders.[72] That bias is being observed and documented in current research.

67. Collins & Collins, *supra* note 49, at 22.

68. Professors Douglas M. Branson and Lisa M. Fairfax recently have summarized the progress of women and people of color on corporate boards. *See* BRANSON, *supra* note 7, at 87-108, 150-53, 187-92; Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to their Advancement*, 65 MD. L. REV. 579, 581-89 (2006) [hereinafter *Mixed Data*]; Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105 (2005) [hereinafter *Reflections*].

69. *See* Beecher-Monas, *supra* note 4, at 47.

70. *See* BRANSON, *supra* note 7, at 90-91, 110, 148-50; Fairfax, *Mixed Data*, *supra* note 68, at 599-601 (2006); Fairfax, *Reflections*, *supra* note 68, at 1112-13.

71. *See, e.g.*, Susan M. Adams & Patricia M. Flynn, *Local Knowledge Advances Women's Access to Corporate Boards*, 13 CORP. GOV.: AN INTL REV. 836 (2005); Business Wire, *Rate of Women's Advancement to Top Corporate Officer Positions Slow, New Catalyst Tenth Anniversary Census Reveals; Projected Trend Indicates It Could Take 40 Years for Women to Achieve Parity with Men in Corporate Officer Ranks* (July 26, 2006).

72. Fairfax, *Mixed Data*, *supra* note 68, at 601-02. *See also* BRANSON, *supra* note 7, at 55-74.

A recent study (the "Bigelow & McLean Parks study") provides evidence that investors do not trust female corporate leaders.[73] Specifically, the Bigelow & McLean Parks study concludes that, despite evidence of the success of women in the corporate environment, prospective investors in an initial public offering ("IPO") are willing to invest more in a corporation that has a male Chief Executive Officer ("CEO") than they would invest in a corporation that has a female CEO[74] — and they also are willing to compensate that male CEO better than they would compensate a woman with the *exact* same qualifications for service in that *exact* same role.[75]

The Bigelow & McLean Parks study involves a survey conducted with 222 students in a Masters in Business Administration program.[76] Participants were given background reading materials, including a variety of investment data and information, relating to the IPO of a fictitious corporation and were asked to respond to a survey regarding the CEO and the senior management team (referred to in the study report as the "top management team" or "TMT"). Among the background reading materials were summaries of the qualifications of the CEO and other senior executives of the corporation. In materials given to certain of the test subjects, the CEO was female, and in others, the CEO was male. In either case, test subjects were given information that included TMTs with varied gender distributions.[77] The gender of the CEO and senior executives was indicated using photographs and gendered names. These sex differences were the only variables in the background reading materials; financial factors and operational information relating to the fictitious corporation, for example, were not altered in the materials.[78] The study tested a variety of reactions based on both the sex of the CEO and the sex distribution of the senior management team.

73. Lyda S. Bigelow & Judi McLean Parks, Skirting the Issues: A "Green Ceiling" for Female Entrepreneurs (unpublished paper, on file with author).

74. *Id.* at 24.

75. *Id.* at 25.

76. Except as otherwise noted, the summary in this paragraph is derived from the text. *Id.* at 18-19.

77. Sex distributions within the TMT varied from homogeneous (all one sex), to skewed (85 percent/15 percent), to tilted (65 percent/35 percent), to balanced (50 percent/50 percent). *Id.* at 19.

78. *Id.* at 30, 31 (explaining that researchers used the financial statements from a real IPO in their test materials to enhance the realism of the investment information offered to participants).

The sex of the CEO was significant over all tested areas, including assessments related to the senior management team.[79] In each case, participant evaluations of the CEO and the management team were less favorable when the CEO was female. Among other things, the participants: would invest almost three times as much in the male CEO-led corporation;[80] more positively evaluated the skills of the male CEO than those of the female CEO;[81] allotted the female CEO only 86 percent of the compensation allotted to the male CEO;[82] and judged the management team more favorably when it was led by the male CEO.[83] "That gender stereotypes had such a significant impact on the amount that naïve investors were willing to invest; on the perceived qualification of the CEO, qualifications that were identical in every way; and, through the CEO, on perceptions of the TMT process, is more than a little troubling."[84]

Interestingly, the gender mix of the senior management team did not test as significant to the participant investors. Participants did not isolate significant differences in strategic assessments, capabilities, or processes based on the sex composition of the overall management team (apart from the female CEO factor).[85] These findings regarding the sex composition of management teams are, indeed, quite surprising when compared to the results regarding the sex of the CEO. However, Bigelow and McLean Parks caution that their manipulation of the demographics of the board may have unintentionally affected these results.[86]

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79. Bigelow and McLean Parks summarize the results in this regard as follows:

> Based on our data, we find that the sex of the CEO is the only salient evaluative component of the top management team to naïve investors. Our sample suggests that the market does not "see" sex as a predictor of potentially better performance (and, of course, once they do, the market will accommodate it in pricing, and the effect will disappear). Disconcertingly, they do pick up on sex as a marker, but their stereotypes overwhelm their interpretation of the marker, potentially causing them to make poor decisions.

Bigelow & McLean Parks, *supra* note 73, at 28.

80. *Id.* at 24.

81. *Id.* at 23-24.

82. *Id.* at 25.

83. *Id.* at 23-24.

84. *Id.* at 30. This conclusion and the related findings in the Bigelow & McLean Parks study are similar to the conclusion and findings of another recent study involving sex differences in mutual fund managers. *See* Niessen & Ruenzi, *supra* note 47, at 3-4 (noting that inflows to female-managed mutual funds are lower than those to male-managed funds, despite (1) the lack of a significant difference in average portfolio performance and (2) more persistent performance of female-managed portfolios, and attributing these findings to "stereotyping of fund investors who for some reason believe male managers do a better job in managing money").

85. *Id.* at 23.

86. *Id.* at 29.

III. SEX, TRUST, AND CORPORATE DECISION MAKING

The relationship of existing, general gendered trust research to corporate decision making is not clear or conclusive. Moreover, trust games, inventories, interviews, and other testing devices represented in the social science literature are admittedly imperfect tools for measuring and classifying trusting behavior and trustworthiness, and study design or implementation in individual cases may be less than optimal.[87] For these reasons, one must be cautious about extrapolating too much from the few gender-based studies regarding trust that are summarized and cited to in Part I of this Article. However, even from this imperfect knowledge base, certain limited, preliminary observations and suggestions regarding linkages between social science trust research and corporate governance may be made. These observations and suggestions emanate from interpretations of social science study results on sex and trust in light of the components of corporate governance and existing empirical and theoretical corporate governance scholarship.

In general, existing social science trust research tells us that both men and women are trusting. Moreover, both men and women may be trustworthy. These general conclusions are important in relation to corporate decision making. Trust — both trusting behavior and trustworthiness — is essential to the effective operation of the corporation in general and the constitution and operation of a corporate board and corporate management in particular.[88] Trust is at the heart of the fiduciary relationships that characterize corporate governance and comprise the corporation.[89] Moreover, without trust, consensus would be difficult to achieve and decision making would be inefficient.[90] However, trust issues

87. *See, e.g.*, Blair & Stout, *supra* note 2, at 1777-78; Bigelow & McLean Parks, *supra* note 73. In particular, it should be noted that the Maddux & Brewer study and the Bigelow & McLean Parks study involve student test subjects, which may limit the applicability of the results of these studies to other populations. *See* text and sources cited *supra* note 22. Further, the Collins study involves self-reported traits and behaviors, which may give rise to nonobjective, inaccurate, or otherwise faulty data. *See* Collins & Collins, *supra* note 49, at 21. Finally, the Collins study does not differentiate among female white collar offenders by corporate position or crime, which may limit the applicability of its results in this context. *See* Jacobs, *supra* note 50, at 849-50.

88. Blair & Stout, *supra* note 2, at 1738, 1757-58; Duggin & Goldman, *supra* note 1, at 256-57; Marchesani, *supra* note 8, at 341.

89. *See* DALLAS, *supra* note 17, at 255-56; *cf.* Blair & Stout, *supra* note 2, at 1743-44; Duggin & Goldman, *supra* note 1, at 257-68. In fact, fiduciary relationships are conceptually rooted in trust. *See* Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U.L. REV. 1, 28 (2006) ("The Latin root of fiduciary — 'fides' — means 'faith,' as in trust, reliability, or faith-fulness.").

90. *See* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 152-54, 341-42 (1995) (outlining reductions in transaction costs and other efficiencies occasioned by trusting behaviors in business); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 812-13 (2001) (exploring effects on

in corporate governance also have a negative side. Trust may be undermined, rather than reinforced, by applicable statutory and decisional law. For example, the monetary liability of corporate directors for breach of the duty of care may be limited by corporate charter exculpation provisions, undercutting one legal basis for trust in corporate decision making.[91] Also, for some, the ultimate Delaware Supreme Court opinion in the stockholder derivative action against directors and officers of The Walt Disney Company further shook the bedrock of trust foundational to Delaware corporate fiduciary duties.[92] And, as we have learned from the corporate fraud uncovered in the early twenty-first century, even in a corporate governance system where codependence is encouraged, trust may be misplaced, both *by* board members or executives and *on* board members or executives.[93]

A. TRUSTING BEHAVIOR AND CORPORATE DECISION MAKING

Gender differences in the bases for trusting behavior (in the form of collective versus relational trust) are not apparently value-laden in a general sense; women are not necessarily more or less well-suited to being directors or executives than men based on existing research on gendered trusting behavior. Neither collective nor relational trust is *superior to* the other, taken in the abstract. They are merely different rationales for trusting. However, taken in a particular context, one form of trusting behavior may be implicated where another may not. Based on these observations, how, then, might collective and relational trust be implicated in or impact corporate decision making?

For one, if male or female board members view themselves as being in

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board productivity of mistrust and trust between corporate boards and chief executive officers). *See also* Leslie, *supra* note 19, at 532-33 (describing the general relationship between trust and cooperative behavior).

> Where trust can be harnessed, it can substantially reduce the inefficiencies associated with both agency and team production relationships. Trust permits transactions to go forward on the basis of a handshake rather than a complex formal contract; it reduces the need to expend resources on constant monitoring of employees and business partners; and it avoids the uncertainty and expense associated with trying to enforce formal and informal agreements in the courts. Trust behavior also reduces losses from others' undetectable or unpunishable opportunistic behavior, losses that could discourage the formation of valuable agency and team production relationships in the first place.

Blair & Stout, *supra* note 2, at 1757.

91. *See* DALLAS, *supra* note 17, at 255-56.

92. *See* Duggin & Goldman, *supra* note 1, at 261; Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 132 (2006). *But see* Duggin & Goldman, *supra* note 1, at 356 ("To the extent the courts prove willing to enforce it, the Disney standard promises to promote general trustworthiness instead of requiring actors to act, or refrain from acting, in specified ways.").

93. *See* sources cited *supra* note 2.

the same collective "group" as corporate management, they may be more likely to trust management, even where management is being dishonest or misleading. The same may be said of women who have relational connections with corporate management. Similarly, male or female directors or executives who view other individuals on the board or management team, respectively, as members of their collective "group"[94] may be more likely to trust and support the consensus of that group and engage in "groupthink"[95] or other herding behaviors[96] in their collective decision making that may be detrimental to the corporation and its shareholders. These observations are particularly relevant in light of theory positing (and empirical evidence of) a positive relationship between board tenure and in-group conceptualization.[97] Similarly, female directors or executives with personal relationships connecting them to other directors or executives, respectively, may be more likely to trust and agree with those others in their collective decision making, even when that trust proves harmful to the corporation and its shareholders. Either basis for trusting behavior, collective or relational, when unchecked by independent thought and inquiry, may lead to suboptimal monitoring and management. Facts and circumstances relating to each individual corporate director and executive and each distinctive set of corporate directors and executives (as well as, perhaps, other facts and circumstances, including the nature of the action being taken) determine whether and, if so, which type of trust may operate. These facts and circumstances necessarily will be fluid as board and management team membership and individual director and executive knowledge and experience change over time.[98]

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94. There is evidence that board tenure is positively related to group status among board members. *See* Langevoort, *supra* note 90, at 811 ("[O]nce on the board, social ties build so that, as Cox and Munsinger demonstrated in their study of board structural bias, those members committed to the group gradually develop a sense of 'in-group' bias that colors how they evaluate claims by others (such as derivative lawsuits brought by shareholders) that threaten one or more group members.").

95. *See* Langevoort, *supra* note 90, at 810 ("That phrase, invented by Irving Janis, refers to the tendency of cohesive groups implicitly (indeed, subconsciously) to censor nonpreferred points of view and any information inconsistent with what is preferred." (footnote omitted)). *See also* BRANSON, *supra* note 9, at 177-78; O'Connor, *supra* note 6, at 1238-39.

96. *See* Stephen M. Bainbridge, *Why A Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 27-29 (2002); Beecher-Monas, *supra* note 4, at 28; Reza Dibadj, *Reconceiving the Firm*, 26 CARDOZO L. REV. 1459, 1490-91 (2005); A. Mechele Dickerson, *A Behavioral Approach to Analyzing Corporate Failures*, 38 WAKE FOREST L. REV. 1, 28 (2003).

97. *See, e.g.*, Langevoort, *supra* note 90, at 811; O'Connor, *supra* note 6, at 1303; Nikos Vafeas, *Length of Board Tenure and Outside Director Independence*, 30 J. BUS. FIN. & ACCOUNTING 1043 (2003).

98. It is important to note that these effects may be time-sensitive. Studies on trusting and trustworthiness generally test trusting behavior toward and trustworthiness of "strangers" — those previously unknown to the trustor on an individual basis. After a time, directors and executives likely would become "known quantities" to each other, which may

The coexistence of both forms of trusting behavior — collective and relational — on corporate boards of directors and management teams, however, may create enough dissonance to provide the opportunity and need for independent thought and inquiry. In a cooperative decision making environment, where one board member is willing to trust an officer of the corporation or a fellow board member and another is not, decision making logically will require more reflection and deliberation than where all agree to trust. This reflection and deliberation improves the decision making process and is likely to generate a more well-considered decisional output.[99] Therefore, the very fact that board members and managers trust differently may be beneficial to corporate decision making. This potential benefit argues for diversification on the basis of gender at the highest levels of the corporation as a means of diversifying trusting behaviors among corporate decision makers.[100]

B. TRUSTWORTHINESS AND CORPORATE DECISION MAKING

1. Other-Regardedness

Existing research on sex and trust also indicates that corporate boards and management may benefit from overall gender diversification because of differences in or relating to the trustworthiness of men and women. For

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have the tendency to increase collective or relational trust within or between the corporation's board and its executives.

99. *Cf.* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 151-32 (propounding and citing theorists in support of "[t]he notion that decisions produced by a finely wrought process of dialogue and compromise are better than decisions made unilaterally by a uniform group of individuals"); Beecher-Monas, *supra* note 4, at 44-46 (describing and characterizing the benefits of disagreement among corporate directors); Langevoort, *supra* note 90, at 810-11 ("The most productive boards are ones that have enough diversity to encourage the sharing of information and active consideration of alternatives, but enough collegiality to sustain mutual commitment and make consensus-reaching practicable within the tight time frames in which boards must operate."); David O'Donnell & Philip O'Regan, Exploring Critical Dialogue in the Boardroom: Getting Inside the Empirical Black Box of Board Dynamics 5-7 (Mar. 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900967 (describing and illustrating the positive role of "critical dialogue" in board decision making). This assumes that the directors can engage in cooperative behavior that is conducive to informed decision making. *See* Adams & Ferreira, *supra* note 27, at 2 ("To increase board effectiveness it may not be enough to simply increase the number of female directors on the board; diverse boards may require additional mechanisms to ensure cooperation between directors."); Beecher-Monas, *supra* note 4, at 40-44 (describing and discussing certain aspects of board cohesion, composition, and trust); *id.* at 47-50 (suggesting the need for and means of achieving a "culture of dissent" — a respect and acceptance for differences in group dynamics).

100. *See infra* note 117 regarding arguments for board diversity. It is important to note that any considerations weighing in favor of gender diversification on the basis of trust-related issues should be balanced against countervailing considerations, including any related costs. *See, e.g.*, Adams & Ferreira, *supra* note 27, at 19-20 (describing some of these costs, based on their findings). Among other things, "[d]iverse boards may require additional incentives to work cooperatively and may require additional time to digest different viewpoints and resolve disagreements." *Id.* at 17.

example, because women typically are more other-regarding than their male counterparts, they may be less likely than men to take action for their own personal benefit and more likely to take action (lawful or unlawful) for the benefit of others, including the corporation and its shareholders. Accordingly, the presence of women on a corporate board or in the corporate executive suite may help avoid the replication of certain perceived contributing causes of the fraud identified at Enron and other corporations (including especially the acknowledged possibility that corporate officers, many of whom also were directors, manipulated corporate financial and other disclosures in order to enhance their own equity-based compensation).[101] Avoidance of these agency costs may help enhance the overall trustworthiness of boards.[102]

We also know, however, that other-regarding women may be white collar criminals. Accordingly, trustworthiness borne of other-regardedness alone may not protect the corporation from white collar crime. Unfortunately, we do not know whether the white collar criminals in the Collins study committed crimes involving corporate fraud like that involved in the corporate fiascos uncovered in the early twenty-first century. We cannot glean much from the Collins study, for example, about either: (1) the nature of the positions the subject female offenders occupied at the time their crimes were committed; or (2) the nature of the white collar crimes that these women committed. These facts would be helpful in assessing the applicability of the finding of the Collins study to gendered trustworthiness in corporate decision making.

However, we do know from the Collins study that these other-regarding women may take unlawful action to benefit someone outside the corporation. In other words, a female director or executive may make decisions on behalf of the corporation to benefit people or constituencies other than the corporation and its shareholders. This behavior has the potential of being as detrimental to the corporation and its shareholders as the self-interested behavior associated with the Enron debacle and other recent corporate scandals. Among other things, both behaviors may constitute breaches of the state corporate law fiduciary duty of loyalty —

101. *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004); Erica Beecher-Monas, *Enron, Epistemology, and Accountability: Regulating in a Global Economy*, 37 IND. L. REV. 141, 156 (2003); Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 708, 736 (2005); Kurt Eichenwald, *Enron's Many Strands: Executive Compensation: Enron Paid Huge Bonuses in '01; Experts See a Motive for Cheating*, N.Y. TIMES, Mar. 1, 2002, at A1.

102. However, the other-regarding and empathetic nature of women may not alone be an accurate indicator that women are more trustworthy than men, as the Collins study indicates. *See generally* Part I.B.3.

or, worse yet, criminal activity. Accordingly, the other-regarding nature of women may or may not be a positive gendered characteristic for a corporate director or executive.

2. Risk Aversion

Further, female trustworthiness may be based on more than mere other-regarding preferences. As the gendered trust literature indicates, female trustworthiness also may be linked to risk aversion.[103] To the extent that the trustworthiness of women is based on risk aversion, women may be deemed *less* desirable as directors or executives.[104] Investors desire and expect that corporate directors and managers will take some risks in their decision making — conscious, well-considered risks for the benefit of the corporation and its shareholders.[105] Further, managers may desire to take risks for the benefit of the corporation and its shareholders that risk-averse directors do not embrace. In short, female board members or executives may be less able than male directors or executives to meet the risk expectations of managers or investors.

However, even if female directors and executives are more risk averse than male directors and executives, this different risk preference may add valuable diversity to a corporate board or management team by changing the presumptive risk profile of the board or management. As with diverse trusting behaviors and differences in other-regardedness, diverse risk preferences may enrich corporate decision making. The risk-takers and the risk-averse will be required to discuss and deliberate to achieve consensus, especially as to appropriate levels of corporate risk.[106] With different risk preferences, a corporate board or management team should have the capacity to engage in better quality decision making.

C. ANTI-FEMALE CEO BIAS AND CORPORATE DECISION MAKING

Yet, research tells us that directors and investors may have to overcome latent biases against female corporate leaders to accomplish any desired gender diversity in corporate management.[107] Under current corporate law, securities regulation, and general practice, directors are identified and nominated by a committee or the whole of the existing board of

103. *See supra* note 47 and accompanying text.

104. Gagliardi v. Trifoods Int'l, 683 A.2d 1049, 1052 (Del. Ch. 1996) ("Shareholders don't want (or shouldn't rationally want) directors to be risk averse.").

105. *Id. See also* Cynthia A. Williams, *Icarus on Steroids*, 94 GEO. L.J. 1197, 1211 (2006).

106. *See supra* notes 99-100 and accompanying text.

107. This sex bias compounds a recognized general bias against diversity. *See* Langevoort, *supra* note 90, at 811. However, the literature does not uniformly support a bias against diversity. *See* Adams & Ferreira, *supra* note 27, at 3 (referencing the results of various studies in this regard). *See* Bigelow & McLean Parks, *supra* note 73 (whose results as to senior management teams, for example, may provide some evidence that women are not subject to bias when part of a larger group).

directors.[108] The corporation's shareholders then have the right to vote on nominees selected by the committee or the board, although the current system of voting leaves almost no doubt that management's nominees will be elected.[109] Similarly, corporate officers generally are elected or appointed by the board of directors.[110] Accordingly, any anti-female bias that exists at the board or investor level — but especially, under current rules, at the board level — may handicap efforts to accomplish gender diversity on corporate boards and in corporate management teams, regardless of the benefits that may be achieved by that gender diversity.[111]

108. BRANSON, *supra* note 7, at 179-80; Fairfax, *Mixed Data*, *supra* note 68, at 599; Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 744-45 (2003).

109. Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 521 (1990) ("In theory, the shareholders of public companies elect directors, who watch corporate officers, who manage/watch the company on the shareholders' behalf. But since Berle and Means, we have understood that this theory is a fiction. The managers — the current officers and directors — pick the directors, and the shareholders rubberstamp the managers' choices.").

110. Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1605 (2005) ("[O]fficers are appointed and can be removed only by, or under a grant of authority from, directors."); *id.* at 1607 ("[T]he board of directors appoints and sets the compensation of senior officers, delegates managerial responsibilities to those officers, and monitors and evaluates the managerial performance of officers."); Joo, *supra* note 108, at 744-45 (noting, among other things, that "director homogeneity contributes to executive homogeneity because directors control the appointment of executive officers.").

111. Professor Doug Branson writes:

> There may be differences between men and women, but by and large they are small and overrated. In the workplace or on the job ladder, we must strive to ignore those differences, except when they are absolutely undeniable and inescapable. Then we embrace them. Only when such an attitude is the most widely held one will corporate America remove many of the obstacles that now forestall the advancement of women.

BRANSON, *supra* note 7, at 184-85. In fact, gender diversity on boards has been increasing, and is predicted to continue to increase, at a slow rate. *See id.*, at 87-108; Fairfax, *Mixed Data*, *supra* note 68, at 581-89.

> The number of women directors at Fortune 500 companies appears to have increased by at least 1% over the last five years. If these patterns persist, then within the next twenty years, virtually all Fortune 500 companies, and perhaps even most all Fortune 1000 companies, may have at least one woman on their boards.

Fairfax, *Reflections*, *supra* note 68, at 1109 (footnotes omitted). *See also* Robin Cohen & Linda Kornfeld, *Women Leaders Boost Profit*, BARRON'S, Sept. 4, 2006, at 37 (noting evidence of the positive relationship between women corporate leaders and corporate financial success, but cautioning that "the road toward gender parity in Corporate America still is long."). Professor Branson questions whether women's current roles on corporate boards constitute mere tokenism. BRANSON, *supra* note 7, at 109-110, 132-33, 152-53.

IV. CONCLUSION: REFOCUSING ON BOARDS OF DIRECTORS

Corporations generally are managed by or under the direction of their boards of directors.[112] As corporate decision makers, directors are critically important to corporate governance.[113] If there is a locus of trust in the corporation, it is the board. Directors are the macro-level corporate managers, making organization-critical decisions and monitoring the decision making of the corporations officers, the day-to-day managers of firm operations. The board elects or appoints those corporate officers, and the board (or a committee of its members) identifies and selects, with CEO input and subject to shareholder approval, its own members.[114] Accordingly, if trust issues are to be addressed in corporate America, the board should be the key focal point. The Sarbanes-Oxley Act of 2002 recognizes the centrality of the board in corporate governance and its effects on trust, but the Act and its regulatory progeny narrowly take aim at the perceived crisis in corporate trust by using a restricted definition of director independence as a cure-all. Based on existing research in the social sciences, another possible and promising focus for enhancing trust in the corporation is gender diversification of boards of directors.

This Article has a limited objective. It seeks not to add to or resolve the different findings and musings of empiricists and theoreticians on trust, sex, or board composition. Rather, this Article begins to tell a story about the relationship among sex, trust, and corporate boards based on the conceptual underpinnings of corporate governance and interpretations of existing bodies of scholarly work on gendered trust and boards of directors. The purpose of telling this fledgling tale is to further illuminate legal issues surrounding board composition in the wake of our recent bout of corporate fraud and the legislation and regulation that followed. This emerging "sex, trust, and corporate boards story" is part of a larger body of research and writing in process; sex is only one of many factors that have been, or undoubtedly will be, identified as relevant to trust and the composition of boards of directors.[115]

Regardless, recent scholarly work in psychology, sociology, anthropology, economics, and other social science disciplines illuminating sex-based differences in trusting behavior and trustworthiness may have

112. *E.g.*, 8 DEL. C. § 141(a) (2006) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors.").

113. *See* BRANSON, *supra* note 7, at 129 ("If corporate governance is a solar system, the board of directors is the sun . . . ."). This does not mean that boards of directors can be studied or otherwise considered in isolation in resolving corporate governance issues. *See* Mitchell, *supra* note 9, at 1366-67.

114. *See supra* notes 108-110 and accompanying text.

115. Many recognize that there is a wide range of overall corporate governance literature on board dynamics. *See, e.g.*, O'Donnell & O'Regan, *supra* note 99, at 3-5.

utility in helping to determine optimal corporate board composition. For example, the studies profiled and described in this article indicate that men and women trust and are trustworthy on different bases. Accordingly, the inclusion of both females and males on boards of directors may positively influence board process and deliberations by diversifying the bases for trusting behaviors and trustworthiness in the boardroom. However, the benefits of gender diversity on boards of directors may be difficult to achieve based on underlying biases against women in corporate leadership positions.

What will it take to confirm and flesh out the components of the basic narrative suggested by the research presented and analyzed in this Article? Among other things, more targeted empirical and theoretical work should be done to *directly* test and explore the effects of sex-based trust issues in the corporate decision making context to permit more refined conclusions and solutions. Specifically, focusing on boards of directors, researchers should theorize and test the trusting behaviors and trustworthiness of male and female directors of varying tenures on various different kinds of corporate boards.[116] Moreover, female perpetrators of white collar crimes should be studied on a more detailed basis. In each case, the knowledge gained from these studies should enable directors and investors to better screen possible board nominees for psychological and biographical traits that best indicate trustworthiness and desired bases for trustworthiness. Also, directors' and investors' bases and capacities for bias against female directors should be more closely examined to ensure that optimal board composition is achievable, even as these directors and investors gain increased knowledge of the potential benefits of gender diversity on corporate boards. In general, the results of these additional studies may expose corroborating or new evidence that will enable a more direct and nuanced assessment of the relationship among sex, trust, and corporate boards.

In the interim, in the absence of this further targeted research, directors and investors may want to consider the impact of existing broad-based research on gender and trust in determining whom to nominate and elect to corporate boards. In particular, it may be advisable to further encourage gender diversity on corporate boards based on the apparent relationship

116. This type of study would form part of a growing body of work that attempts to study board dynamics more directly. *See, e.g.*, O'Donnell & O'Regan, *supra* note 99, at 16 (noting that "a number of researchers on corporate governance have embraced an alternative research agenda that stresses the centrality of context and the necessity of gaining access to the real world of board processes, dynamics and interactions."). The more specific the study, the more valuable it may be, since trust is a complex, multidisciplinary concept. *See* Dirks & Ferrin, *supra* note 19, at 451. Studying directors of varying tenure will be important, since the typical trust game conducted in the cited studies measures trust among relative strangers, not those with long-term, ongoing relationships. *See* Beecher-Monas, *supra* note 4, at 40; *supra* note 98.

between gender diversity and trust diversity. This suggestion emanates from the existing research on sex and trust, but it is consistent with proposals made by other scholars — in particular, corporate governance scholars — on different grounds.[117] Because of differences in their bases for trusting behavior and trustworthiness, female directors may exhibit trusting behaviors or trustworthiness in different circumstances or environments than male directors exhibit trusting behaviors and trustworthiness. As this article argues, the very existence of a difference in trust on a corporate board may be beneficial. Among other things, varied bases for trusting and trustworthiness among board members should enhance thoroughness and caretaking in the boardroom, since not all directors (at least initially) will trust or be trusted by the same people. This thoroughness and caretaking ultimately should increase trust in and among the various corporate constituencies.[118]

117. *See, e.g.*, BRANSON, *supra* note 7, at 176-79 (positing and assessing various potential benefits to gender diversity on boards of directors); Adams & Ferreira, *supra* note 27, at 19-20 (noting that their "results suggest quite strongly that in boards with relatively more women, more directors participate in decision-making, which may enhance their effectiveness" and concluding that "increasing gender diversity may benefit firms in which performance-related pay is less costly."); Beecher-Monas, *supra* note 4, at 4 (diverse boards are more likely to achieve the kind of active, critical thinking that independence rules are designed to achieve."); David Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33 (2003) (offering and analyzing data on the value of overall board diversity); Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1383-87 (2002) (discussing gender diversity, among other things, and its various impacts on corporate management); O'Connor, *supra* note 6, at 1306-15 (regarding board diversity generally); Fairfax, *Mixed Data*, *supra* note 68, at 589-98 (summarizing and assessing arguments in this regard); Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1258, 1349-51 (2004) (illuminating her proposal that "[s]hareholder proposals to implement work-family policies should recommend nominating more women, and particularly mothers, to corporate boards."); Donald J. Polden, *Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom*, 36 U. MEM. L. REV. 67, 69 (2005) ("Improved gender and racial diversity of corporate governing boards would enhance SOX's fundamental policy of increased integrity in the management of large corporations through greater independence and competence of their directors."); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 493-94 (2002) (setting forth certain benefits of diversity on corporate boards); Nina Smith et al., Do Women in Top Management Affect Firm Performance? A Panel Study of 2500 Danish Firms, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=780910 (Aug. 2005), at 2-4 (summarizing arguments in support of gender diversity of corporate boards); Hayley Buckridge, Note, *Merging Without Purging: Incentivizing Boards of Directors to Promote Diversity through M & A*, 20 ST. JOHN'S J. LEGAL COMMENT 443, 496-99 (2006); *see also* Fed'l Glass Ceiling Comm'n, *A Solid Investment: Making Full Use Of The Nation's Human Capital* 5 (1995); Am. Mgmt. Ass'n, *1998 AMA Survey Senior Management Teams: Profiles and Performance*, http://www.amanet.org/research/pdfs/senior.pdf, at 1 ("Heterogeneity — a mixture of genders, ethnic backgrounds, and ages in senior management teams — consistently correlates to superior corporate performance.").

118. Many have theorized about (and otherwise commented on) diversity's positive effects on board dynamics. For example, in advocating for pluralism on corporate boards, Professor Kent Greenfield suggests,

Both the examination of existing broad-spectrum social science research on sex and trust and the engagement of scholars in more specialized research involving sex and trust in the context of board decision making are important to ongoing debates in the area of corporate governance.[119] In particular, as legal and other scholars continue to theorize and test ways to increase trust in and among the constituencies comprising the corporation and as scholars and rule makers consider possible legal, regulatory, and other reforms targeted directly or indirectly at the same, more detailed knowledge of the bases for trusting behavior and trustworthiness in board decision making will be essential.[120] Only with this further information will we best know how to effectively and appropriately address important unresolved corporate governance questions relating to both trust and gender diversity in corporate boards of directors.

> corporate boards — now among the most homogeneous decision-making groups in society — would stand to benefit from a greater openness and diversity. Such openness would not only make for better decision making but likely *fairer* decision making as well.

GREENFIELD, *supra* note 99, at 152 (emphasis in original). Quite similarly, in the specific context of gender diversity, Professor Doug Branson offers,

> [di]versity will enhance small-group decisionmaking and diminish the isolation of corporate boards. Many boards are men's clubs, in which the members dress the same, have attended the same schools, and represent a single social class. Directors and the boards on which they sit tend to be isolated from what goes on in the society that surrounds them.

BRANSON, *supra* note 7, at 178-79.

119. *Accord* Blair & Stout, *supra* note 2, at 1810 ("A solid understanding of the social and economic circumstances that elicit trust behavior is accordingly vital to our understanding of a wide range of social and legal institutions, including corporations and corporate law.").

120. *Cf.* Ashraf et al., *supra* note 14, at 6 ("If policy makers wish to raise the level of trust, they need to know the determinants of trust. If trust is mainly a function of expected trustworthiness, they should focus on the level of trustworthiness and on beliefs about that level. In contrast, if trust is mainly motivated by warm-glow kindness, they should focus on fostering of intrinsic rewards."); Hong & Bohnet, *supra* note 15, at 27 ("This paper suggests that anyone wishing to increase people's willingness to trust may benefit from taking the status differences in the relative importance of various motives into account and use the corresponding institutional devices to address them.").

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