

SYMPOSIUM

INTRODUCTION TO SYMPOSIUM ON PEOPLE OF COLOR, WOMEN, AND THE PUBLIC CORPORATION: THE SOPHISTICATION OF DISCRIMINATION

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Justice O'Connor[] . . . fully understood the real world of discrimination. . . . [O'Connor] graduated number two in her class from Stanford, . . . couldn't get a job because she was a woman; they'd offer her a job as a secretary. . . . [S]he understood . . . that *discrimination has become very sophisticated* . . . [and] very much more subtle than it was . . . 50 years ago. . . . [E]mployees don't say any more . . . "We don't like blacks in this company," or, "We don't want women here." They say things like, "Well, they wouldn't fit in," or, ". . . they tend to be too emotional" or "a little high-strung." . . . [I]t's harder to make a case of discrimination even though there's no doubt that it still exists. . . . What I do wonder about is . . . whether you fully appreciate how discrimination does work today.¹

I recently heard a speaker distinguish "scholars" from "intellectuals." A "scholar", he explained, is someone who gathers facts and concepts without knowing what to do with them. An "intellectual" is someone who puts facts and ideas to use. In the spring of 2005, a group of accomplished intellectuals gathered at St. John's University School of Law to participate in

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¹ *Confirmation Hearing on the Nomination of Samuel A. Alito to be Associate Justice of the United States Supreme Court: Hearing Before the S. Comm. on Judiciary*, 109th Cong. ___ (2006) [hereinafter *Hearings*] (statement of Sen. Joseph R. Biden, Member, S. Comm. on Judiciary) (emphasis added), available at http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781_pf.html.

the conference entitled, "People of Color, Women, and the Public Corporation." They presented papers that put to meaningful use the facts, ideas, and theories they had gathered concerning the relationships between women and people of color, and the public corporation.

Two weeks before the conference, I attended an event sponsored by the Macon B. Allen Bar Association and invited a white male attorney with whom I sat to the conference. "Is this kind of conference necessary?" he asked. After I spent a minute or two explaining why it was imperative to hold a conference such as this, he said, "I don't see what the problem is. I'd be happy to change places with a black woman. I'd rather be a black, female lawyer with all the opportunities they have today."

The next day a young, anxious-looking woman of color stopped me in the corridor of the law school building. She was looking for help with an employment discrimination problem and one of my colleagues suggested that she speak with me. After inviting her into my office, she told me a devastating story about the sexual harassment she had faced at her company for more than a year. Her supervisor touched her in unwanted and inappropriate ways. She endured insulting comments about her body. She was afraid to take her break because it would require her to be in a room with the supervisor. She worked in constant fear for her personal safety. Her ordeal had destroyed her confidence. It had compromised her ability to communicate. She was on the verge of tears. She was shaking.

I include a description of these two events because they demonstrate the exigency of a symposium such as this. The white, male attorney who dreamed of being black and female believed that racism and sexism no longer afflict the vocational, financial, and personal lives of women and people of color. He assumed that women and minorities only benefit from, and are never disadvantaged because of their racial and sexual identities. It is important for men and whites who believe as he does to hear the typically untold stories of people like the unsteady woman who visited my office. Unfortunately, the attorney who questioned the need for this conference did not attend. He missed an important opportunity to understand the issues women and people of color face in the business setting.

It is difficult for people of different races to come together to

talk about racism and race discrimination.² Interracial discussions of America's race problem rarely occur because we live in a society that remains racially segregated and stratified, even today.³ Moreover, some whites who participate in discussions about race may fear that they will say the wrong thing. People of color may fear that they will *hear* the wrong thing. It is, perhaps, slightly easier to talk about sexism and sex discrimination, but a serious discussion remains difficult.⁴

In the business setting, the equitable treatment of women and people of color depends on the commitment of corporate officers, directors, managers, and senior executives, almost all of whom are white and male.⁵ In spite of the difficulties inherent in discussing racism and sexism, it is important that the discourse *not* occur among women and people of color only. Whites and men must participate.

² "Decades into the experiment of integration, race still infuses our quotidian interactions, remaining a source of misunderstanding and enlightenment, alienation and togetherness." *Talking About Race*, N.Y. TIMES, July 16, 2000, at F25.

³ See Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1464 (2002) ("Interaction among racial groups is most likely to occur in the workplace."); see also JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2005) (describing racially segregated schools that result from segregated housing patterns); DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 586 (3d ed. 1992) (discussing attempts to integrate schools); Josh Barbanel, *New York Education Chief Notes Disparity in Schools*, N.Y. TIMES, Dec. 15, 1993, at B1; John M. Jackson, *Remedy for Inner City Segregation in the Public Schools: The Necessary Inclusion of Suburbia*, 55 OHIO ST. L.J. 415, 417 (1994).

⁴ In a conversation among reporters who wrote articles for a series about race relations, one author asked, "[w]hy is race a more sensitive subject than sex . . . ?" Sam Roberts, *The Way We Live Now: 7-16-00: Round Table; Writing About Race (And Trying to Talk About It)*, N.Y. TIMES, July 16, 2000, at F16. Another reporter answered the question: "Labels get affixed to people for saying 'the wrong thing.' It may be unfair but it's true. If a guy says something about women he can jokingly say, 'Well, I'm just a chauvinist, I'm just a chauvinist pig,' and make a joke out of it. I don't think you run across anybody who would jokingly refer to himself as a racist. It's such a radioactive subject because these labels are so explosive." *Id.*

⁵ Cf. Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267 (1994) (describing the glass ceiling that prevents women and people of color from climbing to the top of corporate hierarchies); *Helping Women Get to the Top*, ECONOMIST, July 23, 2005, at 11. "[T]he world's biggest companies are still almost exclusively run by men." *Id.* "[In 2005,] women account for 46.5% of America's workforce and for less than 8% of its top managers . . ." *The Conundrum of the Glass Ceiling*, ECONOMIST, July 23, 2005, at 67. "Today, the corner offices of the nation's largest companies are dominated by white men in a way that few other parts of society still are." David Leonhardt, *Who's in the Corner Office?*, N.Y. TIMES, Nov. 27, 2005.

The dominant focus of this Symposium is on the public corporation. They are ubiquitous. Public companies employ millions and provide goods, services, and opportunities that touch every aspect of our lives. Because they are large, their impact is momentous. Public companies exercise considerable control over the choices we make about fundamental aspects of our lives as consumers. Those employed by public companies depend on the income and benefits their employers provide which make it possible to feed, clothe, and educate themselves and their families. The success of women and minority entrepreneurs often depends on their ability to supply public companies with goods or services. Public companies affect the lives of every American, as well as the lives of many of the world's inhabitants.

Unfortunately, discrimination, racism, and sexism afflict many of the relationships between public corporations and the women and people of color who deal with them. The attorney who questioned whether this conference was necessary did not understand this. Senator Joseph Biden, however, demonstrated that he understood the enduring nature of discrimination, racism, and sexism when he questioned Judge Samuel Alito during the 2006 U.S. Senate Judiciary Committee Hearing on Alito's nomination to the Supreme Court. Biden began one round of his exchange with Alito by depicting the discrimination Justice Sandra O'Connor faced in the early years of her legal career.⁶ Biden acknowledged that discrimination is different today. The senator observed that present-day discrimination is more subtle, more sophisticated. Most important was Biden's affirmation that discrimination persists.

Biden questioned Alito about the concept of "subjective business judgment" on which Alito relied in a discrimination case tried before him while serving on the Court of Appeals for the Third Circuit.⁷ After hearing the case, Alito concluded that it was appropriate to defer to a company's articulated reason for not promoting a patently qualified black, female employee, even in the face of the employee's claim of discrimination. Biden discussed some of the evidence that supported a finding of discrimination, and the fact that Alito's colleagues on the Third Circuit had disagreed with him. Only Alito had concluded that

⁶ See *supra* text accompanying note 1.

⁷ The case to which Biden referred is *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997).

the case should not go to the jury. Alito's colleagues on the Third Circuit observed that the standard he proposed would "eviscerate Title VII because . . . it ignores the realities of racial animus."⁸

At the hearings, Alito defended his position to Biden by saying that "there was no direct evidence of discrimination."⁹ He continued, however, by commenting that "[t]here are subtle forms of discrimination and the judicial process has to be attentive to the fact that discrimination exists and, today, a lot of it's driven underground."¹⁰ In spite of Alito's claim that he understood the persistence and subtlety of present-day discrimination, he defended his position, asserting that the employer had engaged in "a really minor violation of the company's internal practices."¹¹ Biden disagreed with Alito by noting that the company's violation of its internal policy was "not just a little deal."¹² This exchange inspired Biden to wonder whether Alito "fully appreciate[d] how discrimination . . . work[s] today."¹³ This Symposium includes an outstanding paper by the keynote speaker, Professor Rachel Moran, that confronts the issue of present-day discrimination and how it operates. She describes varying types of discrimination as defined by critical race theorists and law and economics scholars, and considers their application in the business setting.

Enduring discrimination in the corporate setting harms individuals, businesses, and society in general. Race discrimination and harassment, and sex discrimination and harassment continue to taint many American workplaces. Many relationships between public companies and female and minority consumers, communities of color, and women and minority entrepreneurs are burdened by discriminatory practices and

⁸ See *Hearings*, *supra* note 1, at ___ (statement of Sen. Joseph R. Biden). The actual statement by the court in *Bray* was as follows:

This statute must not be applied in a manner that ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the "best" candidate regardless of that person's credentials. . . . Indeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.

Bray, 110 F.3d at 993.

⁹ See *Hearings*, *supra* note 1, at ___ (statement of Samuel A. Alito).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (statement of Sen. Joseph R. Biden).

¹³ *Id.*

customs that are rarely examined.

Here are some of the facts that describe the status of women and people of color and their relationships with many public companies. Workers of color are sometimes paid less than white workers for the same work.¹⁴ Women are frequently paid less than men for the same work.¹⁵ Workers of color are promoted less frequently than whites with the same qualifications.¹⁶ Women are promoted less frequently than men who have the same qualifications.¹⁷

Latinos and Latinas are the fastest growing minority group in this country, and even though they have a buying power that exceeds \$200 billion, they occupy fewer than 5% of the total positions available at Fortune 500 companies. In 2001 the income of the average black household was 64.9% of the income of white households.¹⁸ Black men earned 73.9% of what white men earned, and "the number of employed black managers and professionals fell. . . . Meanwhile, the number of employed white managers and professionals continued to rise [in 2002]."¹⁹

¹⁴ For example, black male managers and executives earn 23% less than white managers and executives. See Roger O. Crockett, *Progress Without Parity*, BUS. WK., July 14, 2003, at 100.

¹⁵ In June 2004, a United States District Court ruled that a sex discrimination lawsuit against Wal-Mart Stores, Inc. could proceed as a class action. See Steven Greenhouse & Constance L. Hays, *Wal-Mart Sex-Bias Suit Given Class-Action Status*, N.Y. TIMES, June 23, 2004, at A2. The class of women employees alleged pervasive sex discrimination that included claims that women were paid less than men for the same work. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004).

"Women's annual earnings, relative to men's, have moved up more slowly since the early 1990s than previously, and still remain substantially below parity. Women who work full-time throughout the year . . . earned 76.5 percent as much as men in 2004." *The Gender Wage Ratio: Women's and Men's Earnings*, Fact Sheet, Institute for Women's Policy Research, <http://www.iwpr.org/pdf/C350.pdf>. In 2005, "[f]emale managers' earnings . . . average 72% of their male colleagues'." *The Conundrum of the Glass Ceiling*, *supra* note 5.

¹⁶ Telephone Interview with James Vagnini, Partner of Leeds, Morelli & Brown (Sept. 9, 2005) (describing his representation of clients of color against public companies and the "irrefutable evidence" of discrimination in pay and promotion decisions).

¹⁷ Women employees at Wal-Mart alleged pervasive sex discrimination that included claims that women were promoted less frequently than men who have the same qualifications. See *Dukes*, 222 F.3d at 141.

¹⁸ See Crockett, *supra* note 14.

¹⁹ *Id.* *Business Week*, the *New York Times*, and the Center for Economic and Policy Research have in recent years reported that while fewer African Americans are poor, African Americans are still not close to achieving economic equality with white Americans.

Consumers of color pay more for mortgages, cars, and other goods and services than whites.²⁰ Women often pay more than men for certain goods and services.²¹ Consumers of color frequently receive goods and services that are inferior to those purchased by whites.²² Many public companies are slow to do business with minority- and women-owned businesses.²³ And the global impact of corporate activity has racial implications when companies do business in developing countries where people of color predominate.²⁴ For example, poor people and people of color are harmed when multinational companies employ exploitative labor practices and pollute the water and air in the countries where they do business.²⁵

This Symposium about public companies, race, and gender is crucial for several reasons. First, the accounting scandals that took place at companies such as Enron and WorldCom and the resultant legislative and administrative corporate governance reform have eclipsed discussion and concern about the status of women and minorities in Corporate America. Meaningful discussion of racism and sexism in the business setting rarely occurs.

Second, to the extent it occurs, the discourse on race and gender in the business setting typically focuses on diversity efforts rather than the continuing problem of discrimination. The typical diversity discussion that takes place in the corporate setting obscures, rather than confronts, persistent discrimination

²⁰ See e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995).

²¹ *Id.*

²² African Americans, for example, frequently complain about retail employees who are slow to help them but quick to suspect them of theft. *Cf.*, Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, 57 DISP. RESOL. J. 26, 28 (May-July 2002). An African American teenager sued an Eddie Bauer store after having been falsely accused of stealing. *See id.* The store's security guard made the accusation in public and in a degrading way, and the company offered no apology for the guard's conduct. *Id.*

²³ Encouraging public companies to do business with minority suppliers of goods and services was one focus of the 2004 Seventh Annual Rainbow/PUSH Wall Street Project Conference. *See* Cheryl L. Wade, "We Are An Equal Opportunity Employer": *Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1542 (2004).

²⁴ *See* Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER, RACE & JUST. 213 (2003).

²⁵ *Cf.* LYNNE L. DALLAS, *LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH* 634-49 (2005).

issues.²⁶ On their web sites, and in other communications with shareholders and the general public, corporate spokespersons speak of equal opportunity, compliance with law, and even affirmative action. This empty rhetoric excludes consideration of discrimination issues and allows companies to avoid responsibility for enduring racism and sexism within the firm.

It is dangerously naive to believe that anti-discrimination efforts are not needed within public companies that employ and deal with thousands of people. The inevitability of discrimination in the corporate setting becomes evident when one considers the vast numbers of people who work for, or act on behalf of, the typical public company. Increased diversity will only lead to an increase in the number of complaints from women and minority consumers, employees, and suppliers if corporate managers fail to monitor and deal with inevitable discrimination.

Aggrieved women and minorities typically bring claims against public companies when treated unfairly. Many discrimination suits are settled in secrecy. Because the terms of such settlements remain undisclosed, they offer no guidance for other companies. Even when settlement terms are disclosed, other companies may continue to ignore discrimination problems and miss the opportunity to learn something from the litigation brought against the defendant corporation about the equitable treatment of women and minorities. For example, in the employment discrimination context, Texaco settled a race discrimination class action for more than \$175 million.²⁷ Just four years after the Texaco settlement, Coca-Cola paid almost \$200 million to settle a similar race discrimination class action.²⁸ Other companies have faced similar allegations of pervasive discrimination since the Texaco and Coca-Cola settlements. And, just as troubling are the indications that race and sex discrimination problems at Texaco and Coca-Cola persisted long after the settlements were paid.²⁹

This Symposium is imperative because the approaches

²⁶ See generally Wade, *supra* note 23 (providing several examples of obfuscating diversity discussions on corporate web sites, proxy statements, and in compliance programs).

²⁷ See Kenneth Labich, *No More Crude at Texaco*, FORTUNE, Sept. 6, 1999, at 205.

²⁸ See Phillip M. Berkowitz, *The Coca-Cola Pact: A Wake-Up Call for International Employers*, N.Y. L.J., Nov. 30, 2000, at 5.

²⁹ See Wade, *supra* note 23, at 1551-52.

explored in the articles avoid the inadequacies of discrimination litigation and settlement by suggesting structural and preventive changes, strategies, and perspectives. Two authors, however, continue to look to litigation as part of a potential resolution of race and gender inequity in particular, and corporate social irresponsibility in general. Professors Adam Sulkowski and Kent Greenfield see shareholder activism as a viable method for enhancing corporate social responsibility, including justice and equity for women and people of color. They apply the ultra vires doctrine under which institutional shareholders and investor groups may sue when a company engages in unlawful conduct such as discrimination.

Professor Thomas Joo concludes that shareholder activism and governmental regulation fail to adequately promote racial justice. He prefers the possibility of achieving institutional reform that will lead to racial justice through existing corporate hierarchy. He proposes reliance on the discretion of corporate directors and senior officers. Professor Steven Ramirez also looks to corporate managers, concluding that the derivation of much corporate misconduct, including race discrimination, is in the structure of corporate governance and the operation of corporate law. Ramirez proposes the professionalization of the management of public companies. This would require a shift from CEO dominance in corporate governance decision making to a more diverse and accountable sector of corporate managers.

Two authors focus on corporate boards. Professor Larry Catá Backer examines directorial fiduciary duty. He explores director independence analysis under the duty of loyalty. He explains that critical race and feminist legal theory offer insights that would make determinations of director independence more realistic. He undertakes this examination by exploring the Delaware Chancery Court's analysis of the independence of an African American woman who served on the Walt Disney board. Professor Lisa Fairfax compares the progress of women and people of color in attaining seats on corporate boards. She observes that women of color face the most obstacles in this regard. Fairfax links the relatively low numbers of people of color and women on corporate boards to the difficulty both groups encounter in reaching the highest rungs of the corporate ladder. This link exists because directors are typically chosen from the ranks of senior executives.

Two authors provide a comparative lens that looks beyond U.S. borders. Professor Janis Sarra explores the impact of multinational corporations on women and people of color. She confronts the issues of board diversity and fiduciary duty as a way to improve corporate compliance with human rights law. Sarra compares the United States and Canada with respect to the roles played by shareholder activists and regulators in improving corporate governance in a way that seeks to mitigate the harmful impact of corporate activity on women and people of color. Professor Claire Moore Dickerson explores the commercial lives of women in developing markets, focusing primarily on West Africa. She compares the role of public companies in the United States to their role in emerging markets. This comparison allows her to challenge the U.S. norm of shareholder wealth maximization.

Professor Marleen O'Connor explains economic and social changes in corporate and familial relationships. She proposes that the family be included among corporate stakeholders, in part because of the impact of corporate employment decisions on the family unit. She also discusses the impact of women's decisions about work on the family, corporate life, and the economy in general.

Professor Robert Ashford uses Binary Economics to construct a series of voluntary transactions that would narrow the gap in economic wealth between men and whites on one hand, and women and people of color on the other. Through trusts, women and people of color can purchase shares in public companies. The funds required for the purchase will come from loans extended by commercial banks, savings and loan institutions, insurance companies, or other lenders. The acquisition of corporate shares will mean that the trust beneficiaries, women and people of color, will no longer depend on their labor for wealth accumulation. They will amass wealth from the earnings of capital. The increased wealth of women and people of color will increase consumer demand for the goods and services provided by public companies. People of color, women, public companies, and the economy in general will benefit.

The excellent articles that are part of this Symposium offer insights that may improve the lives of women and people of color, not only in the business setting, but in all aspects. The Symposium authors take on issues relating to corporate

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governance, corporate culture, corporate social responsibility, critical race theory, feminist legal theory, law and economics, and socioeconomics. It is only with a greater understanding of these themes that discriminatory corporate cultures can be transformed, and discrimination in the business setting mitigated.