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Bringing Talent Off the Bench and into the Game: The Underrepresentation of Women in the Boardroom

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BRINGING TALENT OFF THE BENCH AND INTO THE GAME: THE UNDERREPRESENTATION OF WOMEN IN THE BOARDROOM

Rachel Orbach[*]

While women have expanded their footprint in corporate America in recent years, they are still underrepresented in the upper echelons of corporate governance, specifically in boardrooms, which dictate the direction of a company. At the current rate, it will take more than four decades before women's representation on corporate boards reaches parity with that of men. Women face obstacles that make it difficult to rise in the ranks of corporate America. This can be attributed to numerous factors that collectively burden women with expectations that are at odds with success. These factors include low representation of women in traditional pipelines to board seats, lack of flexibility in the workplace, male-driven work cultures, and disproportionate mentorship and sponsorship opportunities.

Why should companies care about diversity? The importance of diversity can be reinforced by both business and moral arguments. The business case highlights the value-maximizing effect of diverse boards while the moral arguments emphasize that gender diversity is the "right thing to do." However, despite these arguments in favor of gender diversity, the efforts to improve diversity on boards have been lacking. This Note highlights the current landscape and suggests ways to break down barriers to increase women's representation in the boardroom. A balanced boardroom with more women's perspectives will lead to an improved understanding of a company's stakeholders and its customers' needs. Increased diversity can also enhance a board's ability to meet its fiduciary duties.

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INTRODUCTION

The Oracle of Omaha, Warren Buffett, has said his success is partly due to the fact that he only needed to compete with half the population.[1] Unfortunately, when surveying the landscape of corporate America, it appears that, as is generally the case, Buffett is correct in his assessment. While women continue to outpace men in educational achievement, this has not translated to increased representation of women in the corporate sphere, as evident by the lack of diversity in boardrooms.

Women face numerous obstacles in their rise to senior positions. Firstly, it is challenging for women to attain board positions when the prerequisite is often experience in a senior management position, a level at which they already face significant underrepresentation. Secondly, the workplace has failed to accommodate mothers and provide the flexibility that they need in balancing child rearing and their professional lives. This has enabled the creation of a class of dependent women who adjust their careers to accommodate their spouses, further enabling men to continue to dominate the public sphere. Motherhood triggers assumptions that women are less committed to their jobs and are therefore less qualified. While women and men both practice work-life balance, they do not share the same burdens because typically, women disproportionately bear the costs of having a family.

Furthermore, the male-driven culture is a hindrance to women's success as they face pressure to conform to established male norms. Women and men are biologically different, and there are cultural norms and stereotypes to which each gender is expected to conform. If women stray from what is expected, it hurts their chances of success. The male-dominant corporate culture only reinforces this notion by appointing male directors who will "fit in" with the status quo.

Moreover, the "glass ceiling" that caps women's success also prevents highly successful women from reaching positions where they are able to receive the proper mentorship and sponsorship opportunities that men have. In the unlikely event that women do receive such mentorship, the advice is usually skewed by unexamined mindsets in the workforce or lacks the proper direction. For the first time in American history, single women outnumber married women. This has significant ramifications, as there are a greater number of women who are

1. SHERYL SANDBERG, LEAN IN: WOMEN, WORK AND THE WILL TO LEAD 6 (2013).

independent and the workforce will presumably need to adjust accordingly. However, the extent to which single women will stimulate change depends on women stepping up to call for the progress they desire.

Where women are represented in boardrooms, certain patterns have emerged. A lack of a "critical mass" of women hinders their ability to have their voices heard. Moreover, there is a pattern of boards appointing one "trophy" woman to multiple boards, creating the illusion that companies care about diversity and inclusiveness, when in reality, companies are recycling the same women. In other cases, corporations fail to find the lack of diversity in board positions problematic and therefore do not prioritize remedying the issue at all.

Why should companies care about diversity? Diversity is important because investors care about the equity returns in their companies (which are affected by board heterogeneity), and the concept of the "business case" is in line with their investment agendas. Another argument is a moral argument, which states that diversity is important because it is simply the "right thing to do." Appointing more women on boards would be a more accurate reflection of society and signal to consumers the value companies place on equal representation.

While initiatives to improve diversity on boards exist, these efforts have fallen short. Overall, there is an absence of legislation on the state level. However, there have been some voluntary approaches aimed at setting target numbers of women on boards. Regulation S-K, put forth by the SEC, mandates disclosure of a company's board composition, but the law is more suggestive than compulsory in nature and has yet to yield significant change. Compared to countries around the world that have taken a more hard-line approach by instituting mandatory quotas, the United States lags behind in increasing gender equality on boards.

This Note highlights the current landscape and suggests ways to break down barriers to increase women's representation in the boardroom. While this Note calls for more women on boards, it is not an invitation to hand out board seats to women. There is a need for women to achieve their rightful positions because of their qualifications, and not solely for the sake of diversity. A balanced boardroom with more women's perspectives will lead to an improved understanding of a company's stakeholders and its customers' needs, and allow directors to adeptly perform their roles as fiduciaries to the corporation.

Part I of this Note provides background on the board of directors' role in a corporation and the current status of women's representation in boardrooms, highlights the barriers women face in rising to higher ranks, and analyzes why diversity matters. Part II describes recent U.S. efforts to improve diversity, including both state- and federal-level initiatives. Lastly, Part III outlines some concrete suggestions for improving diversity on boards moving forward.

I. BACKGROUND

A. DIRECTORS

1. The Role of Corporate Boards

The board of directors plays a crucial role in a corporation's decision-making process.[2] Given its role as the corporation's strategic leader, the board of directors is often considered the "epicenter of U.S. corporate governance."[3] The board's role is determined by state statutes, which safeguard the board of director's management of the corporation's affairs.[4] Directors are responsible for developing strategies through problem solving and critical analysis. According to the Organisation for Economic Co-operation and Development's Principles of Corporate Governance, "[t]he corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders."[5]

The corporate structure lends itself to a separation of ownership and control, whereby one group—the directors—controls the corporation, and another group—the stakeholders—provides the capital.[6] This

2. Rajeev Gupta, *The Pursuit of Diversity in the Boardroom*, EXECRANK, https://execrank.com/board-of-directors-articles/pursuit-diversity-boardroom/ [https://perma.cc/NXE8-XJ7S] (last visited Sept. 25, 2016).

3. JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 51 (2008).

4. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141 (West 2016).

5. ORGANISATION OF ECON. CO-OPERATION & DEV., G-20/OECD PRINCIPLES OF CORPORATE GOVERNANCE (2015), http://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en [https://perma.cc/9RKJ-QCGC].

6. Kose John & Lemma W. Senbet, *Corporate Governance and Board Effectiveness*, 22 J. BANKING & FIN. 371, 372-373 (1998).

separation of ownership and control inherent in a corporation gives rise to potential conflicts between the corporation's stakeholders and directors.[7] Corporate governance is a set of practices and rules that handles this conflict.[8] Given the directors' responsibility to guide the corporation and guard company assets, they would be prudent to implement the principles critical to good corporate governance, one of which is the board's duty to monitor.[9] The monitoring role is important because corporate ownership is often dispersed, which makes it challenging for shareholders to effectively monitor director behavior.[10] Therefore, it is the directors' job to serve as the shareholders' guardian and engage in effective risk oversight and crisis management. Directors must foresee challenges that lie ahead and apply their expertise to help their companies navigate such obstacles. In a constantly shifting business landscape, boards must be progressive in order for their companies to maintain a competitive position.[11]

Due to shareholders' lack of control over a corporation's ordinary business operations and their need to rely on directors and officers to manage the corporation, directors and officers owe fiduciary duties to the shareholders.[12] Fiduciary duties are a feature of state law and include

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7. *Id.* This conflict creates an "agency problem." *Id.*

8. *Id.*

9. Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, The Important Work of Boards of Directors (Oct. 14, 2015), https://www.sec.gov/news/speech/important-work-of-boards-of-directors.html [https://perma.cc/2RWA-7L6D]. *Cf.* Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000) (stating that "[a]spirational ideals of good corporate governance . . . are highly desirable, often tend to benefit stockholders, [and] sometimes reduce litigation . . . [b]ut they are not required by the corporation law and do not define standards of liability").

10. Large corporations especially have a problem with the monitoring duty because their ownership is typically even more distributed. John & Senbet*, supra* note 6, at 372. As a result, individual shareholders do not have enough interest to validate spending time and money to monitor managers and instead rely on others' efforts to do so. *Id.*

11. Two-thirds of directors surveyed in a 2014 Spencer Stuart survey agree that boards need to be savvy and believe that board turnover is "important" or "critically important." Steven A. Rosenblum, Karessa L. Cain & Sebastian V. Niles, *NYSE: Corporate Governance Guide*, NYSE (Dec. 2014), https://www.nyse.com/publicdocs/nyse/listing/NYSE_Corporate_Governance_Guide.pdf [https://perma.cc/57VQ-6HK3] [hereinafter *Corp. Guide*]; Aguilar, *supra* note 9.

12. *See* Roel C. Campos, Comm'r, Sec. & Exch. Comm'n, Remarks Before the CNMV Corporate Governance and Securities Markets Conference (Feb. 8, 2007), https://www.sec.gov/news/speech/2007/spch020807rcc.htm [https://perma.cc/XQQ9-E7J5].

the duty of care and the duty of loyalty.[13] Under the shareholder primacy model, the board's central role is to maximize shareholder wealth.[14] To fulfill their duties, loyal and prudent directors should maximize long-term value creation for the company.[15] Shareholders sometimes contest the board's corporate decisions, such as a decision to make charitable contributions.[16] However, corporate statutes allow directors to use corporate profits for corporate donations and social goals.[17] Charitable giving provides a means for a company to create a benevolent image, maintain a devoted customer-base, and can be an advantageous tax strategy.[18]

Fiduciary duties provide recourse for shareholders when the directors' actions run contrary to the goal of maximizing company profits or are not in the best interests of the corporation.[19] Specifically,

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13. There is also the duty of good faith, which is a component of the duty of care and the duty of loyalty. *See, e.g.*, DEL. CODE. ANN. tit. 8, § 102 (West 2016) (disallowing limitation of liability for duty of care violations resulting from bad-faith actions); Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006) (holding that the failure to act in good faith is a factor considered when evaluating a potential breach of the duty of loyalty).

14. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (expressing the position that profits should be managers' primary goal); *see also* AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (1994) ("[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.").

15. *See* TIAA-CREF POLICY STATEMENT ON CORPORATE GOVERNANCE (6th ed. 2011), http://www1.tiaacref.org/ucm/groups/content/@ap_ucm_p_tcp/documents/document/tiaa01007871.pdf [https://perma.cc/DVB3-HLRU]. Companies often over-emphasize the short-term financial outcomes. According to a March 2014 McKinsey and Canada Pension Plan Investment Board survey, 47% of 604 executives and directors from around the world said their companies' boards overemphasized immediate financial outcomes and 74% of those who were currently directors took the responsibility themselves. Dominic Barton & Mark Wiseman, *Where Boards Fall Short*, HARV. BUS. REV., Jan.-Feb. 2015, https://hbr.org/2015/01/where-boards-fall-short [https://perma.cc/GSG4-QTR5].

16. John A. Pearce II, *The Rights of Shareholders in Authorizing Corporate Philanthropy*, 60 VILL. L. REV. 251, 252 (2015).

17. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763 (2005).

18. Pearce II, *supra* note 16, at 252.

19. *See Dodge*, 170 N.W. at 682 (finding that the director and controlling shareholder, Henry Ford, subordinated shareholder interests to those of the customers by not paying dividends).

shareholders can bring a derivative claim when the board breaches its fiduciary duties.[20] In many cases, directors have the protection of the business judgment rule, a safe harbor that provides deferential treatment to directors.[21] Courts give directors some latitude to use their expertise in making business decisions, overlooking losses that may have occurred as a result of managerial decisions made by an officer or director in good faith.[22]

2. Board Size and Director Terms

Corporate boards have the freedom and flexibility to pick the individual board members and set limitations on the size of the board. State statutes require directors to be elected annually,[23] but the board may also be staggered into thirds, should the company choose to do so.[24] Term limits vary from company to company: in 2014, only 3% of boards of S&P 500 companies stipulated director term limits, and the average term for a director for all boards was 8.4 years.[25] Another method boards have adopted to stimulate board refreshment is the establishment of mandatory retirement ages for its directors.[26] In 2014, 73% of S&P 500 boards had formal policies regarding board member

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20. A breach of fiduciary duty can include inadequately informed decisions, self-dealing, failure to monitor, deliberate malice, illegal acts, the taking of an opportunity that belongs to the principal, and interference with the shareholders' right to vote. *See, e.g.*, Miller v. Am. Tel. & Tel. Co., 507 F.2d 759 (3d Cir. 1974); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); *In re* Oracle Corp. Derivative Litig., 824 A.2d 917 (Del. Ch. 2003), Cooke v. Oolie, No. CIV. A. 11132, 2000 WL 710199 (Del. Ch. May 24, 2000); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996); Blasius Indus., Inc. v. Atlas Corp., No. CIV. A. 9720, 1988 WL 909333 (Del. Ch. Aug. 15, 1988); Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

21. *See* Ashley Schoenjahn, Note, *New Faces of Corporate Responsibility: Will New Entity Forms Allow Businesses to Do Good?*, 37 J. CORP. L. 453, 456 (2012).

22. *Corp. Guide*, *supra* note 11, at 111. This rule prevents courts from finding directors at fault if they relied on "any rational business purpose" when making their decision. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

23. DEL. CODE ANN. tit. 8, § 211(b) (West 2016).

24. DEL. CODE ANN. tit. 8, § 141 (West 2016).

25. *Corp. Guide*, *supra* note 11, at 72-73; SPENCER STUART BOARD INDEX 2014, https://www.spencerstuart.com/~/media/pdf%20files/research%20and%20insight%20pdfs/ssbi2014web14nov2014.pdf%20target= [https://perma.cc/GG93-E2ED].

26. *Corp. Guide*, *supra* note 11, at 48.

retirement age.[27] The number of individuals on the board also varies by organization, usually depending on the size and scope of the company. According to a 2014 survey of public companies, the average board size was about ten directors, with larger companies having more directors.[28]

3. Board Committees

The board of directors typically creates individual committees to enhance oversight effectiveness and delegate board responsibilities.[29] The allocation of responsibilities among these committees ensures effective corporate governance and enables the committees to focus on particular issues that may be too large or complex for the entire board; thus, the committees offer input on significant matters, guarantee that the board's work is informed, and recommend policies subject to the entire board's approval.[30] The three most fundamental board committees are the compensation committee, the audit committee, and the nominating and governance committee.[31] The number of committees and their members varies by company, and boards have the freedom to select the size and individual members of each committee.[32] The number

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27. *Id.* at 73. About half of the directors noted that there is a compulsory retirement age on their boards. *Id.* at 48.

28. SPENCER STUART BOARD INDEX 2015, https://www.spencerstuart.com/~/media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015_110215-web.pdf [https://perma.cc/4VV6-FZSG]; *see also* David A. Katz & Laura A. McIntosh, *Gender Diversity on Boards: The Future is Almost Here*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 24, 2016), https://corpgov.law.harvard.edu/2016/03/25/gender-diversity-on-boards-the-future-is-almost-here/ [https://perma.cc/B48G-HDRM] (stating that large firms tend to have larger boards).

29. These committees are permitted by state statute. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(c) (West 2016).

30. *Corp. Guide*, *supra* note 11, at 91.

31. U.S. GOV'T ACCOUNTABILITY OFFICE, STRATEGIES TO ADDRESS REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS (Dec. 2015), http://www.gao.gov/assets/680/674008.pdf [https://perma.cc/K7ZC-6HYF] [hereinafter *GAO Report*]. Companies listed on the New York Stock Exchange are required to have these three committees. *Corp. Guide*, *supra* note 11, at 102.

32. DEL. CODE ANN. tit. 8, § 141(c) (West 2016). Companies may have other committees depending on necessity and the industry. Other board committees include finance, fundraising, product development, promotion and sales, public relations, research, environmental, safety, and programming. Derick Hughes, *The Changing Face of Nomination Committees Globally*, ETHICAL BOARDROOM (Feb. 17, 2014), http://ethic

of women on each of these fundamental board committees is roughly indicative of women's representation on boards generally.[33]

Although state law dictates director responsibilities, it typically does not require director independence.[34] In 2002, the Sarbanes-Oxley Act ("SOX") was enacted to improve disclosure and financial reporting; although it did not expressly address board composition, SOX mandated the presence of an entirely independent audit committee.[35] The New York Stock Exchange ("NYSE") guidelines took a broader approach by requiring its listed companies to have a majority of independent directors on their boards.[36] The NYSE guidelines define independent directors as those with "no material relationship with the company, either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company."[37] The rules specifically forbid certain subsets from being considered independent: individuals who have a significant financial stake in the company, individuals related to top executives, and employees who are only three years removed from the company.[38]

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alboardroom.com/leadership/changing-face-nomination-committees-globally/ [https://perma.cc/FKX4-5TJ6].

33. Katz & McIntosh, *supra* note 28.

34. *See, e.g.*, DEL. CODE ANN. tit. 8, § 144 (West 2016); Theo Francis & Joann S. Lublin, *Boards Get More Independent But Ties Endure*, WALL ST. J. (Jan. 19, 2016), http://www.wsj.com/articles/boards-get-more-independent-but-ties-endure-1453234607 [https://perma.cc/SR2R-CYQR] ("[F]ederal law requires board committees overseeing executive pay or company audits to include only independent directors.").

35. 15 U.S.C. § 78j-1(m) (2012); Cynthia A. Glassman, Comm'r, Sec. & Exch. Comm'n, Board Diversity: The 21st Century Challenge: "The New Regulatory Climate and Impact on Board Composition" (Nov. 11, 2005), https://www.sec.gov/news/speech/spch111105cag.htm [https://perma.cc/3QGX-4ZFT] [hereinafter *Glassman Speech*].

36. N.Y. STOCK EXCH., NYSE LISTED COMPANY MANUAL § 303A.01 (2013), http://nysemanual.nyse.com/lcm/Help/mapContent.asp?sec=lcm-sections&title=sx-ruling-nyse-policymanual_303A.02&id=chp_1_4_3_2 [https://perma.cc/C3HA-WHSW] (last visited Aug. 20, 2016). The Sarbanes Oxley Act, coupled with the listing requirements, has helped fuel the change in composition of corporate boards; as there is more regulation and oversight, companies must look at a larger group of candidates (which has opened up opportunities for women). *Glassman Speech*, *supra* note 35.

37. N.Y. STOCK EXCH., NYSE LISTED COMPANY MANUAL § 303A.02 (2013), http://nysemanual.nyse.com/lcm/Help/mapContent.asp?sec=lcm-sections&title=sx-ruling-nyse-policymanual_303A.02&id=chp_1_4_3_3 [https://perma.cc/N3UR-PTK5] (last visited Aug. 20, 2016).

38. *Id.*; Francis & Lublin, *supra* note 34.

Since the board of directors is essentially the company's compass, board composition is a critical part of the equation. Although nominating processes differ across companies, the board of directors generally creates a nominating and governance committee that reviews and recommends nominees to the board as a whole.[39] The nominating committee is responsible for oversight during the nomination process, and is primarily tasked with evaluating candidates for the board, identifying the traits and talents that are required for candidates to obtain a board nomination, and warranting nominee excellence.[40]

Given their role in presenting new members to the board for appointment, nominating committees have the power to change the face of a company.[41] Consequently, the members of the nominating committees are also the ones held accountable by shareholders when the committee seems to have recruited inexperienced individuals to the board.[42] It is crucial to ensure that new appointees are qualified and can effectively run the company. Committee members, therefore, must keep in mind the enduring life of the corporation, the corporation's best interests, and the applicable rules of corporate governance while selecting new board members.[43] Accordingly, the most desired traits in new members are prior financial and industry experience, experience as a CEO, and an understanding of information technology.[44] Surveyed directors also mention a recent emphasis on candidates with a background in marketing or social media.[45]

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39. The nominating and governance committee also handles matters relating to corporate governance principles, but the nominating role is the primary interest for purposes of this Note. *See e.g.*, Morgan Stanley, Nominating and Governance Committee Charter (as amended Oct. 27, 2016), http://www.morganstanley.com/about-us-governance/ndchart [https://perma.cc/ZLL9-P6SS] (last visited Mar. 6, 2017).

40. Hughes, *supra* note 32. *See generally Corp. Guide*, *supra* note 11, at 91-96.

41. In the 2013 "What Directors Think" survey by Spencer Stuart, about two-thirds of directors stated that endorsements from existing board members served as the most fruitful resource for new board members, and search firms were the second most effective. *Corp. Guide*, *supra* note 11, at 49.

42. Hughes, *supra* note 32.

43. *Id.*

44. *Corp. Guide*, *supra* note 11, at 48.

45. *Id.*

B. BOARDROOMS

1. Number of Women on Boards Generally

According to the 2015 *Women in S&P's 500 Companies Survey* by Catalyst, a nonprofit organization dedicated to expanding opportunities for women in business, women represent 44.3% of the labor force and comprise 36.4% of mid-level managerial positions.[46] However, women hold only 19.9% of board seats, 25.1% of executive/senior level management positions, and only 4.4% of CEO positions.[47] Women occupied only 16.6% of Fortune 500 board seats in 2012 and that number increased by only two percentage points in six years.[48]

Numerous other reports have documented the dearth of women on boards. The United States Government Accountability Office ("GAO") released a report in December 2015 on the status of women on corporate boards, finding that in 1997, women held 8% of board seats and that number increased to about 16% in 2014.[49] Results also showed that the number of women on boards varied across organizations.[50] Generally, women were more adequately represented on boards of large companies than on those of small or medium companies.[51] Women comprised 12% of board positions in small companies, 15% of board positions in medium companies, and 19% of board positions in large companies.[52] Furthermore, 33% of small companies, 17% of medium companies, and 4% of large companies had boards with no women.[53] In terms of industry-specific figures, women were most represented in boardrooms of the household and personal products industry at about 26%, followed by food, beverage, tobacco, and utilities industries at 21%, and in the

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46. *Women in S&P 500 Companies*, CATALYST (Sept. 19, 2016), http://www.catalyst.org/knowledge/women-sp-500-companies [https://perma.cc/Y5VV-GAD5]; *see also Corp. Guide*, *supra* note 11, at 84.
47. *Women in S&P 500 Companies*, *supra* note 46.
48. Boris Groysberg & Deborah Bell, *Dysfunction in the Boardroom*, HARV. BUS. REV. (June 2013), https://hbr.org/2013/06/dysfunction-in-the-boardroom [https://perma.cc/XS75-9W9M].
49. *GAO Report*, *supra* note 31, at 8.
50. *Id.* at 10.
51. S&P 500 companies are considered large while S&P 400 are considered medium and S&P 600 are considered small. *Id.* at 11.
52. *Id.*
53. *Id.*

media industry at 20%.[54] Women were least represented in the boardrooms of the semiconductor industry at 8.8%, energy industry at 10.5%, automobiles components industry at around 11%, and in real estate at 12.9%.[55]

The GAO study also found a difference in the age and tenure characteristics of men and women on boards.[56] On average, female directors were younger than male directors; 45% of women were under the age of sixty compared to 30% of men.[57] Also, female board directors had shorter tenures on boards than males; 42.1% of women served on boards for less than five years compared to 30.2% of men, while only 10.4% of women served for more than fifteen years compared to 18.2% of men.[58]

An earlier report titled, *Missing Pieces: Women and Minorities on Fortune 500 Boards* described the status of women in corporate boardrooms between 2004 and 2010.[59] The report found that for Fortune 100 companies, Caucasian men alone comprised 67.9% of seats in 2012.[60] New Jersey Senator Bob Menendez released a survey in 2014 of sixty-nine Fortune 100 companies and found that only 22.9% of corporate directors were female.[61]

Since the 1970s, the number of women graduating from American legal, medical, and business graduate programs has been steadily increasing. In the 1970s, women were graduating with advanced degrees at a rate of 30%, which increased to more than 40% in the 1990s.[62] In

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54. *Id.*
55. *Id.*
56. *Id*. at 12.
57. Women's average age was 60.4 years and men's was 63.8 years. *Id.*
58. *Id.*
59. ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES: WOMEN AND MINORITIES ON FORTUNE 500 BOARDS: 2012 ALLIANCE FOR BOARD DIVERSITY (ABD) CENSUS (2013), http://www.catalyst.org/system/files/2012_abd_missing_pieces_final_8_15_13.pdf [https://perma.cc/GA42-WU2N].
60. *Id.*; *see also* Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, The Abysmal Lack of Diversity in Corporate Boardrooms Is Growing Worse (May 2, 2011), http://www.sec.gov/news/speech/2011/spch050211laa.htm [https://perma.cc/Z4CV-LH97].
61. BOB MENENDEZ, 2014 CORPORATE DIVERSITY SURVEY (2015), https://www.menendez.senate.gov/imo/media/doc/2014%20Corporate%20Diversity%20Survey%20Report.pdf [https://perma.cc/XH75-2RST].
62. Douglas M. Branson, *Pathways for Women to Senior Management Positions and Board Seats: An A to Z List*, 2012 MICH. ST. L. REV. 1555, 1555 (2012).

2013, women in the 25 to 34 age group were more likely than men in the same age group to receive college and graduate degrees.[63] Today, 9.7 million women are enrolled in undergraduate programs, representing more than half of all undergraduates.[64] This balance between the genders, however, is not reflected at the senior positions of corporations where the proportion of women has remained stagnant.[65] The facts demonstrate that women are highly represented in the lower ranks of companies but noticeably absent from senior positions, which are instead inundated with men.[66] Accordingly, women's opinions are not proportionately captured in corporate decision-making.[67] Gender-blind studies demonstrate the biases women encounter even when they are being evaluated for hiring: "[o]ne study found that replacing a woman's name with a man's name on a resume improved the odds of getting hired by 61 percent."[68]

Gender inequality remains an issue among 99% of Fortune 500 companies' boards.[69] The GAO report found that even if women were

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63. COUNCIL OF ECON. ADVISERS, WOMEN'S PARTICIPATION IN EDUCATION AND THE WORKFORCE (2013), https://www.whitehouse.gov/sites/default/files/docs/womens_slides_final.pdf [https://perma.cc/8RT2-JJSX].

64. In contrast, male students' enrollment was at 7.6 million, comprising 44% of total undergraduate enrollment. *Undergraduate Enrollment*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/programs/coe/indicator_cha.asp [https://perma.cc/Q4Y5-YWPS]. Brande Stellings, Vice President of Corporate Board Services at Catalyst, has aptly asked, "[I]n terms of workforce and talent pool, why would you only want to choose from half of the available candidates?" Emily Peck, *Most Men Don't Care About Diversity in the Boardroom*, HUFFINGTON POST (Oct. 7, 2015), http://www.huffingtonpost.com/entry/corporate- boarddiversity_us_561510b6e4b0cf9984d7af01 [https://perma.cc/6G5C-2R9C].

65. SANDBERG, *supra* note 1.

66. *Id*. at 15. A study spanning twenty-eight countries that evaluated data for 1.7 million employees established that "although women constitute 41% of the global workforce only 19% of executives are female." PRICEWATERHOUSECOOPERS, A MARKETPLACE WITHOUT BOUNDARIES? RESPONDING TO DISRUPTION (2015), http://www.pwc.com/gx/en/ceo-survey/2015/assets/pwc-18th-annual-global-ceo-survey-jan-2015.pdf [https://perma.cc/YYS6-33AY] [hereinafter *PwC Study*] (citing MERCER, WHEN WOMEN THRIVE, BUSINESSES THRIVE (2014)).

67. SANDBERG, *supra* note 1, at 5-6.

68. *How to Be a Workplace MVP*, LEAN IN, http://leanin.org/tips/mvp [https://perma.cc/6GKV-P3ZJ].

69. Claire Groden, *Just 35% of Male Directors Think Having a Female Board Member Is 'Very Important'*, FORTUNE (Oct. 6, 2015), http://fortune.com/2015/10/06/b

appointed to all imminent board openings, the number of women in the boardroom would still not equal that of men until 2024.[70] These figures demonstrate the great disparity between the pool of qualified female candidates and the limited number of women on corporate boards.

2. Companies that Market Products to Women

Companies in the household and personal products industry that market products primarily to women also exhibit a striking underrepresentation of women in senior positions and boardrooms, although they fare better than companies in other industries.[71] Recent attention has mainly been focused on the lack of women in senior positions within stereotypically male-dominated industries, such as in technology. However, the dearth of women there can be more readily explained by the lack of female candidates for higher positions in the tech industry.[72] A report from National Student Clearinghouse noted a decline in the number of women pursuing bachelor degrees in science, technology, engineering, and math disciplines over the past decade.[73] The gender disparity was most apparent in the field of computer science: in 2004, 23% of degrees in the field went to women, and this number

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oard-member-diversity/ [https://perma.cc/4NQN-2GWH].

70. The GAO report stated that "it could take about 10 years from 2014 for women to comprise 30% percent of board directors and more than 40 years for the representation of women on boards to match that of men." *GAO Report*, *supra* note 31, at 9. NY Representative Carolyn Maloney has said, "If we do nothing, we won't reach gender parity on corporate boards for at least another 40 years." Press Release, Office of Carolyn B. Maloney, Maloney's Newly Introduced Gender Diversity in Corporate Leadership Act of 2016 Gains Backing of U.S. Chamber of Commerce (Mar. 9, 2016), https://maloney.house.gov/media-center/press-releases/maloney-s-newly-introduced-gender-diversity-in-corporate-leadership-act [https://perma.cc/EK8G-M2NL] [hereinafter *Maloney Press Release*].

71. *See, e.g.*, Jillian Berman, *Even Companies That Sell Tampons Are Run by Men*, HUFFINGTON POST (July 21, 2014), http://www.huffingtonpost.com/2014/07/21/women-companies_n_5563256.html [https://perma.cc/YJ98-Z3ZB].

72. *See* Catherine Rampell, *Women Falling Behind in STEM Bachelor's Degrees*, WASH. POST (Jan. 27, 2015), https://www.washingtonpost.com/news/rampage/wp/2015/01/27/women-falling-behind-in-stem-bachelors-degrees/ [https://perma.cc/K8PJ-RZZU] (discussing the low percentage of women graduating in the fields of science, technology, engineering, and math).

73. *Id.*

further decreased to only 18% in 2014.[74] On the other hand, there is no lack of female candidates for higher positions within companies that make products geared towards women because women are well-represented in those companies' entry-level and mid-managerial positions.[75]

Catalyst and the Huffington Post analyzed the board composition of the largest companies that manufacture products marketed toward women.[76] This classification spanned a wide variety of organizations: makeup suppliers, department stores, consumer goods manufacturers, and female-oriented clothing companies, including companies such as Macy's, Nordstrom, Procter & Gamble, Sears, L'Oréal, Kimberly-Clark, and Johnson & Johnson.[77] Of the nineteen companies included in the 2014 analysis, only one had a board of directors that was majority female and only one had a C-Suite that was comprised of a majority of women.[78] These results are particularly troubling, given the fact that women are the primary consumers of these products. Women's keen understanding of customer desires in these fields gives them an advantage over their male counterparts when it comes to making marketing decisions.[79]

The deficiency of women in leadership roles at these companies might provide insight as to the reason there are merchandises, advertisements, and promotions that are marketed toward women but instead appear inaccessible and outdated.[80] Men comprise a majority of senior-level management, using data and market research to make decisions about marketing beauty and feminine products, which they personally do not use or understand.[81] Tom Falk, the CEO of Kimberly-

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74. *Id.*

75. Berman, *supra* note 71.

76. *Id.*

77. *Id.*

78. *Id.*

79. Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 788-89 (2011).

80. Berman, *supra* note 71.

81. As one director put it, "When you think about [one of the company's products] particularly and its relationship to women's health and appearance, we needed . . . a woman who, a person who looks at women's health and who has a marketing background." Broome, Conley & Krawiec, *supra* note 79, at 783 (alteration in original).

Clark, realized this mismatch when creating a marketing strategy for feminine hygiene products.[82] The company's campaign featured an advertisement portraying an un-relatable scenario to women.[83] Since then, Kimberly-Clark has started programs specifically targeted at improving female representation, and the numbers are evidence of its success.[84] Women held 19% of director positions in 2009 and by 2013, that number had increased to 26%.[85]

Many may blame the lack of women on corporate boards on "tradition"[86] and the stereotypical gender roles that view men as dominant and women as submissive. However, it is important to consider the full range of business implications involved. For instance, several beauty organizations are family-run businesses where connection with the owners may be given more credence than gender.[87]

C. Barriers to Achieving Diversity

1. Low Representation of Women in Traditional Pipelines to Board Seats

One of the contributing factors to the dearth of women on corporate boards is that new directors are overwhelmingly chosen based on prior CEO, CFO, director or senior management experience, which most women lack.[88] There is a dominant perception that prior management or directorship experience is a necessary qualification for a director position.[89] Data demonstrates that "[o]ver one-half of male Fortune 500 board members in 2001 were CEOs or former CEOs."[90] A study done by Russell Reynolds Associates Inc. demonstrates that companies are

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82. Berman, *supra* note 71.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id*. Estee Lauder and L'Oréal are two such examples.

88. *See supra* Section I.A (discussing board member qualifications).

89. *Corp. Guide*, *supra* note 11, at 106; *see also* Bonnie Gwin, *Trends in Board Composition over the Past Five Years*, HEIDRICK & STRUGGLES BOARD MONITOR (2014), http://www.heidrick.com/~/media/Publications%20and%20Reports/Trends-in-board-composition-over-the-past-five-years.pdf [https://perma.cc/Y7VN-XYCK].

90. Lissa Lamkin Broome*, The Corporate Boardroom: Still a Male Club*, 33 J. CORP. L. 665, 670 (2008).

hesitant to break this pattern and pick fresh talent, and instead choose to focus on the "usual suspects."[91]

Since there is a premium placed on experience, boards are blinding themselves to a whole pool of candidates and instead narrowing the scope of selection to senior level candidates, which are disproportionately men.[92] A study published in the Harvard Business Review found that 19% of male directors preferred to focus "solely on qualifications and experience" while disregarding gender in the selection process.[93] This is evidenced by the fact that in 2014, women made up only 4% of CEOs of S&P 1500 companies, and Fortune 500 companies' boards prioritized former or current CEO experience in the selection of new members.[94] Around 45% of female directors and 67% of male directors have been CFOs or CEOs of a company previously.[95] Since women are often excluded from these roles in the first place, they are less likely to be considered for board positions.

2. Women Fail to Live up to the Stereotypical Male Leader

There is a mismatch between the dominant and authoritative behaviors associated with leadership and traditionally female qualities.[96] Stereotypical male leadership qualities are considered unattractive when

91. Joann S. Lublin, *This Is Why Corporate Boards Aren't More Diverse*, WALL ST. J. BLOG (Apr. 15, 2014), http://blogs.wsj.com/atwork/2014/04/15/this-is-why-corporate-boards-arent-more-diverse/ [http://perma.cc/X9NZ-E7LJ].

92. Tamara S. Smallman, Note, *The Glass Boardroom: The SEC's Role in Cracking the Door Open so Women May Enter*, 2013 COLUM. BUS. L. REV. 801, 808 (2013) (noting that "women hold only about a quarter of . . . senior level positions").

93. Groysberg & Bell, *supra* note 48; *see also* Groden, *supra* note 69 (noting that female directors were more likely than male directors to acknowledge the importance of diversity on boards).

94. *GAO Report*, *supra* note 31, at 14 (noting that "current and former CEOs composed nearly half of new appointments to boards of Fortune 500 companies in 2014"); *see also Corp. Guide*, *supra* note 11, at 49 (stating that the 2013 Spencer Stuart Board Index found that those who had previous leadership experience and had held senior positions in companies made up 23% of new appointees to boards in 2013, an increase from 16% in 2012.).

95. Lublin, *supra* note 91.

96. In interviews, many directors specifically mentioned the cliché that men are from Mars and women are from Venus. Broome, Conley & Krawiec, *supra* note 79, at 780.

exhibited by women. Typically, "[t]he ideal leader, like the ideal man, is decisive, assertive, and independent. In contrast, women are expected to be nice, caretaking, and unselfish."[97] The same behaviors that make men seem confident and self-assured make women seem vain or impolite.[98] Compared to their male counterparts, "women who excel in traditionally male domains are viewed as competent but less likable."[99] On the other hand, when women are "conventionally feminine," they gain in likability but lose out on respect, as they appear "too emotional to make tough decisions and too soft to be strong leaders."[100] This has come to be known as a "double bind," in which women must choose between being viewed as likable but ineffective, or capable and unlikable.[101] To ascend to executive positions, women are expected to behave like men:

> Young women today are urged to finish school, find a job, acquire skills, develop seniority, get tenure, make partner, work endless hours, and put children off until the very last minute. When and if they do give birth, they are expected to treat the event like an appendectomy, take a brief time out for recuperation and then resume the truly important business of business.[102]

Because most directors are male, the director voting process is skewed towards choosing new members who adhere to a similar leadership

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97. Herminia Ibarra et al., *Women Rising: The Unseen Barriers*, HARV. BUS. REV., Sept. 2013, at 65. A Columbia Business School study showed the impact of gender on likability by capturing students' opinions through a case study involving a venture capitalist. Students' reactions differed based only on whether the venture capitalist was named "Howard" or "Heidi": "Howard was described as likeable and Heidi was seen as selfish and 'not the type of person you would want to hire or work for.'" *How to Be a Workplace MVP*, *supra* note 68.

98. *See How to Be a Workplace MVP*, *supra* note 68.

99. *Id*. One male director made this observation about a female director who was no longer at the company: "[s]he was exceedingly competent and assertive and asked a lot of questions and pressed a lot of issues and I think some people got uncomfortable. I don't know whether they got uncomfortable with her because of the issues she was raising or because she was raising issues and was a woman . . . but she wasn't around very long." Broome, Conley & Krawiec, *supra* note 79, at 785.

100. Ibarra et al., *supra* note 97.

101. CATALYST, THE DOUBLE BIND DILEMMA FOR WOMEN IN LEADERSHIP: DAMNED IF YOU DO, DOOMED IF YOU DON'T (2007), http://www.catalyst.org/knowledge/double-bind [https://perma.cc/RET5-9A8Z].

102. ANN CRITTENDEN, THE PRICE OF MOTHERHOOD 29 (10th ed. 2002).

archetype.[103] In the GAO study, many stakeholders disclosed how boards of directors want to "maintain a certain level of comfort in the boardroom" by picking new directors who "fit in."[104] While half of the appointments are made based on executive recruiters' efforts, there is a strong reliance on personal connections for the remainder of appointments.[105] The director nomination process has traditionally been "insular," and consequentially, a networking game.[106]

Sheryl Sandberg, the COO of Facebook, has said, "The gender stereotypes introduced in childhood are reinforced throughout our lives and become self-fulfilling prophecies. Most leadership positions are held by men, so women don't *expect* to achieve them, and that becomes one of the reasons they don't."[107] Social scientists call this phenomenon the "stereotype threat": being aware of a negative stereotype makes it more likely for an individual in that group to be negatively affected by it.[108] The stereotype threat is a contributing factor in discouraging women from rising to executive ranks and from entering technical fields, such as computer science.[109] Many, including Sandberg, have

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103. *Id.* at 31; Berman, *supra* note 71 ("Some will say that women often don't fit the typical image of a leader, putting them at a disadvantage when it comes to decisions about promotions and pay. 'Typically the prototype of the leader is a white male,' said Ragins, the University of Wisconsin professor. 'So when we think about who is going to be the next CEO of the company, the image that comes to mind is often that of a white heterosexual male.'").

104. *GAO Report*, *supra* note 31, at 13; *see also* Broome, Conley & Krawiec, *supra* note 79, at 785 ("[An African-American male director of a national company] described his board colleagues—bluntly—as 'all in these gated communities . . . comfortable talking with people who are just like they are.' The night before the meeting 'they go out to dinner with each other' and do not invite him.").

105. *See GAO Report*, *supra* note 31, at 13.

106. *See* RUSSELL REYNOLDS ASSOCIATES, DIFFERENT IS BETTER—WHY DIVERSITY MATTERS IN THE BOARDROOM 1 (2009), http://www.russellreynolds.com/insights/thought-leadership/Documents/different-is-better_0.pdf [https://perma.cc/U9VL-UY7H].

107. SANDBERG, *supra* note 1, at 22.

108. *Stereotype Threat Widens Achievement Gap*, AMERICAN PSYCHOLOGICAL ASSOCIATION (July 15, 2006), http://www.apa.org/research/action/stereotype.aspx [https://perma.cc/9MPD-V9WY].

109. CATHERINE HILL ET AL., WHY SO FEW? WOMEN IN SCIENCE, TECHNOLOGY, ENGINEERING AND MATHEMATICS (2010), http://www.aauw.org/files/2013/02/Why-So-Few-Women-in-Science-Technology-Engineering-and-Mathematics.pdf [http://perma.cc/3446-E7B8]; *see also supra* Section I.B (discussing figures of women graduating with STEM degrees).

pointed to the fact that women are troubled with self-doubt more often than men, which hinders their success.[110]

3. Inflexibility of the Workplace to Meet the Demands of Motherhood

The workplace is simply out of sync with family life.[111] Family and work priorities clash fiercely, and the United States lags behind other nations when it comes to arranging flexible work opportunities for women.[112] During the same years that women's careers demand the greatest time investment, their biological clocks tick with the pressure to have children.[113] Although women are getting married and having children at a later age, they still have an internal biological clock dictating the ideal time to have children, should they choose to do so.[114]

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110. *See generally* SANDBERG, *supra* note 1. Warren Buffett, in an interview with The Levo, has stated,

> I've seen very, very bright women. I use the example of Katherine Graham, who was outstanding. While she was CEO of the Washington Post the stock went up 40 for 1, she won a Pulitzer Prize, but she had been told by her mother, she'd been told by her husband, she'd been told by lots of people that women weren't as good as men in business. It was nonsense. I kept telling her, "Quit looking in that fun house mirror. You know, here's a real mirror. You're something." And as smart as she was, as high grade as she was, you know, as famous as she became, right to her dying day she had that little voice inside her that kept repeating what her mother told her a long time ago.

Caroline Wright, *Warren Buffett's Advice to YoPro Millennial Women*, YAHOO! FIN. (May 9, 2013), http://finance.yahoo.com/news/warren-buffett-advice-yopro-millennial-124938241.html [http://perma.cc/6Z37-BDRT].

111. *See, e.g.*, CRITTENDEN, *supra* note 102, at 30-32. *See generally* JULIA WARTENBERG, THE IMPLICATIONS OF THE WORK-LIFE CONFLICT IN THE UNITED STATES (2011), https://www.coc.org/files/Briefing%20Paper%207%20Work%20Life%20Conflict.pdf [https://perma.cc/G8P2-D95Q]; JOAN C. WILLIAMS & HEATHER BOUSHEY, THE THREE FACES OF WORK-FAMILY CONFLICT (2010), https://cdn.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf [https://perma.cc/MK42-UUFY].

112. CRITTENDEN, *supra* note 102, at 36.

113. *See id.* at 30-31.

114. Technically, the "optimal" age to have children according to John Mirowsky, sociologist at University of Texas, is between 21.8 and 39.5 years. *See generally* John

Women who choose to have children face the challenge of balancing their home and work lives. Since partners do not typically share equally in the housework and child rearing, women are essentially left with two full-time jobs, and the workplace has not evolved to give women with children the flexibility they need to fulfill their responsibilities. The government is an apt illustration of an establishment that strengthens the traditional gendered division of labor, as evidenced by its imbalanced offering of civil and fiscal protections to the sexes.[115] This traditional concept is also evident in the educational realm; the fact that school days end in the middle of the afternoon and have summer breaks is based on the presumption that the caretaker does not have a full-time job and can take care of the children.[116]

The impediments women face in their climb to higher ranks concerns Felice N. Schwartz, the founder and president of Catalyst.[117] She argues that "women are different from men—they have babies—and because of biology, tradition, and socialization, many might want to reduce their work pace for a time to raise their children. This made women more expensive to hire than men . . . because some will need flexibility and a temporarily slower career path."[118] Offering this flexibility, however, works to the employer's advantage because there is a greater sacrifice in losing capable women than there is in accommodating them.[119]

Despite setbacks in the workplace today, women have come a long way from where they started. The first group of women to receive higher education graduated in the early 1900s.[120] At first, these women had to choose between their career and their families and if they wanted

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Mirowsky, *Parenthood and Health: The Pivotal and Optimal Age at First Birth*, 81 SOC. FORCES 315, 341 (2002).

115. CRITTENDEN, *supra* note 102, at 6.

116. Rebecca Traister, *The Single American Woman*, N.Y. MAG. (Feb. 22, 2016), http://nymag.com/thecut/2016/02/political-power-single-women-c-v-r.html [https://perma.cc/8JAU-ZT9W].

117. CRITTENDEN, *supra* note 102, at 30-33.

118. *Id.* at 30-31.

119. *Id.* at 31 ("She assumed that only women might want a non-career dominant period in their lives and that only mothers are more costlier to hire, overlooking the factors, including excessive competitiveness, that make some men expensive propositions as well.").

120. *Id.* at 33.

a career, they had to completely abandon their home lives.[121] Later, even if women went to work, it was either before or after they had children, and their options were limited to teaching, nursing or secretarial work—the few fields open to women.[122] The college-educated baby boomers were the next group of female graduates and the first women to try to have both a family and a career.[123] These women chased their career aspirations and deferred having children for as long as they could.[124]

Female graduates today are the first to start their careers "at near parity with men,"[125] yet they recognize that receiving similar prospects

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121. *Id.*

122. *Id*. Warren Buffett, in an interview with the Levo League, stated,

> I was born in 1930, I had an older sister Doris, a few years older; a younger sister Bertie, a few years younger. Absolutely as smart as I am—probably a little smarter—and much more personable. They got along better in the world and all of that.
>
> My parents—our parents—loved us all equally, they never told my sisters "you can't do this" or "you can't do that"—verbally—but every message they got from society, from their teachers in every way was that their job was to marry well and that if they insisted on working that they could be a secretary, or a nurse or a teacher.
>
> And essentially they were telling me, again silently in many ways, that the sky was the limit. So we would go to school, we would get similar grades, they had everything going for them—except that they were women.
>
> Society just said if you want to be a teacher, fine. If you want to be a nurse, fine. If you want to be a secretary, fine. But forget everything else. So, I have seen that change in my lifetime, although change was slow…It has changed a lot for the better. There's still important ways to go.

Wright, *supra* note 110.

123. CRITTENDEN, *supra* note 102, at 33.

124. *Id.*

125. *See On Pay Gap, Millennial Women Near Parity–For Now*, PEW RES. CTR. (Dec. 11, 2013), http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now/ [https://perma.cc/R66R-PSET] [hereinafter *Pew Study*] (stating that the millennial generation of young women are "better educated than their mothers and grandmothers had been . . . [b]ut when they look ahead they see

as men does not level the playing field in terms of their professional success.[126] Women spend a great deal of time and money preparing for careers despite the uncertainty surrounding their professional aspirations once they have children.[127] They are aware of the reality that mothers are often at a disadvantage,[128] and are more inclined to find that men are favored in society,[129] and that not enough has been done to advance workplace equality.[130] Women's sidelining in their professions is often excused as "something women 'choose' or as part of life's inevitable compromises."[131]

Part of the problem in the workplace is the fact that raising children in America is hardly measured as work.[132] In the modern economy, two-thirds of all wealth is created by human skills and creativity, which means that parents who are rearing children are major wealth producers in our economy.[133] Ann Crittenden, author of *The Price of Motherhood*, has stated that since individual skills are the necessary source of financial growth, caregivers have "the most important job in the world" as it is their job to nurture those skills from a young age.[134] However, economists consider the time required to raise children[135] as "periods of non-participation in the workforce," during which an individual's professional skills and economic usefulness decrease in value.[136]

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roadblocks to their success . . . [and] think it's easier for men to get top executive jobs than it is for women").

126. SANDBERG, *supra* note 1, at 15.

127. CRITTENDEN, *supra* note 102, at 35.

128. 71% of working women without children and 56% of working women with children have the perception that becoming a mother prejudices their professional goals. Interestingly, only 30% of working mothers said motherhood has actually negatively affected their careers, although after having their first child, some mothers did reduce their work hours. Jenna Goudreau, *ForbesWoman and TheBump.com Survey Results*, FORBES (Mar. 2, 2010), http://www.forbes.com/2010/03/01/family-career-working-mother-forbes-woman-time-survey.html [https://perma.cc/JSW3-SYRM].

129. 53% of women vs 36% of men. *Pew Study*, *supra* note 125.

130. 72% of women vs 61% of men. *Id.*

131. *See* CRITTENDEN, *supra* note 102, at 44.

132. *Id.* at. 11.

133. *Id.* at 8 ("Unpaid female caregiving is not only the life blood of families, it is the very heart of the economy.").

134. *Id.* at 11.

135. *Id*. at 4.

136. Crittenden notes that "the only things that atrophy when a woman has children are her income and her leisure." *Id*.

Individuals who undertake the role of nurturer are discouraged and even punished for performing the job that is critical to human advancement. This creates a contradiction wherein the importance of family and raising children is emphasized, but the work it takes to make a family is overlooked.[137] Parents who choose to spend any meaningful amount of time with their children suffer a substantial economic cost.[138] In reality, one parent has to sacrifice advancing his or her career to take care of the children, and it is typically the mother.[139] Women fall behind men in their career paths as they are often forced to scale back and drop out of the workforce or lose networking prospects and other opportunities[140]: "[u]nfortunately, women's efforts to manage the incongruity between organizational practice and their multiple roles is seen as evidence that they are not serious about their careers and not that organizations have failed to adapt to their needs."[141] As a result, organizations and mentors focus their efforts on men, who are perceived as more secure investments.[142]

Stay-at-home mothers make it possible for their male spouses to advance in their careers and attain senior positions in the workplace. According to a Harvard Business School study, only 10% of women have a partner who does not work full-time compared to 60% of men.[143]

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137. "[G]overnment social policies don't even define unpaid care of family dependents as work. A family's primary caregiver is not considered a full productive citizen, eligible in her own right for the major social insurance programs. Nannies earn social security credits; mothers at home do not." *Id*. at 6.

138. *Id*.

139. Mothers also are more likely to experience family-related career disruptions: 39% of mothers report having to take a significant amount of time off from work to care for a child or family member compared to 24% of working fathers; 59% of millennial women (18 to 32 year olds) think that it is more difficult to progress in one's career when one is a working parent, compared to 19% of millennial men. *Pew Study*, *supra* note 125.

140. Not all those in the Pew Study in 2012 who reduced working hours to take care of family saw an impact on their career, but among those who did, 35% of women said it hurt their careers compared to 17% of men. *Id.*

141. Gelaye Debebe, *Creating a Safe Environment for Women's Leadership Transformation*, 35 J. MGMT. EDUC. 679, 682 (2011) (citing Vinnicombe & Singh, *Women-only Management Training: An Essential Part of Women's Leadership Development*, 3 J. CHANGE MGMT 294 (2003)).

142. SANDBERG, *supra* note 1, at 14.

143. Boris Groysberg & Robin Abrahams, *Manage Your Work, Manage Your Life*, HARV. BUS. REV., Mar. 2014, at 65. Another study found that over half (55%) of male

A Pew Research survey found that 51% of mothers with young children (under the age of eighteen) compared to only 16% of fathers opined that working and parenting has made career advancement more difficult for them.[144]

Women in the workforce are not necessarily employed in the professions or at the salaries commensurate with their education and training.[145] A Harvard Business School study in 2014 found that even the most highly educated married women were not meeting their economic or professional goals.[146] Even though they had comparable ambition and education as their male spouses, they prioritized their husbands' careers.[147] The overwhelming consensus among Generation X Harvard Business School graduates is that men expect their own careers to take the utmost priority while women find that their spouses' careers often take precedence over their own.[148]

Recently, stay-at-home fathers have helped their female spouses advance in their careers. In many instances where women have achieved high ranks in a corporation, their husbands have sacrificed their own careers to care for the children. Leslie Blodgett, founder of the global cosmetic empire Bare Essentials, stated that "[t]o make it to the top, you need a wife."[149] Carly Fiorina's husband retired early from AT&T when

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executives who are married have partners who stay at home, while only 12% of married female business leaders have comparable support from their partners. Caroline Fairchild, *The Rise of Stay at Home Dads? For Female Execs, Not So Much*, FORTUNE: MOST POWERFUL WOMEN (Nov. 20, 2014), http://fortune.com/2014/11/20/stay-at-home-dads-female-execs/ [https://perma.cc/VWX8-JQX9].

144. *Pew Study*, *supra* note 125.

145. CRITTENDEN, *supra* note 102, at 28.

146. Robin J. Ely, Pamela Stone & Colleen Ammerman, *Rethink What You Know About High Achieving Women*, HARV. BUS. REV., Dec. 2014, at 101, https://hbr.org/2014/12/rethink-what-you-know-about-high-achieving-women [http://perma.cc/MLB3-ZAJM].

147. *Id*.

148. *Id*.

149. When an executive told Dawn Lepore, the CEO of Drugstore.com from 2004 until its sale to Walgreens, that her job was made easy due to her husband's willingness to stay at home, she remarked, "[N]o, not easy. He makes it possible." Carol Hymowitz, *Behind Every Great Woman*, BLOOMBERG BUSINESSWEEK, (Jan. 5, 2012, 3:53 PM), http://www.bloomberg.com/news/articles/2012-01-04/behind-every-great-woman [http://perma.cc/KX3K-8PFJ].

she was appointed Hewlett-Packard's CEO.[150] Similarly, numerous female executives of other Fortune 500 companies, including Xerox's Ursula Burns, PepsiCo's Indra Nooyi, WellPoint's Angela Braly, and IBM's Ginni Rometty, had husbands who scaled back their careers.[151] At Fortune's Most Powerful Women Summit in 2002, 30% of the 187 participants had stay-at-home spouses.[152] While stay-at-home fathers are no longer unusual, they are not the norm either.[153] The facts indicate that it is difficult for a parent to rise through the ranks to chief executive without having a stay-at-home spouse or outsourcing childcare.[154]

4. Not All Mentoring Is Created Equal

While men advance through mentoring and sponsorship, women do not receive such opportunities in the same capacity.[155] Mentorship is the process by which individuals receive feedback and advice from more knowledgeable colleagues, and sponsorship is when the mentor draws on his or her connections with senior managers to promote the mentee.[156] Though similar, sponsorship is indispensable to rising in the ranks of one's career.[157] Without sponsorship, it is less probable that

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150. *Id.*

151. *Id*.

152. Fairchild, *supra* note 143.

153. This gendered division of labor still resonates with younger generations. A Harvard Business Review study found that over half (66%) of millennial men expect their partners to assume the role as primary caretaker, while 42% of millennial women expect to fill that role. *See* Ben Geier, *Will Millennial Men Keep Their Wives From Career Success?*, FORTUNE: MOST POWERFUL WOMEN (Nov. 18, 2014, 3:36 PM), http://fortune.com/2014/11/18/will-millennial-men-keep-their-wives-from-career-success/ [http://perma.cc/39GQ-7UFY]. In 1988, 19% of men in the U.S. regularly cared for children under age five and that number increased to 32% in 2010. Still, the stereotype against stay-at-home dads is that they are slackers and like to play golf. *See* Hymowitz, *supra* note 149.

154. While it is less common, there are executives with equally driven spouses. *See, e.g.*, Fairchild, *supra* note 143.

155. Susan Colantuono, *The Career Advice You Probably Didn't Get*, TED (Sept. 2014), https://www.ted.com/talks/susan_colantuono_the_career_advice_you_probably_didn_t_get/transcript?language=en [http://perma.cc/228N-ELYX].

156. *See* Ibarra et al., *supra* note 97.

157. *See* Kathy Caprino, *The Top 6 Communication Challenges Professional Women Face*, FORBES (Dec. 6, 2012), http://www.forbes.com/sites/kathycaprino/2012/

women will seek out or be selected for leading roles.[158] Surveys and interviews conducted by the Harvard Business Review have suggested that women who are skilled and ambitious are "overmentored and undersponsored."[159] Men have an easier time obtaining sponsors who will encourage their advancement.[160] Even when women do find mentors, the advancement opportunities that these relationships lead to are fewer than those acquired by men through their mentors.[161] Women are also typically mentored by junior staff, which slows their rate of advancement.[162]

Unexamined mindsets about how men and women interact in the workforce impacts the advice women are given from mentors and sponsors on their way to the top. Mentors struggle to determine what type of advice is useful for women in a landscape that favors masculine characteristics. As one participant from a Harvard study explains, "[E]ven well-intended mentors have trouble helping women navigate the fine line between being 'not aggressive enough' or 'lacking in presence' and being 'too aggressive' or 'too controlling.'"[163] On the one hand, men have mentors who have helped them come to power in new positions, strategize prospective moves, and have publicly supported their authority.[164] Contrastingly, women's narratives reveal "how mentoring relationships have helped them understand themselves, their preferred styles of operating, and ways they might need to change as they move up the leadership pipeline."[165]

12/06/the-top-6-communication-challenges-professional-women-face/2/#27f6ca373c35 [http://perma.cc/98CQ-YYUV].

158. *See* Ibarra et al., *supra* note 97; *see also* Shane Ferro, *It Takes Just 2 Years Before Corporate America Drains Women of Their Ambition*, BUSINESS INSIDER (May 18, 2015), http://www.businessinsider.com/women-and-ambition-a-corporate-story-2015-5 [http://perma.cc/PT7H-V4BN].

159. *See* Ibarra et al., *supra* note 97.

160. *See* Caprino, *supra* note 157.

161. *See* Ibarra et al., *supra* note 97.

162. *See id.*

163. *See id.* To illustrate this point, consider a male executive who proudly mentored both a man and a woman. Commenting on his role, he said, "I helped the woman build confidence, I helped the man learn the business and I didn't realize that I was treating them any differently." *See* Colantuono, *supra* note 155.

164. *See* Ibarra et al., *supra* note 97.

165. *See id*.

After a couple of years in the workforce, men's assurances and desires remain unchanged, while women's sink radically.[166] By the mid-point of their careers, women do not feel that their superiors support their ambitions, while men feel otherwise.[167] Once women receive feedback indicating that they do not seem to possess the desired characteristics for promotion, they tone down their aspirations.[168] A survey published in the Harvard Business Review also discovered a lack of recognition on the part of male directors regarding the biases faced by female directors.[169] While the women felt like outsiders, the men were unaware that women felt this way.[170] The fact that men and women generally have different interests may contribute to women's symptoms of alienation.[171]

The ability to understand a business in its entirety is crucial to corporate governance, but there is a disconnect between the advice women get from their mentors and the skills that are truly necessary to become a corporate leader.[172] Susan Colantuono, the CEO of Leading Women, explained in her TED talk that leadership could be divided into three categories: "personal greatness," "engaging the greatness in others," and "business, strategic, and financial acumen."[173] These three components are not weighted evenly when it comes to rising in a company.[174] Business, strategic, and financial acumen is twice as important when identifying employees with potential.[175]

To advance from entry-level positions to middle management, women are told to exemplify qualities of personal greatness (by proving themselves to be sharp, diligent, honest, and loyal individuals), and also engage the greatness of others (interact with customers, embolden their

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166. *See* Ferro, *supra* note 158.

167. *See* Julie Coffman & Bill Neuenfeldt, *Everyday Moments of Truth: Frontline Managers Are Key to Women's Career Aspirations*, BAIN & CO. (June 17, 2014), http://www.bain.com/publications/articles/everyday-moments-of-truth.aspx [http://perma.cc/KE6C-ANHT].

168. *See* Ferro, *supra* note 158.

169. *See* Groysberg & Bell, *supra* note 48.

170. *See id.*

171. *See id.*

172. In order to rise to higher levels of management, individuals need a wide range of skills. *PwC Study*, *supra* note 66.

173. *See* Colantuono, *supra* note 155.

174. *See id*.

175. *See id*.

co-workers, negotiate successfully, handle conflicts, and communicate effectively).[176] However, the above guidance lacks any mention of business, strategic, and financial acumen, which is necessary to advance from middle management positions to higher levels of governance.

5. Identified Patterns

Even when women serve on boards, their power is often minimal and certain patterns have been identified, including a lack of critical mass, the groupthink phenomenon, and the trophy woman phenomenon.

The theory of critical mass was applied to gender diversity in boardrooms for the first time in 2006 when researchers demonstrated that having three or more women in the boardroom could lead to crucial changes in the workplace.[177] As the percentage of women in a group increases, women can form alliances, increase their visibility, and have a greater impact on board discussions.[178] Debra Walton, chief content officer of Thomson Reuters has acknowledged this as the "'Power of Three': One woman is a token, two are a presence and three are a voice."[179] When there is less than a critical mass of women, it reduces women's effectiveness as leaders because their power is often reduced by the "solo woman phenomenon" or "tokenism," whereby a single member of a minority group is treated as a token and is on the receiving end of excessive criticism and scrutiny.[180] Women in fewer numbers on

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176. *See id*.

177. VICKI W. KRAMER, ALISON M. KONRAD & SUMRU ERKUT, CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE (2006), https://www.wcwonline.org/pdf/CriticalMassExecSummary.pdf [http://perma.cc/Y9WR-3RZ3].

178. *See id*. While boards with at least one woman function better than those composed solely of men, boards with three or more women enjoy particular success. Groden, *supra* note 69.

179. Debra Walton, *Executive Perspective: Investing in Equality, the Potential of Boardroom Diversity*, THOMSON REUTERS: SUSTAINABILITY (Nov. 4, 2014), http://sustainability.thomsonreuters.com/2014/11/04/executive-perspective-investing-equality-potential-boardroom-diversity/ [http://perma.cc/34RH-63DT].

180. See Section I.C.5 for discussion of the trophy woman phenomenon. Women achieve more influence in boardrooms when they reach "critical mass" of three or more of them on a given board. *See* KRAMER, KONRAD & ERKUT, *supra* note 177; *see also* Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for*

boards must deal with visibility, polarization, and assimilation issues, and are scrutinized more closely while frequently feeling isolated.[181]

Groupthink is the "psychological behavior of minimising conflicts and reaching a consensus decision without critically evaluating alternative ideas in a cohesive in-group environment."[182] It involves self-deception and is motivated by the pressure to conform to group attitudes and mores.[183] Groupthink is particularly harmful in boards because it compromises the individual members' ability to voice differing opinions, instead creating a pressurized environment wherein directors are reluctant to defy the norm.[184]

Even when women are appointed to boards, statistics show that their numbers may be inflated due to the trophy phenomenon, under which the same "token" or "trophy" woman is appointed to multiple boards. In the U.S., it is not uncommon to find one woman serving on multiple boards, even up to seven boards at a time.[185] This distorts the statistics, and thus, the true number of distinct women directors must be smaller than that indicated by Catalyst's 19.9% figure.[186] These "token" appointments give the appearance that companies care about gender diversity when in reality they have not made it a priority.[187]

Critics worry that boards with these trophy directors are overextended and therefore unable to deliver appropriate company supervision.[188] It is important to note that women are predominantly associated with trophy director status, while many men are involved

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Meaningful Gender Diversity on Corporate Boards, 11 SEATTLE J. FOR SOC. JUST. 337, 351 (2012).

181. Carlson, *supra* note 180, at 351.

182. Eric YW Leung, *Diversifying the Board–A Step Towards Better Governance*, ACAA GLOBAL (Aug. 17, 2015), http://www.accaglobal.com/in/en/student/exam-support-resources/professional-exams-study-resources/p1/technical-articles/diversifying-the-board—a-step-towards-better-governance.html [https://perma.cc/KA2L-CUHW].

183. *See* James McRitchie, *Groupthink in the Boardroom Context*, CORP. GOVERNANCE (Feb. 2, 2015), http://www.corpgov.net/2015/02/groupthink-boardroom-context/ [http://perma.cc/YS3E-3S77].

184. *Id.*

185. *See* Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 379 (2014).

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

187. *GAO Report*, *supra* note 31, at 14.

188. Rhode & Packel, *supra* note 185, at 382.

with only one or two boards.[189] The number of female trophy directors has grown exponentially, increasing from nineteen in 2001 to eighty in 2006.[190] Governance consultant Bonnie Hill is one such example.[191] She commented on how companies "'like to bring on people who have a track record' [of serving] on other boards."[192] She herself has eleven years of experience holding directorships at Home Depot Inc. and Yum Brand Inc. and has been frequently requested to join an additional Fortune 250 company's board.[193]

Moreover, when boards already have one or two women on board, their appointment of another woman is less likely.[194] The phenomenon was noticeable across small, medium, and large corporations in 2014 with respect to women's board appointments.[195] Of companies that had no women on their boards, 29% added one woman; of companies that had one female, 15% added an additional; and of companies that had two females on their boards, only 6% added another female.[196] This has prevented women from achieving the "critical mass" necessary to influence corporate decisions.

6. Some Boards Do Not Find a Lack of Diversity Problematic

Recent studies show that America's business elite deem the current board makeup acceptable and do not view the lack of gender diversity as a particularly urgent issue.[197] A 2015 study by LeanIn.org and McKinsey & Company noted corporations' somewhat hypocritical

189. *Id.*; *see also* Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 219, 239-240 (2015). According to the GAO study, it is more probable for female board directors to sit on multiple boards compared to male directors. *GAO Report*, *supra* note 31, at 12. 18.9% of women sit on three boards compared to 14.7% of men and 8.9% of women sit on four boards compared to 6.6% of men. *Id.*

190. Trautman, *supra* note 189, at 240.

191. Joann S. Lublin, *This Is Why Corporate Boards Aren't More Diverse*, WALL ST. J. BLOG (Apr. 15, 2014), http://blogs.wsj.com/atwork/2014/04/15/this-is-why-corporate-boards-arent-more-diverse/ [http://perma.cc/X9NZ-E7LJ].

192. *Id.*

193. *Id.*

194. *GAO Report*, *supra* note 31, at 13-14.

195. *Id.*

196. *Id.*

197. Carlson, *supra* note 180, at 357-58.

treatment of the issue of gender diversity in the boardroom, which is an unfortunate situation, given that "the road to equal representation in corporate America lacks backing from those in the best position to build it."[198] According to PricewaterhouseCoopers' ("PwC") 2016 Annual Corporate Directors Survey of 884 public company directors, 41% of male directors labeled gender diversity as a "very important" attribute for their companies' boards, compared to 37% two years ago.[199] Most women said diversity in the boardroom benefits the corporation, while most men did not agree.[200]

The fact that existing boards fail to find diversity important is tied to the lack of women in these positions. Boards made up mostly of men may also be less welcoming to new members, while those with female members are more likely to add new members.[201] This is significant because newer members of boards are more likely to view diversity as a positive attribute.[202] While some organizations have instituted a policy to promote diversity, nearly a third of the 1322 CEOs in a 2014 PwC survey had not.[203] Roughly 64% of CEOs declared that their companies maintain a diversity and inclusiveness strategy, 13% stated that their companies did not have such a policy but did plan to implement one, while 17% of CEOs' companies did not have such a strategy in place nor did they plan on enacting one.[204]

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198. Katy Osborn, *What Corporate Boards Really Think About Diversity*, MONEY (Oct. 6, 2015), http://time.com/money/4061669/corporate-boards-diversity/ [http://perma.cc/34PE-FFKL].

199. PRICEWATERHOUSECOOPERS, THE SWINGING PENDULUM: BOARD GOVERNANCE IN THE AGE OF SHAREHOLDER EMPOWERMENT (2016), http://www.pwc.com/us/en/corporate-governance/annual-corporate-directors-survey/assets/pwc-2016-annual-corporate—directors—survey.pdf [https://perma.cc/P4VP-W796].

200. Just 31% of men thought diversity would enhance corporate operations. Peck, *supra* note 64. *See also* Groden, *supra* note 69 (noting that "[a]ccording to Bloomberg, 63% of female respondents—compared with 35% of men—said that having women on corporate boards was very important").

201. Gupta, *supra* note 2.

202. Groden, *supra* note 69.

203. *PwC Study*, *supra* note 66, at 32.

204. *Id.* In this instance, diversity strategy considers diversity generally, not solely with respect to gender.

D. THE CASE FOR DIVERSITY

The case for diversity can be categorized as either an economic or ethical argument. The economic argument, known as the business case for diversity, holds that boardroom diversity enhances a company's bottom line financial performance.[205] On the other hand, the ethical argument calls for equal opportunity and inclusiveness.[206]

1. Business Case

The business case for diversity argues that diversity leads to better economic outcomes.[207] Studies have shown that corporations with diverse boards enjoy greater profits, as diversity "leads to better decision-making, improved performance of monitoring functions, and stronger market penetration."[208] Studies have also shown that corporations with female board members realize greater benefits in terms of stock value, equity yield, and growth compared to companies where women were nonexistent on boards.[209] Dr. Aaron Dhir, author of *Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity*, has identified several positive outcomes when three or more women are present on boards:

(1) Enhanced dialogue

(2) Better decision-making, including the value of dissent

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205. Carlson, *supra* note 180, at 339.
206. *Id.*
207. *Id* at 341.
208. *Id* at 343. *See also No News Is Bad News: Women's Leadership Still Stalled in Corporate America*, CATALYST (Dec. 14, 2011), http://www.catalyst.org/media/no-news-bad-news-womens-leadership-still-stalled-corporate-america [https://perma.cc/45D9-AVLL].
209. *Corp. Guide*, *supra* note 11, at 84. *See also* MARCUS NOLAND, TYLER MORAN & BARBARA KOTSCHWAR, IS GENDER DIVERSITY PROFITABLE? ANALYSIS FROM A GLOBAL SURVEY (2016), https://piie.com/publications/wp/wp16-3.pdf [http://perma.cc/ZN6X-H9G8]; *PwC Study*, *supra* note 66, at 28; Daniel Victor, *Women in Company Leadership Tied to Stronger Profits*, N.Y. TIMES (Feb. 9, 2016), http://www.nytimes.com/2016/02/10/business/women-in-company-leadership-tied-to-stronger-profits.html [https://perma.cc/SL5T-RHH5].

(3) More effective risk mitigation and crisis management, and a better balance between risk-welcoming and risk-aversion behavior

(4) Higher quality monitoring of and guidance to management

(5) Positive changes to the boardroom environment and culture

(6) More orderly and systematic board work

(7) Positive changes in the behavior of men.[210]

Thus, the benefits of board diversity translate directly to improved corporate performance.

For companies to succeed, their boards should have market reciprocity, i.e., they should be a reflection of their customer base.[211] Women account for well over 70% of the purchasing power in the household and $20 trillion of global purchases.[212] Currently, only 16% of directors have the impression that their boards grasp the undercurrents of the industries in which their corporations operate.[213] If the percentage of female directors were more proportionate to the percentage of female employees and the female customer base, companies would develop a better understanding of the marketplace, which could increase corporate profits.[214] Therefore, obtaining the female perspective is consistent with directors' fiduciary duties to enhance the companies' value for their shareholders.

Investors have also expressed concern over boardrooms satiated with directors who have been around for a long time, as their ties to the company may make them less disposed to defy senior directors.[215]

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210. Aimee Hansen, *Overdue Change? How Women Impact on Boardroom Dynamics and Why Boards Need It*, THE GLASSHAMMER (Apr. 16, 2015), http://theglasshammer.com/2015/04/16/overdue-change-how-women-impact-on-boardroom-dynamics-and-why-boards-need-it/ [http://perma.cc/72PE-9JZJ].

211. Deborah Gills, the President of Catalyst, stated that "[t]o serve the market, you need to look like the market and secondly . . . advancing any business in any industry requires the full talent that's available in the marketplace." Berman, *supra* note 71.

212. *Id.*

213. Barton & Wiseman, *supra* note 15.

214. Leung, *supra* note 182.

215. Corporations frequently contend that these longstanding board members add value to the corporation as they are familiar with the company, and that independence

Having a diverse board could improve a firm's investor relations, as directors can strengthen ties with investors by making decisions that keep them satisfied with how the company is being run.[216] Boards are now paying more attention to investor recommendations.[217] As PwC's Annual Corporate Directors Survey found, "[i]n some ways, the pendulum has swung from a 'board-centric' model that took root after the governance and accounting scandals of the 1990s to an 'investor-centric' model today."[218]

The business case for having more women on boards has its limitations, as the research does not explain exactly how board heterogeneity may change the corporate setting.[219] Specifically, it is difficult to decipher whether companies with better financial performance have the capacity to add women to their boards, or if women choose to work for more successful companies, or if women positively influence a company's performance.[220] Furthermore, it can be challenging to distinctively identify an individual director's impact on company performance.[221]

2. Moral Argument

Morally, diversity on corporate boards is important since it demonstrates an equal opportunity for both men and women.[222] This

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by itself does not ensure that directors will act in the stakeholders' interests. Francis & Lublin, *supra* note 34.

216. *See* Leung, *supra* note 182.

217. 18% of directors say that they use recommendations from investors, compared to 11% 5 year ago. PRICEWATERHOUSECOOPERS, *supra* note 199, at 1.

218. *Id.*

219. Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 434 (2008) (noting that there needs to be more empirical work to completely understand the precise manner in which diversity on boards influences a corporation's performance).

220. *Id*. at 433-434 (noting that studies of board diversity could also indicate "1) that more successful firms have greater resources to dedicate to the pursuit of board diversity, 2) that more successful firms are under greater public scrutiny and pressure as regards board diversity, or 3) that female and minority directors are scarce commodities who can choose to serve only on the boards of more successful firms").

221. Trautman, *supra* note 189, at 227.

222. Broome, Conley & Krawiec, *supra* note 79, at 763 (stating that "corporate boards should be more diverse because it is the morally concrete outcome").

argument is premised on societal motivations including equal opportunity and acknowledging the disproportionate obstacles that select groups confront.[223] As law professor Barbara Black has stated:

> Given the poor performance of the boards of many leading financial institutions during the recent financial crisis, it is hard to believe that the presence of more women in the boardroom would have a deleterious effect on risk-management oversight . . . . [A] business justification for increased female representation on corporate boards hardly seems necessary . . . . This is an issue of equal opportunity.[224]

Despite the appeal of this argument, it has limited value within the shareholder primacy model of the corporate structure.[225] It can be challenging to implement a diversity policy within a corporation if it has not been sufficiently proven that board diversity positively impacts corporate performance.[226]

Lissa Broome, head of University of North Carolina School of Law's Director Diversity Initiative, and Kimberly Krawiec, Katherine Robinson Everett Professor of Law at Duke University, noted how a diverse corporate board sends a signal to relevant observers of corporate behavior.[227] Signaling is one party conveying to another party information about itself that is important but not immediately apparent.[228] Having a diverse board may enhance the corporate reputation by signaling to shareholders and employees that the company values gender diversity.[229]

Lisa M. Fairfax, co-director of the DirectWomen Board Institute dedicated to promoting board diversity, believes that corporate boards today will progressively react to shareholders' concerns because of the moral argument without needing to defend their actions through market gain alone.[230] Fairfax compared promoting boardroom diversity to

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223. Trautman, *supra* note 189, at 229.
224. Barbara Black, *Stalled: Gender Diversity of Corporate Boards*, 37 U. DAYTON L. REV. 7, 20 (2011).
225. Broome, Conley & Krawiec, *supra* note 79, at 763.
226. *Id.*
227. *See generally* Broome & Krawiec, *supra* note 219.
228. *Id.* at 447-52.
229. *Id.*
230. Trautman, *supra* note 189, at 229.

corporate charitable donations.[231] Boards' decisions to make charitable contributions have been upheld by the courts as such acts promote the corporation's perception in society.[232] Endorsing gender heterogeneity in boardrooms for the company's benefit may likewise boost the corporation's reputation.[233]

Board diversity combines alternate and complementary opinions, experiences, and views for a deeper and more constructive dialogue.[234] Combining different individuals' contributions will likely lead to higher quality decisions based on a broad range of perspectives than decisions made in a groupthink environment.[235] By enabling a varied blend of perspectives, diversity fosters the development of new products and solutions.[236]

Despite the drawbacks typically associated with stereotypical gender differences, the differences in personality may actually benefit certain human relations issues.[237] As one male director stated, "[W]omen

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231. *Id.*; *see also supra* Section I.A.1 (discussing the charitable gift exception).

232. Trautman, *supra* note 189, at 229; *e.g.*, A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (1953). This is an exception to the shareholder primacy role. *See supra* Section I.A.

233. Trautman, *supra* note 189, at 229.

234. Broome, Conley & Krawiec, *supra* note 79, at 778.

235. *Id.* at 779-780. In interviews, directors questioned whether boards would be able to accomplish the agendas important to corporate America without diversity. *Id.* at 779. One director stated that most veteran male directors' experiences involve "an old, classic hierarchy of organization," which is becoming outdated. *Id.*

236. *PwC Study*, *supra* note 66.

237. As Dr. Louann Brizendine explains,

> In the brain centers for language and hearing, for example, women have 11 percent more neurons than men. The principal hub of both emotion and memory formation – the hippocampus – is also larger in the female brain as is the brain circuitry for language and observing emotions in others. . . . The female brain has tremendous unique aptitudes – outstanding verbal agility, the ability to connect deeply in friendship, a nearly psychic capacity to read faces and tone of voice for emotions and states of mind, and the ability to defuse conflict. All of this is hardwired into the brains of women. These are the talents women are born with that many men, frankly, are not. Men are born with other talents, shaped by their own hormonal reality . . .

are a lot better [at] dealing with egos of other people than men are and they're a lot more patient and they're a lot more team oriented," while men are more "competitive and . . . blustery."[238] Increasing women's presence in executive roles will also allow for better role models for other women in the workplace.[239] Successful women help accelerate progress toward gender equality as other women's achievements help motivate women in more junior positions.[240]

II. RECENT EFFORTS TO IMPROVE DIVERSITY

A. STATE LAW INITIATIVES

There are no significant gender diversity obligations imposed by corporate law at the state level. Delaware law, for instance, has no stipulations regarding diversity of board candidates.[241] There have been some state level initiatives of a more voluntary nature, designed to encourage women's representation on boards.[242] Several states, including Massachusetts, Illinois, and California, have recently passed resolutions recommending the appointment of women to boards and setting the minimum number of board positions that must be occupied by women, depending on the board size.[243] For example, the Illinois resolution sets guidelines for the number of women that public corporations should appoint by 2018: boards with fewer than five members should aim to have at least one woman; boards with five to nine members should have at least two women; and boards with nine or

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Caprino, *supra* note 157 (quoting LOUANN BRIZENDINE, THE FEMALE BRAIN 5-8 (2007)).

238. Broome, Conley & Krawiec, *supra* note 79, at 780.

239. A veteran female board member stressed that when she was an employee, the existence of female board members was assuring and gave her a sense of comfort. *Id.* at 793.

240. *Id.* at 762 (noting that some directors were of the opinion that "diverse boards aid in the recruitment, retention, and promotion of women and minorities, particularly with succession issues in senior management").

241. Remus Valsan, *US Bill on Gender Diversity in the Boardroom*, ECCLBLOG (Apr. 22, 2016), http://www.ecclblog.law.ed.ac.uk/2016/04/22/us-bill-on-gender-diversity-in-the-boardroom/ [https://perma.cc/GC8T-A267].

242. Katz & McIntosh, *supra* note 28.

243. *Id.*

more members should have at least three women.[244] Illinois state representative Michelle Mussman has stated, "As our work force becomes more representative of our society, it is very important that corporate leadership follows the same trend."[245] Other states, including Pennsylvania,[246] New York,[247] and Virginia[248] have also joined this movement. New York Representative Carolyn Maloney introduced the Gender Diversity in Corporate Leadership Act in March 2016, which the U.S. Chamber of Commerce endorsed.[249] This requires the Securities and Exchange Commission ("SEC") to release a yearly report on the gender diversity of boards, and further mandates that public companies recount the gender of board members and board candidates in the same fashion that they disclose name, age, and credentials.[250] It further calls for the establishment of an SEC Advisory Group to describe approaches and make suggestions for ways companies can grow the female presence on their boards.[251]

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244. H.R. Res. 439, 99th Gen. Assemb., 1st Sess. (Ill. 2015).

245. Michelle Mussman, *Mussman Passes Resolution for Gender Diversity on Corporate Boards*, CHI. TRIB. (June 10, 2015), http://www.chicagotribune.com/suburbs/arlington-heights/community/chi-ugc-article-mussman-passes-resolution-for-gender-diversit-2015-06-10-story.html [http://perma.cc/5ZSE-HQQQ].

246. *Mayor Nutter Signs Councilwoman Blondell Reynolds Brown's "Women on Corporate Boards" Bill-#130457*, PHILA. CITY COUNCIL (Sept. 25, 2013), http://phlcouncil.com/mayor-nutter-signs-councilwoman-blondell-reynolds-browns-women-on-corporate-boards-bill-130457/ [https://perma.cc/8CWN-GFCD].

247. *Maloney Press Release*, *supra* note 70.

248. A House Resolution encouraging gender diversity in corporate boards was sponsored by a representative from Virginia. H.R. Res. 445, 114th Cong. (2015).

249. *Maloney Press Release*, *supra* note 70; *see also* H.R. 4718, 114th Cong. (2016).

250. *Maloney Press Release*, *supra* note 70.

251. *Id.*

B. FEDERAL LAW

1. SEC Disclosure Law

Prior to 2010, there was a notable absence of laws and regulations that addressed gender diversity.[252] Given the absence of state and federal action on this issue, the SEC took initiative to address the lack of women on boards.[253] Through a release in 2009, the SEC sought input from investors and other market participants about diversity in the boardroom.[254] In response to its proposal, the SEC was flooded with letters, 90% of which endorsed company disclosure relating to boardroom diversity.[255] Given that these letters came from individuals and organizations that represent over $3 trillion in resources, there is a prevailing sentiment that evidence of diversity is a crucial factor for company valuation.[256]

Keeping in mind the public interest and the needs of investors, the SEC adopted a rule that added a disclosure component to the nomination process.[257] The rule was a part of Regulation S-K, which is a set of rules developed by the SEC that sets forth detailed disclosure requirements for various SEC filings used by public companies.[258] Specifically, companies must now disclose whether they consider diversity in the nomination process, how diversity is considered, and how effective they deem their policy.[259] These Proxy Disclosure Enhancements went into

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252. THOMAS LEE HAZEN, DIVERSITY ON CORPORATE BOARDS–LIMITS TO THE BUSINESS RATIONALE AND THE CONNECTION BETWEEN SUPPORTING RATIONALES AND THE APPROPRIATE RESPONSE OF THE LAW 7 (2011).

253. *Id.*

254. Proxy Disclosure and Solicitation Enhancements, Securities Act Release No. 9052, Exchange Act Release No. 60,280, Investment Company Act Release No. 28,817, 74 Fed Reg. 35,076 (proposed July 17, 2009).

255. Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Diversity in the Boardroom Is Important and, Unfortunately, Still Rare (Sept. 16, 2010), https://www.sec.gov/news/speech/2010/spch091610laa.htm [https://perma.cc/JYE2-PWXS].

256. *Id.*

257. 17 C.F.R. § 229.407 (2016).

258. Regulation S-K requires public companies to disclose the specifics of their business operations, including but not limited to a description of their business, their securities, financial information, specifics of management positions, qualifications, salary, the corporate governance structure, etc. *See generally* 17 C.F.R. § 229 (2016).

259. *GAO Report*, *supra* note 31, at 6.

effect on February 28, 2010[260] and "provide investors with important information about companies' financial condition and business practices for making informed investment and voting decisions."[261]

Although the disclosure rule is a step in the right direction, many have questioned the rule's efficacy. Former Chair of the SEC, Mary Jo White, has said that many investors want to learn about the gender diversity of boards and it is debatable whether existing laws are truly providing the requisite information to them.[262]

The primary concern with the law is its inconsistent interpretation. This stems from the SEC's failure to define diversity, and its decision to instead allow companies to define it "in ways that they consider appropriate."[263] Since diversity encompasses different things, a wide range of factors could fall under the umbrella of diversity.[264] A candidate may be considered diverse based on educational background, interests, professional experiences, individual qualities, differences in viewpoint, or based on age, race, gender, and ethnicity.[265] In fact, an analysis of the proxy statements of the S&P 100 companies found that when interpreting diversity, most companies "define diversity with reference to a director's prior experience or other nonidentity-based factors rather than his or her socio-demographic characteristics."[266] More than 80% of the companies considered background and experience as sources of diversity, while only about half defined diversity in terms of gender, race, and ethnicity.[267] In a recent petition to the SEC to

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260. Proxy Disclosure Enhancements, Securities Act Release No. 9089, Exchange Act Release No. 61,175, Investment Company Act Release No. 29,092, 97 SEC Docket 1382 (Dec. 16, 2009).

261. *Id.*

262. Molly Petrilla, *The SEC Wants New Rules for Board Diversity—Here's Why That Matters*, FORTUNE: MOST POWERFUL WOMEN (Jan. 29, 2016, 2:29 PM), http://fortune.com/2016/01/29/sec-rules-board-diversity/ [https://perma.cc/KV6Y-YJKY].

263. Proxy Disclosure Enhancements, Securities Act Release No. 9089, Exchange Act Release No. 61,175, Investment Company Act Release No. 29,092, 97 SEC Docket 1382 (Dec. 16, 2009).

264. *Id.*

265. *Id.*

266. Elizabeth Olson, *New Paper Finds Fuzzy Definitions for Board Diversity*, N.Y. TIMES: DEALBOOK (Oct. 20, 2014), https://dealbook.nytimes.com/2014/10/20/new-paper-finds-fuzzy-definitions-for-board-diversity/ [https://perma.cc/NJZ8-EM3L].

267. *Id.*

improve board nominee disclosure, a group of public fund fiduciaries supervising $1 trillion worth of assets stated that the lack of guidance on how diversity is defined and companies' varying interpretations of the term fail to capture any information in a manner that would be relevant to investors.[268]

The rule does not require companies to disclose diversity statistics and its vagueness allows companies to share very little.[269] Companies can consider diversity in any way that suits them, and they are free to exclude gender altogether from this calculation.[270] Companies can even report that they do not have a diversity policy and still be in compliance with the law.[271] As a result of diversity's ambiguous definition and the fact that the rule is more suggestive than compulsory, the envisioned change has yet to take effect despite the SEC's efforts.

2. Dodd-Frank Act

Congress has emphasized the fact that financial regulators should be spearheading efforts to recruit employees from divergent backgrounds.[272] Specifically, there is a clear instruction in Section 342 of the Dodd-Frank Act for the SEC to launch an Office of Minority and Women Inclusion ("OMWI") that would handle "all matters of the agency relating to diversity in management, employment, and business

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268. ANNE SIMPSON ET AL., PETITION FOR AMENDMENT OF PROXY RULE REGARDING BOARD NOMINEE DISCLOSURE–CHART / MATRIX APPROACH 1 n. 2 (2015), https://www.sec.gov/rules/petitions/2015/petn4-682.pdf [https://perma.cc/5HHH-ZZHV].

269. Mary Jo White, Chair, Sec. & Exch. Comm'n, Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability (June 27, 2016), https://www.sec.gov/news/speech/chair-white-icgn-speech.html [https://perma.cc/LPL2-2ZCH].

270. *Id.*

271. Melissa Blechman, leader of the 30% Club, stated that "the critical part here is the SEC does not define diversity, and companies can simply comply with the rule by saying they don't have a diversity policy." Jena McGregor, *A New Push Begins to Get More Women on Corporate Boards*, L.A. TIMES (Jan. 16, 2016), http://www.latimes.com/business/la-fi-on-leadership-women-boards-20160114-story.html [http://perma.cc/62A7-G92W].

272. Aguilar, *supra* note 255.

activities."[273] This law permits the SEC to take action to increase diversity in the workforce. The statute permits the OMWI to create standards for "assessing diversity policies and practices of regulated entities," "increased participation of minority-owned and women-owned businesses in programs and contracts of the agency," and "equal employment opportunity and racial, gender, and ethnic diversity of workforce and senior management."[274] Even though OMWI's new employs are marginally more diverse than preceding hires, the 2012 to 2015 data exposes the persistent lack of diversity in the workplace.[275]

C. OTHER U.S. EFFORTS

To increase visibility of qualified candidates, organizations have created databases of qualified women ready to be appointed on company boards. Global Board Ready Women is one of the most prominent initiatives, and other projects include Diversity in Boardrooms, Stanford Women on Board Initiative, and WomenCorporateDirectors Foundation.[276] Organizations such as 2020 Women on Boards and

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273. *Id.*; *see also About the Office of Minority and Women Inclusion*, SEC. & EXCH. COMM'N (June 11, 2015), https://www.sec.gov/omwi/about-omwi [http://perma.cc/7LGD-2ZK8].

274. Aguilar, *supra* note 255.

275. NATIONAL CREDIT UNION ADMINISTRATION OFFICE OF MINORITY & WOMEN INCLUSION CONGRESSIONAL REPORT 2015, https://www.ncua.gov/About/leadership/Pages/minority-women-inclusion/documents/2015-omwi-congressional-report.pdf [http://perma.cc/4CXK-93KF].

276. DIVERSITY IN BOARDROOMS, http://www.diversityinboardrooms.com [http://perma.cc/ZXV4-D49M] (last visited Sept. 26, 2016); *Stanford Women on Boards Initiative*, STANFORD GRADUATE SCHOOL OF BUSINESS, https://www.gsb.stanford.edu/alumni/communities/gsb-women/stanford-women-boards-initiative [https://perma.cc/2JTG-JXZ9] (last visited Sept. 26, 2016); WOMEN CORPORATE DIRECTORS FOUND, http://www.womencorporatedirectors.com [http://perma.cc/8GEN-SJB4] (last visited Sept. 26, 2016).

Diversity Inc. publish diversity indexes,[277] while other organizations have created diversity awards to encourage board diversity.[278]

In recent years, investors have initiated their own efforts to improve gender diversity.[279] Investors have zeroed in on corporations' environmental, social, and governance practices ("ESG") as "corporate investment in ESG enhances a company's performance and reputation, fosters revenue growth, and represents an avenue for shareholder engagement."[280] Since gender diversity plays a crucial part in ESG practices, investors have begun to prioritize it accordingly.[281] One example of such efforts is the Thirty Percent Coalition founded in 2011, which aims to have women represent 30% of U.S. public companies' boards.[282] As a result of its efforts, a female director has been elected at over 100 companies that were previously governed by all-male boards.[283] Another investor-led effort is State Street Global Advisors, which manages an exchange-traded fund that invests in U.S. companies with the highest levels of gender diversity in their sectors.[284]

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277. *Boardroom Diversity: When Women Lead*, 2020 WOMEN ON BOARDS, https://www.2020wob.com/companies/2020-gender-diversity-index [http://perma.cc/F75L-X8N3] (last visited Sept. 26, 2016); *The 2016 DiversityINC Top 50 Companies for Diversity*, DIVERSITY INC., http://www.diversityinc.com/the-diversityinc-top-50-companies-for-diversity-2016/ [http://perma.cc/PL4E-HHED] (last visited Sept. 26, 2016).

278. *See, e.g.*, *Catalyst Award*, CATALYST, http://www.catalyst.org/catalyst-award [https://perma.cc/TW28-DUG3] (last visited Sept. 26, 2016).

279. *See, e.g.*, 21ST CENTURY ENGAGEMENT: INVESTOR STRATEGIES FOR INCORPORATING ESG CONSIDERATIONS INTO CORPORATE INTERACTIONS, BLACKROCK (2015), https://www.blackrock.com/corporate/en-us/literature/publication/blk-ceres-engagementguide2015.pdf [https://perma.cc/S66D-XKSG].

280. Katz & McIntosh, *supra* note 28.

281. *Id*.

282. The Coalition is comprised of private equity, public companies, institutional investors, professional service firms, national women's organizations, and government officials. *Who We Are*, THIRTY PERCENT COALITION, http://www.30percentcoalition.org/who-we-are [https://perma.cc/R63Q-A8CA] (last visited Sept. 26, 2016).

283. *Id*.

284. The fund is called the SPDR SSGA Gender Diversity Index ETF, and it trades with the ticker symbol SHE. *SHE*, ETF.COM, http://www.etf.com/SHE [https://perma.cc/VKL4-XJDN] (last visited Sept. 26, 2016).

D. Global Approach

Countries around the world have taken measures to address gender diversity in corporate boardrooms. Some have taken a strong approach by enforcing mandatory quotas. Norway requires at least 40% of board seats to be allocated for women depending on the size of the board, Italy has a 33% quota, Malaysia instituted a 30% quota for new appointments, and Israel and India require at least one woman on the board.[285] Other countries have taken more voluntary approaches, including setting goals for women's representation, which typically fall between 20% and 40%.[286]

III. Ways to Increase Women on Boards

Women's low representation on boards is a multifaceted problem that requires a multifaceted solution. In addition to supporting initiatives already underway, board diversity could be encouraged through proxy access and amendments of disclosure laws. Furthermore, women should be encouraged to be proactive about their careers, but companies should still play their part to enable women's success.

A. Shareholder Proxy Access Rules

Shareholder voting allows shareholders to remedy mistakes by the board of directors through the nomination and election of new candidates for the board. However, direct shareholder voting in the context of the modern corporation would be complex and inefficient due to the number of shareholders and geographically dispersed ownership. The proxy process, whereby shareholders sign a proxy card, which authorizes an aggregating intermediary to vote the stakeholders' shares in favor of a particular director (or for some other corporate action), is a way to simplify the process. Proxy access, i.e., the ability of shareholders to include director nominees in the company's proxy material, is a way for shareholders to nominate or recommend specific

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285. *See* LINDA-ELING LEE ET AL., WOMEN ON BOARDS: GLOBAL TRENDS IN GENDER DIVERSITY ON CORPORATE BOARDS 24 (2015), https://www.msci.com/documents/10199/04b6f646-d638-4878-9c61-4eb91748a82b [https://perma.cc/7XWU-3A9P].

286. Katz & McIntosh, *supra* note 28, at 3.

candidates for directorship roles.[287] The proxy process, in essence, is one of the primary ways by which shareholders are able to participate in corporate governance and company meetings without a physical presence.[288]

The proxy process, however, has had the opposite effect of its intended purpose as, in practice, it weakens shareholders' ability to nominate and elect directors by rendering it increasingly more difficult to unseat incumbent directors.[289] Although in theory shareholders have the right to nominate directors, their approval is mostly seen as a "rubber stamp process of affirmation," given the tremendous costs and administrative burdens associated with the initiation of a challenge through proxy.[290]

The SEC's Rule 14a-8 is the mechanism that protects shareholders' rights to vote in director elections by allowing their proposal to be placed beside management's proposals in the proxy materials of a corporation.[291] While the rule used to permit the exclusion of shareholders' director proposals, the SEC amended the rule in 2012; a company can no longer exclude a proposal purely because it relates to the nomination or election of directors.[292] Under the amended rule, companies can still exclude shareholder proposals for director elections

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287. COUNCIL OF INSTITUTIONAL INV'RS, PROXY ACCESS: BEST PRACTICES 2 (2015), http://www.cii.org/files/publications/misc/08_05_15_Best%20Practices%20-%20Proxy%20Access.pdf [https://perma.cc/Y8EY-U2LC].

288. *See* Facilitating Shareholder Director Nominations, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 Fed. Reg. 56,668 (Sept. 16, 2010).

289. E-mail from James McRitchie, Publisher, CorpGov.net, to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (Aug. 17, 2009), https://www.sec.gov/comments/s7-10-09/s71009-307.pdf [https://perma.cc/S4RQ-458T].

290. *Id*.

291. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39,093, Investment Company Act Release No. 22,828, 62 Fed. Reg. 50,682 (proposed Sept. 26, 1997).

292. William P. Mills, III & Braden K. McCurrach, *United States: Recent Amendments to Rule 14a-8 and the Implications for the 2012*, MONDAQ (Oct. 4, 2011), http://www.mondaq.com/unitedstates/x/147604/Securities/Recent+Amendments+To+Rule+14a8+And+The+Implications+For+The+2012 [https://perma.cc/MUF7-8C3W]; *see e.g.*, 17 C.F.R. § 240.14a-8(i)-(v) (2016) (listing the five reasons companies may exclude shareholder proposals).

under certain specified scenarios (e.g., if the proposal would remove a director prior to the expiration of his term).[293]

Shareholders should use proxy access to increase boardroom diversity. In particular, shareholders should propose an amendment of the company's bylaws pursuant to Rule 14a-8 to require the board of directors and other relevant stakeholders to consider gender diversity in the recruitment of senior management and director nominees.

In 2013, the New York City comptroller, Scott Stringer, as investment adviser to the New York City Pension Funds retirement system, launched the Boardroom Accountability Project. The purpose of the program was to establish a "more diverse, independent and accountable" board of directors at U.S. public companies through proxy access.[294] His leading action involved submitting proxy access shareowner proposals to seventy-five companies in 2015.[295] One such proposal filed with C.F. Industries Holdings Inc. asked the board of directors to broaden its recruitment efforts to include women and minorities, and to notify the shareholders of any attempts to increase diversity.[296] Additionally, BlackRock Inc. revised its guidelines to resist the reappointment of board members who paid "insufficient attention to board diversity."[297] As of 2015, over 100 U.S. companies have

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293. Companies do not need to include the shareholders proxy proposal however, if it violates a substantive or procedural component of the rule. 17 C.F.R. § 240.14a-8(i) (2016); DAVID M. LYNN & ANNA T. PINEDO, FREQUENTLY ASKED QUESTIONS ABOUT SHAREHOLDER PROPOSALS AND PROXY ACCESS 1 (2015), http://media.mofo.com/files/Uploads/Images/Frequently-Asked-Questions-about-Shareholder-Proposals-and-Proxy-Access.pdf [http://perma.cc/2RL9-PCSS]. If a component of the rule is violated, the company is required to notify the SEC, typically by asking for a "no-action letter." LYNN & PINEDO, *supra*, at 1.

294. OFFICE OF THE N.Y.C. COMPTROLLER SCOTT M. STRINGER, NEW YORK CITY PENSION FUNDS: 2015 SHAREOWNER INITIATIVES POSTSEASON REPORT 4 (2015), http://comptroller.nyc.gov/wp-content/uploads/documents/NYCRS_Shareowner_Initiatives_-_2015_Postseason_Report.pdf [http://perma.cc/82KT-3PAQ].

295. *Id.*

296. SIMPSON ET AL., *supra* note 268.

297. Michelle Edkins, BlackRock's global head of corporate governance and responsible investment, remarked, "Our updates to the U.S. guidelines reflect our engagements with companies over the past couple of years and our evolving expectations of public company boards and directors." Joann Lublin, *BlackRock Toughens Stance on Boards*, WALL ST. J. (Mar. 3, 2015), http://www.wsj.com/articles/blackrock-to-take-tougher-stance-on-u-s-corporate-directors-1425414807 [http://perma.cc/6MLS-FQME].

supported proxy access bylaws that are in line with the NYC Funds' conditions.[298]

B. Self-help for Women

For the first time in the history of the U.S., the number of single women is higher than that of married women.[299] The rise of independent women marks the start of a new kind of identity for the American woman. History serves as a reminder that the driving force behind significant milestones for women's rights are, in fact, women.[300] In the nineteenth century, single women, including Susan B. Anthony, Jane Addams, Alice Paul, and Elizabeth Blackwell led the fight for suffrage and abolition, were leaders in the field of medicine, and founded women's colleges.[301] Women in the late twentieth century led the sexual revolution and women's rights movements, resulting in positive legal and social changes for women.[302] The rise of single women has changed the shape of families, and women's participation in the workforce means that legislation must adapt to this change to address the realities of modern life. Single women rightfully demand equal pay, family leave, increased minimum wage, universal pre-K, reduced college costs, reasonable healthcare costs, and reproductive freedom.[303] A set of strategies that would permit women to devote time to both their careers and their families would help women attain senior positions[304] and compete on an equal footing with men. To enable a company to flourish, companies must relinquish the economic and social systems that encourage stereotypical categorization of males and females alike. However, the extent to which women will have an impact depends on women recognizing that they have political power and stepping up to exercise it and call for change.

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298. Office of the N.Y.C. Comptroller Scott M. Stringer, *supra* note 294.

299. This can be attributed to the "disestablishment of marriage," which women today are widely embracing. In 2009, less than 50% of women were married. *See generally* Traister, *supra* note 116.

300. *Id*.

301. *See id*.

302. *Id*.

303. *See generally id.*

304. Victor, *supra* note 209.

Aspiring women must be outspoken and understand the steps necessary to achieve their goals. In order to close the gender gap at the top, women need to eliminate the internal barriers that exist within themselves by "leaning in," in the words of Sheryl Sandberg, and creating careers that soar.[305] Women must focus on expanding and proving their abilities, their grasp of the industries, and their roles in reaching these goals, i.e., their "positional purpose."[306]

C. Company Efforts

Although women need to be reminded to reach for the top and remove internal barriers, this does not take the onus off of companies. Women can only get to the top when institutional barriers are removed. As Colantuono has stated:

> [W]e don't want to put 100 percent of the responsibility on women's shoulders, nor would it be wise to do so, and here's why: In order for companies to achieve their strategic financial goals, executives understand that they have to have everyone pulling in the same direction. In other words, the term we use in business is we have to have strategic alignment.[307]

Despite the fact that executives are familiar with this concept, 63% of companies lack it, which in turn means that these organizations are not guaranteed to hit their financial targets.[308] Businesses, therefore, should take steps and develop initiatives to support gender diversity. By moving more women into high visibility roles, women will also have greater access to mentors and sponsors throughout their careers.[309]

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305. *See generally* SANDBERG, *supra* note 1.

306. Colantuono, *supra* note 155; Susan L. Colantuono, *There Are 3 Keys to Career Success–But Women Are Only Taught 2 of Them*, MOTTO (Feb. 4, 2016), http://motto.time.com/4167912/career-advice-women/ [https://perma.cc/6ZMY-ZEWL].

307. Colantuono, *supra* note 155.

308. *Id.*

309. For example, L'Oréal is one such organization that has a suite of programs aimed at boosting women's progress. The company hosts an annual retreat for females and also has a grant program focused on women in science. *See L'Oréal USA for Women in Science*, L'ORÉAL USA, http://www.lorealusa.com/csr-commitments/the-l%E2%80%99or%C3%A9al-corporate-foundation/science/l%E2%80%99or%C3%A9al-usa-for-women-in-science-program [https://perma.cc/D52G-J8NC] (last visited Mar. 6, 2017); Kate Dingwall, *L'Oréal, P&G Voted Top Work Place for Women*, FASHION

Companies should develop formalized recruiting efforts and ensure they have nominating committees filled with a majority of outside directors.[310] More outreach should be encouraged in recruiting efforts, and companies should expand their search beyond the standard pool of candidates. In an effort to "dispel the myth that the underrepresentation of women on corporate boards is a supply problem," Catalyst is generating a catalog of female candidates who are prepared to be board members and already have the CEO stamp of approval.[311] Nominating committees should take advantage of databases—developed by organizations such as Catalyst— of board-qualified female candidates.

Companies should create a culture of inclusion, which welcomes, values, and leverages the benefits of diversity, thereby enabling women to grow. This can be accomplished through organizing seminars, keynotes, speakers, or panels on the barriers women face, and spreading awareness of the underlying cultural factors that are impediments to women's success in the workplace. Such programs can signal to employees that gender diversity is an important policy on the company's agenda. It is imperative that companies engage all employees, male and female, in their inclusion initiatives. To date, diversity programs are commonly absorbed with emboldening the minority crowd or educating the majority crowd about their prejudices.[312] However, the two are not mutually exclusive. Effective and responsible leadership entails including "100% of the target audience."[313]

Corporations need to provide across-the-board recognition of the importance of raising children and preserving families. This vital work currently results in professional demotion instead of being rewarded for

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NETWORK (Mar. 1, 2017), http://us.fashionnetwork.com/news/L-Oreal-P-G-voted-top-work-place-for-women,798897.html#.WLnPUhIrLGI [https://perma.cc/6FW8-3TG2] (last visited Mar. 6, 2017).

310. It is important to note that this is already required by many companies, such as those listed on the NYSE. *See supra* notes 36-38 and accompanying text.

311. The list is expected to launch in 2017. Laura Cohn, *Exclusive: Airbnb, P&G, and Unilever Are Partnering with the Clinton Foundation to Invest over $70m in Women*, FORTUNE: MOST POWERFUL WOMEN (Sept. 20, 2016), http://fortune.com/2016/09/20/chelsea-clinton-no-ceilings-clinton-global-initiative/ [http://perma.cc/8MFA-HZKX].

312. Avivah Wittenberg Cox, *Corporate Diversity Initiatives Should Include White Men*, HARV. BUS. REV. (Sept. 6, 2016), https://hbr.org/2016/09/corporate-diversity-initiatives-should-include-white-men [http://perma.cc/PH9S-6NSS].

313. *Id.*

its importance.[314] Appropriate acknowledgment of the challenges of child-rearing would resolve the inconsistencies between the hopeful advice given to women and the harsh realities of the workplace.[315] One avenue companies can take is to provide coaching to new parents. The consulting firms Life Meets Work and Talking Talent are dedicated to training and instructing employers, and in some large companies, especially where employees have demanding work schedules, employees have started using such services.[316] The coaching sessions can be done in-person, over the phone or through the web, and can be done individually or in group sessions. The goal of such coaching is to help parents manage their work and home responsibilities, set boundaries, prioritize their tasks, and facilitate their transition to parental leave.[317] Companies that offer these benefits include MetLife, Deutsche Bank, Etsy, Ernst & Young, KPMG, and Grant Thornton. By providing such services, companies are showing employees that they are supportive and that they are taking active steps to change the work culture.[318]

Another avenue companies can use to both retain women and recognize parenting challenges is to change the emphasis on face time in the office.[319] The expectation in many industries today is that it is a core part of the job to arrive at the office early, leave late, and work on weekends. While the pendulum has undoubtedly swung too far toward too many hours spent in the office, there is still value (e.g., informal sharing of ideas or cross-pollination of views from various departments) in employees working in a communal area. However, with today's technological advances, employees should not be compelled to remain in the office all hours of the night when the same work can be done remotely. If a parent can periodically leave the office early to see to their child rearing responsibilities, it would create a culture more

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314. *See generally* CRITTENDEN, *supra* note 102; Traister, *supra* note 116.

315. CRITTENDEN, *supra* note 102, at 10.

316. Tara Siegel Bernard, *Why Companies Have Started to Coach New Parents*, N.Y. TIMES (July 22, 2016), http://www.nytimes.com/2016/07/23/your-money/why-companies-have-started-to-coach-new-parents.html [https://perma.cc/5N8L-DTXK].

317. *Id.*

318. *Id.*

319. Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC (July/August 2012), https://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/ [https://perma.cc/ZE9G-ZWQA].

accommodating to working parents. This workplace flexibility would not only benefit working parents, but would also likely produce more satisfied and productive employees.

D. DISCLOSURE

Many of the barriers to women's representation relate to the policies and practices within the corporation itself. Compelled disclosure with respect to these topics would allow shareholders to better scrutinize the environment for diversity within a corporation. Specifically, Regulation S-K should be amended to require greater disclosure with respect to (i) the director nomination and election process, and (ii) the company's policies and efforts regarding gender diversity. Regarding the director nomination procedures, SEC disclosure requirements should be amended to define diversity more specifically, e.g., to include gender, race, and ethnicity rather than just allowing companies to interpret diversity however they please.[320] The SEC should also create a universal template that every public company would be required to use to present the qualifications of director candidates.[321] According to Regulation S-K, companies are required to disclose their processes for evaluating nominees for director positions, but they are not required to have a diversity policy.[322] If companies do not have a diversity policy, they should be required to disclose such information and the underlying reason as well. Additionally, companies should be required to disclose the information they consider during the nomination process. This would hopefully encourage boards (or their nominating committees) to look at different sources and organizations that have already put in the effort to find qualified women to serve on boards.[323]

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320. Letter from Sec. & Exch. Comm'n Advisory Comm. on Small & Emerging Cos. To Mary Jo White, Chair, Sec. & Exch. Comm'n 3 (Dec. 2016), https://www.sec.gov/info/smallbus/acsec-board-diversity-recommendation.pdf [https://perma.cc/45PE-ZZCC].

321. COUNCIL OF INSTITITIONAL INV'RS, BEST DISCLOSURE: DIRECTOR QUALIFICATIONS & SKILLS (2014), http://www.cii.org/files/publications/governance_basics/04_28_14_best_disclosure.pdf [https://perma.cc/TM5Y-Z2A9].

322. If the company has a diversity policy, then the rule requires that they "describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy." 17 C.F.R. § 229.407(c)(2)(vi) (2016).

323. *See supra* note 276 and accompanying text.

While diversity in the composition of a company's board is crucial, companies should also have policies that are designed to promote diversity among management and employees. Many companies have handbooks or information online regarding their business operations and policies, but currently, there is limited information that is required to be included in the material. Companies should be compelled to disclose narrative descriptions of (1) maternity, paternity, and child care policies ("Familial-Related Policies"); (2) the number of men and women at each level utilizing the Familial-Related Policies; and (3) the number of men and women at each level of management. The aim of these disclosures is to remedy the issue of women's low retention rates and their absence in the higher ranks of corporations. By coercing companies to make these disclosures, directors and shareholders will be obligated to pay closer attention to the current landscape of the workplace and remedy the obstacles in women's paths to board positions.

CONCLUSION

Women have made great progress in the boardroom over the past four decades. This has enabled a new type of conversation—not one focused merely on getting women in the door, but on closing the gap at the top. There are real barriers that women face: prerequisite qualifications, the lack of workplace flexibility in adapting to parenting needs, the male dominated culture in the boardroom, gender behavioral disparities, the differences in guidance and mentorship for females and males, and the general desire to maintain a certain corporate culture. These obstacles are tangible and must be acknowledged and remedied. These issues could be remedied through enhancements to the proxy process and company disclosure requirements. By requiring companies to provide the necessary information and context regarding diversity and by improving the voting process, stockholders will have the knowledge and ability to effectuate change. While women need to step up, companies and shareholders do as well, and should take steps to adopt policies that encourage women's development and inclusion in the workforce and on boards.