

Still Searching for Gender Diversity in the C-Suite⁺

by

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Equal Pay Day occurred on April 10, 2018. This is the day when the average woman has made up for salary losses due to gender-based pay differences.¹ Put another way, women needed to work slightly over three extra months to catch up with men's salaries.² For every dollar men earn, women, on average, earn \$.80.³ The pay gap is only one example of stubborn, gender-based disparities that still exist in the workplace despite the antidiscrimination measures of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act which have been on the books for over 50 years.

Although Title VII, accompanying legislation, and judicial rulings have improved the work environment for women, pathways for women to C-suites are still elusive. Some numbers have improved, but they are still fairly dismal.⁴ For example, women were presidents or COOs of only thirteen S & P Fortune 500 Companies in 2016; this is up from nine in 2006.⁵ This reality presents a paradox in light of the findings of many studies that suggest that there is a positive correlation between gender diversity at the top of the organization and financial success. Marcus Noland, a co-author of research conducted by the Peterson Institute for International Economics, stated, "With respect to women on the board, evidence is mixed. But the data on women at C-Suite level is much more robust and solid — we can torture that data any way you want and still get the same answer. For the sample as a whole, firms with more women can expect a 6 percentage point increase in net profit."⁶ A better path to diversity in the C-suite might not only help the firm's financial performance; it may also help employee retention and begin to address the persistent gender-based disparity in pay. In this paper, we suggest several measures from legal reform to improved mentoring that may help in improving the representation of women in the top levels of management and reducing the elusive pay gap.

To address these issues, this manuscript is organized as follows. Part I provides an overview of Title VII, followed by Part II with a discussion of the statistics showing that women are still facing barriers to positions of corporate leadership, that the elusive pay gap persists, and that business enterprises employing gender diversity in positions of top leadership tend to show increased profitability. A variety of strategic approaches including a rebuttable presumption of discrimination in certain situations, transparency in wage information, and the role that mentoring could play in addressing these issues are offered in Part III. Concluding remarks follow.

I. Title VII

¹ *Equal Pay Days 2018*, EQUAL PAY DAY, <http://www.equalpaytoday.org/equalpaydays/> (last visited Sept. 23, 2018).

² Women in Iceland took a different approach to demonstrating the pay disparity. They left work at 2:38 p.m., the time they calculated that they stopped being paid for equal work. Liz Alderman, *Equal Pay for Men and Women? Iceland Wants Employers to Prove It*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/business/economy/iceland-women-equal-pay.html>.

³ *Equal Pay Days 2018*, *supra* note 1, citing Sarah Fleisch Fink, Director of Workplace Policy and Senior Counsel at the National Partnership for Women and Families.

⁴ Joann S. Lubin, *More Women Are Winning CEO Jobs*, WALL ST. J., JAN. 18, 2017, at B5.

⁵ *Id.* Most of these women have advanced after establishing a long, positive record within the company. "Companies are more willing to take a risk on a man than a woman with a similar experience set." *Id.* (quoting Amy Hayes, a senior consultant at Russell Reynolds Associates, Inc.). The new CEOs of Hershey Co., Tupperware Brands Corp., Occidental Petroleum Corp., and Nasdaq Inc., are recent examples. *Id.*

⁶ Tim Smedley, *Diversity at the Top Pays Dividends*, FIN. TIMES (Mar. 7, 2016), <https://www.ft.com/content/82a3ace2-d97d-11e5-a72f-1e7744c66818>.

Passed in the wake of the Civil Rights Movement, it has now been over 50 years since the enactment of the Civil Rights Act of 1964 (the “Act”). Title VII of the Act makes it unlawful for an employer to engage in employment practices that “discriminate against an individual with respect to “compensation, terms, conditions, or privileges of employment;” or “to limit, segregate, or classify employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual’s race, color, religion, sex, or national origin.”⁷ Consistent with the remedial nature of the Act, the law’s prohibition of discrimination based on sex is expansive. It includes neutral employment practices that disproportionately affect one sex without a valid business justification,⁸ violations where sex was a motivating factor among legitimate factors,⁹ and even inaction (when an employee tolerates a hostile atmosphere caused by sexual harassment, for example).¹⁰

In 2016, there were 26,934 charges of sex-based discrimination received by the Equal Employment Opportunity Commission (EEOC), the main agency administering Title VII.¹¹ There are two broad categories of cases, intentional discrimination¹² and disparate impact claims that are based on “practices that are fair in form, but discriminatory in operation.”¹³ A growing number of cases involve this latter category. Since the passage of Title VII, blatant discriminatory practices (intentional discrimination) have significantly declined.¹⁴ Harboring overt racist or sexist beliefs has become increasingly socially unacceptable, and many employers now have formal anti-discrimination policies.¹⁵ Despite these material advances, less-explicit discrimination continues to plague the true spirit of the Act — “[c]ognitive bias, structures of decision-making, and patterns of interaction,” have replaced overt racism and sexism, but still perpetuate inequality.¹⁶ Modern psychological research shows that “a person’s group status can

⁷ 42 U.S.C. §2000e-2(a) (2016).

⁸ *Id.* § 2000e-2(k) (2016).

⁹ *Id.* § 2000e-2(m) (2016).

¹⁰ Margaret E. Johnson, “*Avoiding Harm Otherwise*”: *Reframing Women Employees’ Responses to the Harms of Sexual Harassment*, 80 TEMP. L. REV. 743, 749 (2007) (noting that inaction is the most common response to sexual harassment).

¹¹ *Charge Statistics, EQUAL EMP. OPPORTUNITY COMM’N*, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 22, 2018). Of the sex-based cases brought in 2016, 5,114 were resolved in favor of the charging party. A total of \$137.3 million was awarded in damages. *Id.*

¹² To succeed in this type of case, the plaintiff must first make out a prima facie case as laid out in *McConnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff meets this burden the employer has the opportunity to provide a legitimate, nondiscriminatory reason for its employment action. If the employer does so, the plaintiff then has the rebuttal opportunity to show that the employer’s proffered justification is a mere pretext for discrimination. *Id.*

¹³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁴ Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit and Consumer Markets*, 34 ANN. REV. SOC. 181, 195 (2008).

¹⁵ Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.- C.L. L. REV. 91, 91-96 (2003).

¹⁶ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

bias a decision maker's perceptions, judgments, and actions through processes that are quite independent of any invidious intention."¹⁷

One obstacle women face in working their way up in companies is related to how they are perceived by senior executives, who are disproportionately male. Because firm decision makers possess only incomplete information about employees, they frequently resort to factors such as similarity, familiarity, and social contacts in making their determinations regarding employees' competence, commitment, and fit in the company.¹⁸ Moreover, research by Aarti Ramaswami, Jia-Chi Huang, and George F. Dreher suggests that demographic characteristics such as gender and marital status affect men's and women's career development differently.¹⁹ Unfortunately, marital and dependent status are much more harmful to a woman's career opportunities than to a man's.²⁰

As outright gender discrimination is thoroughly condemned in most workplaces, subconscious, psychological processes are often used to provide an explanation for the low representation of women in the top ranks of companies. Social-identity theory, for example, posits that individuals attach differing value to different social categories, assigning more value to those categories with which they personally identify.²¹ Relatedly, the similarity-attraction theory suggests that individuals are more likely to be attracted to individuals who share similar demographic features or social and cultural backgrounds as them.²²

Thus, there is an incongruence in the current disparate treatment analysis of cases brought under Title VII because it does not account for situations where an employer subjectively believes its legitimate non-discriminatory reasons for a particular adverse employment decision, but was instead influenced by subconscious cognitive bias and stereotyping.²³ The plain language of Title VII does not require intentional discrimination, yet case law has created an unfairly difficult burden of proof on the employee to demonstrate intentional discrimination. Further, there is also a concern that the current paradigm exacerbates intergroup tension because a plaintiff's pleadings attempting to show intent can generate defensiveness and feelings of resentment by opposing parties to a Title VII lawsuit.²⁴ Tactics to rectify this ineffectiveness are discussed later in the paper.

II. The Statistics

This Part reviews the statistics regarding the difficulty for women to find pathways to climb to positions of organizational leadership as well as the continued pay gap between men and women's salaries. These statistics are juxtaposed against studies finding that when women

¹⁷ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1243 (1995).

¹⁸ Jenny M. Hoobler et al., *Bosses' Perceptions of Family-Work Conflict and Women's Promotability: Glass Ceiling Effects*, 52 ACAD. MGMT. J. 939, 951-54 (2009).

¹⁹ Aarti Ramaswami et al., *Mentoring Across Cultures: The Role of Gender and Marital Status in Taiwan and the U.S.*, 67 J. BUS. RES. 2542, 2543 (2014).

²⁰ *Id.*

²¹ Georgia T. Chao & Henry Moon, *The Cultural Mosaic: A Metatheory for Understanding the Complexity of Culture*, 90 J. APPL. PSYCHOL. 1128, 1131 (2005).

²² DONN BYRNE, *THE ATTRACTION PARADIGM* 211 (1971).

²³ Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74. WASH. L. REV. 913, 932 (1999).

²⁴ *Id.*

are part of the decision-making team, firm performance tends to improve. These issues are discussed below.

A. Women in Positions of Corporate Leadership

Although the representation of women in positions of corporate leadership has increased over the last several decades, there is much room for improvement. In 1980, for example, there were no women in C-suite positions at Fortune 100 companies, but this proportion increased to 11 percent by 2001.²⁵ From 1997 to 2009, board seats held by women in S&P 1500 companies increased 94 percent.²⁶ According to the World Economic Forum's 2017 Gender Gap Index, which seeks to measure gender equality across health, education, economics and politics,²⁷ women occupy 16.4% of the board seats in listed companies in the U.S.²⁸

Although the advancement of gender equality in corporate leadership positions is undoubtedly meaningful, the current progress is still less than impressive. In recent years, corporate boards have failed to increase their percentage of women.²⁹ Additionally, women hold only 14.8% of top management positions in the U.S.³⁰ The World Bank found that the global share of women in senior management is 24 percent.³¹ Even more disconcerting, a comprehensive statistical analysis has suggested that "if a firm already has one woman in a top management position, then the odds that another woman will also have a top position are lower."³² Studies have also suggested that once women reach a 20 percent threshold for these positions, men tend to go from feeling positive about the addition of women to feeling threatened.³³ Recent studies, however, show that companies which have females on their top executive teams outperform those with no female top managers.³⁴

There is evidence that some companies are recognizing the benefits of board and top management team diversity, that "male, pale and stale doesn't cut it anymore."³⁵ Pressure to

²⁵ Judith Warner, *Fact Sheet: The Women's Leadership Gap*, CTR. FOR AM. PROGRESS (Mar. 7, 2014, 8:56 am), <https://www.americanprogress.org/issues/women/report/2014/03/07/85457/fact-sheet-the-womens-leadership-gap/>.

²⁶ *Id.*

²⁷ Klaus Schwab, *Preface to The Global Gender Gap Report 2017*, WORLD ECON. F., v (2017), http://www3.weforum.org/docs/WEF_GGGR_2017.pdf.

²⁸ *The Global Gender Gap Report 2017*, WORLD ECON. F., 335 (2017), http://www3.weforum.org/docs/WEF_GenderGap_Report_2017.pdf; see also *Women on Corporate Boards*, CATALYST (Mar. 16 2017), <http://www.catalyst.org/knowledge/women-corporate-boards-globally>.

²⁹ *Compare The Global Gender Gap Report 2013*, *supra* note 28, at 370, with Warner, *supra* note 25.

³⁰ Julia Dawson et al., *The Credit Suisse Gender 3000*, CREDIT SUISSE RES. INST., 14 (2014), <https://directwomen.org/sites/default/files/news-pdfs/9.pdf>.

³¹ THE WORLD BANK, GENDER AT WORK, A COMPANION TO THE WORLD DEVELOPMENT REPORT ON JOBS 2 (2014), http://www.worldbank.org/content/dam/Worldbank/Event/Gender/GenderAtWork_web2.pdf.

³² *Why There are so Few Women in Corporate Leadership?*, IDEAS AT WORK, COLUM. BUS. SCHOOL (June 26, 2013), <https://www8.gsb.columbia.edu/articles/ideas-work/why-are-there-so-few-women-corporate-leadership>.

³³ *Id.*

³⁴ Cristian L. Dezsö & David G. Ross, *Does Female Representation in Top Management Improve Firm Performance? A Panel Data Investigation*. 33 STRATEGIC MGMT. J. 1072, 1077 (2012); Seung-Hwan Jeong & David A. Harrison, *Glass Breaking, Strategy Making, and Value Creating: Meta-Analytic Outcomes of Women as CEOs and TMT Members*, 60 ACAD. OF MGMT. J. 1219, 1232-34 (2016).

³⁵ Jeff Green & Emily Chasan, *More Investors Pressure Corporate Boards on Diversity*, SEATTLE TIMES, Mar. 3, 2017, at A16. A 2016 survey of directors indicated that the financial impact of women on boards was unknown

diversify is coming from both within and outside the company. Even the statue of a young girl “facing down” the statue of the bull in front of the New York Stock Exchange has been cited as representing a push for women on boards.³⁶ One example of external pressure is the California Public Employees’ Retirement System, a \$309.7 billion that fund, has made diversity a priority in its proxy voting.³⁷ IBM and CVS stated that they will consider gender and racial diversity in appointing board members. In each of the past five years, twenty board diversity proposals were brought to companies. All is not smooth sailing however; of the nine proposals voted on in 2016, eight were rejected by shareholders.³⁸ Only 13% of companies even give specific details about diversity.³⁹ In 2016, about 13% of new board appointments were women.⁴⁰ If the current pace holds true, women will not hold 50% of board seats until 2055.⁴¹ Not surprisingly, the percentages vary by industry, with the lowest in male-dominated industries.⁴² In the banking and capital market area, 26% of the seats were held by women; in insurance, only 21%.⁴³ In general, women held almost 20% of the board seats on Fortune 1000 companies.⁴⁴

Perhaps even more disconcerting than the lack of women in corporate leadership positions are the statistics pertaining to childbearing women in the workforce. In stark contrast to men, women in the labor market are less likely to be married and have children.⁴⁵ One study, for example, has indicated that 33 percent of high-achieving women (those between ages 28 and 40 earning over \$55,000 per year and those between ages 41 and 55 earning over \$65,000 per year) and 49 percent of ultra-high-achieving women (those earning over \$100,000 per year) between 41 and 55 were childless.⁴⁶ Another study found that only half of the women that work on Wall Street had children, while 74 percent of men that work on Wall Street had children.⁴⁷

among directors for years. Joann S. Lubin, *Dozens of Boards Excluded Women for Years*, WALL ST. J., Dec. 28, 2016, at B5.

³⁶ Joann S. Lubin & Sarah Krouse, *Push for Women on Boards*, WALL ST. J., Mar. 7, 2017, at B6. The statue was put there by State Street, a giant index-fund. It is pushing boards to appoint more women. The organization will vote against board members of companies that have no female board members unless they can show that they attempted to improve diversity. This could be shown, for example, by setting diversity goals and casting a wide net when hiring. The statue has become so popular that the mayor of New York decided that it should remain for a year. *Id.*

³⁷ Jeff Green & Emily Chasan, *Investors Push Corporate Boards to Add Women, People of Color*, CHI. TRIB. (March 2, 2017, 1:22 PM), <http://www.chicagotribune.com/business/ct-corporateboards-diversity-20170302-story.html>.

³⁸ *Id.* Apple and Tyson shareholders were among those rejecting diversity proposals. *Id.*

³⁹ *Id.*

⁴⁰ Elizabeth Olson, *Banking Industry Addresses Diversity, Adding Women to Boards*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/business/dealbook/banking-industryaddresses-diversity-adding-women-to-boards.html>.

⁴¹ *Id.* The head of PricewaterhouseCooper’s governance insights center, Paula Loop, cited two actions companies can take to speed up diversity, mandatory retirement age and term limits. *Id.* About 4% of S&P 500 companies have term limits. *Id.*

⁴² Lubin & Krouse, *supra* note 36.

⁴³ Olson, *supra* note 40. The insurance industry also had the lowest percentage of female new directors – 7%. *Id.*

⁴⁴ Lubin & Krouse, *supra* note 36. Bigger businesses have made the most progress. *Id.*

⁴⁵ Sharon Rabin Margalioth, *Women, Careers, Babies: An Issue of Time or Timing?*, 13 UCLA WOMEN’S L.J. 293, 303-04 (2005).

⁴⁶ *Id.* at 304.

⁴⁷ Dan Ackman, *Greed and Groaning on Wall Street*, FORBES (Jul. 26, 2001, 5:00 PM), <https://www.forbes.com/2001/07/26/0726topwomen.html#4ddf39796067>.

Additionally, highly-educated women are less likely to participate in the workforce once they have children.⁴⁸

This lack of female leadership is not due to a supply problem; by 2015, 89 percent of women had completed high school or more⁴⁹ and 33 percent had completed four years of college.⁵⁰ Additionally, young women attended graduate school at a higher proportion than men; 11 percent of women ranging from ages 25–34 had two years or more of graduate school, while that number was only 8 percent for men.⁵¹

B. The Pay Gap

The pay gap between men's and women's salaries is another prime example of bias in the workplace. Women are more likely to have an advanced degree than men, are entering the workforce in nearly equal numbers as men,⁵² and are protected by the Equal Pay Act of 1963 (EPA) and Title VII; yet the needle has barely nudged.⁵³ More than 50 years after the Equal Pay Act became law, women still earn \$.80 for every dollar men earn.⁵⁴ In 2016, women made a median weekly salary of \$749, compared to a median salary of \$915 for men.⁵⁵ This disparity intensifies among those with higher degrees. Men with bachelor's degrees made a median of \$1,246 per week, but the median of women with bachelor's degrees was only \$931.⁵⁶ Among those with professional degrees, men received a median of \$1,896, while women received a median of only \$1,411.⁵⁷

Although the above figures are based on median salaries of full-time workers, the discrepancies occur in a wide range of occupations where the comparisons in terms of education, experience, and other traits are easier to make.⁵⁸ For example, female surgeons earn 71 percent of what male surgeons do and five of the 10 major occupational groups where women lagged the most were in finance.⁵⁹ The pay gap between male and female CFOs at S&P 500 companies was

⁴⁸ Amy Wolf, *Women with Elite Education Opting Out of Full-Time Careers*, RESEARCHNEW@VANDERBILT (Apr. 8, 2013, 8:00 AM), <http://news.vanderbilt.edu/2013/04/women-elite-education-work-less/>.

⁴⁹ *Educational Attainment in the United States: 2015*, U.S. CENSUS BUREAU (Mar. 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf>.

⁵⁰ *Id.*

⁵¹ *Women in America: Indicators of Social and Economic Well-Being*, U.S. DEPARTMENT OF COMMERCE (Mar. 2011), <https://www.commerce.gov/sites/commerce.gov/files/migrated/reports/womeninamerica.pdf>.

⁵² Terry Morehead Dworkin, Aarti Ramaswami, & Cindy A. Schipani, *A Half-Century Post-Title VII: Still Seeking Pathways for Women to Organizational Leadership*, 23 UCLA WOMEN'S L. J. 29, 33 (2016).

⁵³ *Id.*

⁵⁴ See *Equal Pay Day 2018*, *supra* note 1 and accompanying text; see also Alderman, *supra* note 2 and accompanying text.

⁵⁵ *Women's Median Earnings 82 Percent of Men's in 2016*, U.S. BUREAU OF LAB. STAT. (Mar. 8, 2017), <https://www.bls.gov/opub/ted/2017/womens-median-earnings-82-percent-of-mens-in-2016.htm>.

⁵⁶ U.S. BUREAU OF LAB. STAT., *WOMEN IN THE LABOR FORCE: A DATABOOK*, 59-60 (Mar. 26, 2013), <http://www.bls.gov/cps/wlf-databook-2012.pdf>.

⁵⁷ *Highlights of Women's Earnings in 2016*, 9-15, U.S. BUREAU OF LAB. STAT. (Aug. 2017), <https://www.bls.gov/opub/reports/womens-earnings/2016/pdf/home.pdf>.

⁵⁸ Claire Cain Miller, *How to Bridge That Stubborn Pay Gap*, N.Y. TIMES (Jan. 15, 2016), http://www.nytimes.com/2016/01/17/upshot/how-to-bridge-that-stubborn-pay-gap.html?_r=0.

⁵⁹ *Id.*

8.7% in 2015.⁶⁰ This is not an unusual discrepancy. A *Wall Street Journal* poll found that in many “elite jobs” and professions, women in these areas showed the biggest pay gaps.⁶¹

Women with children face an even greater discrepancy. There is a “motherhood wage penalty” up to five percent per child, further compounding how significant this disparity really is.⁶² Experts at a congressional hearing identified a “direct connection” between pregnancy discrimination and self-sufficiency, as well as a significant risk for poverty.⁶³ This is true even though women are the primary or co-primary wage earners in almost two-thirds of families.⁶⁴

Despite the widespread disparities, there are relatively few cases brought under the Equal Pay Act and success is not likely. In 2016, 1,075 charge receipts were filed under the Equal Pay Act and 1,201 claims resolved.⁶⁵ Only 18.9% of resolved claims were decided in favor of the charging party.⁶⁶ Women find difficulty bringing successful claims under the Equal Pay Act for a variety of reasons. Not only must a woman establish that the work her and her male counterpart perform is equal in required skill, effort, responsibility and working conditions; but an employer can justify wage differences “based on any other factor other than sex.”⁶⁷

C. The Paradox

Studies examining inclusion of women in corporate management positions show that, rather than being a burden on corporations, greater inclusion of women presents a significant boon to companies. For example, Jeong and Harrison recently conducted a meta analysis of research studies on the relationship between having women in top management and firm financial performance and find that having women in top management roles is positively related to financial performance.⁶⁸ Dezsó and Ross similarly find a positive association between having a least one women in top management and financial performance, although the effect may be driven by particularly strong positive effects in innovation-intensive industries as measured by research and development expenditures.⁶⁹ Recently, a working paper by Noland, Moran, and Kotschwar, indicated that the presence of female executives in a firm was associated with unusually strong performance by that firm.⁷⁰ The greater gender diversity in top corporate

⁶⁰ Tatyana Shumsky, *Big Number*, WALL ST. J., Aug. 30, 2016, at B5.

⁶¹ Janet Adamy & Paul Overberg, *Women in Elite Jobs Face Stubborn Pay Gap*, WALL ST. J. (May 17, 2016), <https://www.wsj.com/articles/women-in-elite-jobs-face-stubborn-pay-gap-1463502938>.

⁶² Julie Manning Magid, *Cloaking: Public Policy and Pregnancy*, 53 AM. BUS. L.J. 439, 441 (2016). The public meeting, held by the EEOC, was regarding drafting new guidance about regulations related to pregnancy and its economic impact. See Press Release, EEOC, *Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities, Widespread Problem, Panelists Tell EEOC* (Feb. 15, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/2-15-12.cfm>.

⁶³ Magid, *supra* note 62.

⁶⁴ Press Release, *supra* note 62.

⁶⁵ *Equal Pay Act Charges*, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm> (last visited Sept. 23, 2018).

⁶⁶ *Id.*

⁶⁷ 29 U.S.C. § 206(d) (2016).

⁶⁸ Jeong & Harrison, *supra* note 34.

⁶⁹ Dezsó & Ross, *supra* note 34.

⁷⁰ Marcus Noland et al., *Is Gender Diversity Profitable? Evidence from a Global Survey* (Peterson Inst. Int’l Econ., Working Paper No. 16-3, 2016), <https://ssrn.com/abstract=2729348>. Although the above referenced studies show correlations between markers of better financial performance and gender diversity on boards, it should be noted that

positions, the better the financial results. These studies present a paradox when juxtaposed with the disappointingly low numbers of women in the C-suite, discussed above.

III. Proposed Solutions

In this Part, we advocate a number of strategic approaches aimed at attacking wage disparity and the lack of gender diversity in the C-Suite. These include legislative approaches, a call for pay transparency, judicial intervention, the adoption of effective mentoring programs, along with additional action items for business to improve the working environment for women, and a call to investors to demand the firm to hire more women for positions of leadership.

A. Legislative Approaches

The Equal Pay Act of 1963 (EPA),⁷¹ enacted the year before Title VII, was at the time seen as addressing the important discrimination issue for women – unequal pay. It had previously been considered fair to pay men more for the same work because they were seen as supporting a family and therefore needed more.⁷² It is narrowly drawn because it was designed to address only unequal pay for equal work. It requires that men and women working in the same establishment and doing equal work be paid the same. Different pay can be justified by showing that “any factor other than sex”⁷³ caused the differential. When Title VII became law, a coordinating provision was added to make sure VII’s broader provisions did not undermine the narrower EPA.⁷⁴

The EPA does not address the fact that many occupations filled primarily by women are often paid less than those held by men. There have been many efforts since the 1970s to broaden the comparison from equal work to comparable work or more broadly, work of equal value to the organization or society under a Title VII discrimination claim. The issue was raised in the Supreme Court case of *County of Washington v. Gunther*.⁷⁵ In *Gunther*, female jail matrons who worked in the female section were paid less than male correction officers, who worked with many more prisoners on the male side of the jail. Additionally, matrons devoted a large share of their time doing clerical work, which was seen as less valuable. Thus, the female matrons’ work was not considered equal to the work of the male corrections officers under the EPA. The Court majority viewed the case as one in which the employees were trying to show that the county deliberately paid them less because they were women. It rendered a very narrow decision which left many questions unanswered including the comparable worth argument. It did hold, though, that the coordinating provision did not import the equal work requirement into Title VII. A

the evidence is mixed. W. Gary Simpson et al., *What Do We Know about Women on Boards?*, 20 J. APPLIED FIN. 1,12 (2010).

⁷¹ 29 U.S.C.A. § 206 (d) (2006). It was passed as an amendment to the Fair Labor Standards Act, and generally shares its enforcement procedures, coverage, and remedies. Ellen M. Bowden, *Closing the Pay Gap: Redefining the Equal Pay Act’s Fourth Affirmative Defense*, 27 COLUM. J. L. & SOC. PROBS. 225, 228 (1994).

⁷² Bowden, *supra* note 71 at 228.

⁷³ This could include factors such as seniority, merit, or a piecework system. *Id.* at 236. Job segregation or discrimination in assignment is not a justification and can be addressed under Title VII. *Id.* at 239-40.

⁷⁴ 42 U.S.C.A. § 2000e-2(h) (2016). Known as the Bennett Amendment, it provides that a differentiation in wages or compensation authorized by the EPA is not an unlawful employment practice under Title VII.

⁷⁵ *Cty. of Wash. v. Gunther*, 452 U.S. 161 (1981).

decade later, a subsequent Ninth Circuit case delivered another important defeat to the theory,⁷⁶ and courts have not been hospitable to comparable claims since then.

There have been many other legislative efforts to address the wage gap since the passage of the EPA; unfortunately, most have been unsuccessful. Perhaps the most effective, if it had been enacted, would have been the Paycheck Fairness Act (PFA).⁷⁷ This statute would have shifted the burden of proof and required the employer to demonstrate sex-based differential compensation is, among other things, consistent with business necessity. If substantiated, the employee could then rebut this showing by demonstrating that an alternative employment practice exists that would serve the same business purpose without producing the gender-based differential.⁷⁸

The PFA, which has been considered since 1997, has floundered repeatedly.⁷⁹ Most recently introduced by Sen. Barbara Mikulski (D-MD) in the Senate and Rep. Rosa DeLauro (D-CT3) in the House, almost all congressional democrats were cosponsors to the 2015-16 version but not a single Republican woman signaled her support. The bill was referred to the House Committee on Education and the Workforce subcommittees on Workforce Protections and on Higher Education and Workforce Training, in November of 2015 where no further action was taken.⁸⁰ The bill was expected to have a better chance of becoming law after the anticipated election of Hilary Clinton as President in 2016, but under a Trump administration, and with both houses of Congress held by Republicans, its passage prospects have significantly dimmed.

At the same time, many states have taken up the fight for equal pay in some manner.⁸¹ California,⁸² New York,⁸³ North Dakota,⁸⁴ Maryland,⁸⁵ and Massachusetts⁸⁶ have adopted language from the PFA in the past few years and at least 18 states are currently debating bills to further address the gender pay gap.⁸⁷ California, for example, adopted its own Fair Pay Act (FPA), which became effective January 1, 2016. It amends the 1976 California Labor Code

⁷⁶ *Am. Fed'n of State, etc. v. Washington*, 770 F.2d 1401(9th Cir. 1985).

⁷⁷ See *S.862 (114th): Paycheck Fairness Act, Summary*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s862/summary> (last updated Feb. 14, 2016). It would have amended the Fair Labor Standards Act. *Id.*

⁷⁸ *S.84 – Paycheck Fairness Act, Summary*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/84> (last visited May 21, 2017). This is called a BFOQ, or bona fide occupational qualification, under Title VII. Legal Information Institute, *Bona Fide Occupational Qualification (BFOQ)*, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/bona_fide_occupational_qualification_bfoq (last visited Aug. 12, 2017).

⁷⁹ Editorial Board, *Editorial: Paycheck Fairness Act Would Help Equalize Women's Wages*, ST. LOUIS-POST DISPATCH (Nov. 2, 2016), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-paycheck-fairness-act-would-help-equalize-women-s-wages/article_64e397c6-1bdd-5a9a-872b-28ea28c1b0c7.html.

⁸⁰ *H.R.1619 – Paycheck Fairness Act, Bill History in the Congressional Record*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/1619/history> (last visited May 21, 2017).

⁸¹ Alabama and Mississippi are the only states which have not adopted some form of equal pay law; almost all of which explicitly cover gender or sex discrimination. *State Equal Pay Laws*, NAT'L CONF. OF ST. LEGISLATURES (Aug. 23, 2016), <http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx>.

⁸² CAL. GOV'T CODE § 12940 (Deering 2016); Claudia A. Halasz, *California's Expanding Fair Pay Act*, NAT'L L. REV. (Mar. 15, 2017), <http://www.natlawreview.com/article/california-s-expanding-fair-pay-act>.

⁸³ N.Y. LAB. LAW § 194 (Consol. 2016).

⁸⁴ N.D. CENT. CODE, § 34-06.1-03 (2015).

⁸⁵ MD. CODE ANN., LAB. & EMPL. § 3–304 (West 2018).

⁸⁶ MASS. GEN. LAWS. ANN. ch. 149, § 105A (West 2018).

⁸⁷ *2012 Equal Pay Legislation*, NAT'L CONF. OF ST. LEGISLATURES (Nov. 25, 2012), <http://www.ncsl.org/research/labor-and-employment/2012-equal-pay-legislation.aspx>

§1197.5.⁸⁸ The Fair Pay Act makes it easier to prove a case of wage discrimination by no longer requiring the claimant to show that she does “equal work” to her male comparator. The language now requires she show their jobs require “substantially similar work. . . .” when determining if pay discrimination exists. It also eliminates the requirement that the employees work in the same establishment.⁸⁹ It limits the use of a “bona fide factor other than sex” defense to when it is: 1) demonstrated to account for the entire wage differential, 2) not derived from a sex-based compensation difference, 3) is related to the employment position and 4) is consistent with “an overriding legitimate business purpose. . . .”⁹⁰ Finally, the FPA states that the “bona-fide factor” defense will fail if the employee demonstrates that “an alternative business practice exists that would serve the same business purpose without producing the wage differential.”⁹¹

New York’s version of paycheck fairness act is similar to the California law except that New York requires the employees to compare work in the same establishment and it has no explicit requirement that the entire differential be accounted for by the “bona fide” factor.⁹² North Dakota’s version of this legislation is not as expansive as California’s or New York’s but it does only require the aggrieved employee show a discrepancy in wages between comparable employees to establish a prima facie case of discrimination.⁹³ It also prohibits employers from decreasing an employee’s wages to eliminate discrimination.⁹⁴ Maryland’s version includes the “bona fide” factor language of California and New York as well as language relating to employment opportunities.⁹⁵ The law bars discrimination in: 1) career track assignment, 2) failing to provide information on career paths and promotions and 3) limiting opportunities that would be available if not for the employee’s sex or gender identity.⁹⁶ Much like the California law, the Massachusetts statute replaces wording on “equal” work with “substantially similar,” and furthermore includes the same “bona fide” language the other state laws introduce.⁹⁷ The Maryland statute also includes a section establishing a state commission to investigate the gender pay gap.⁹⁸

Pay disparity is not just a U.S. issue. Iceland recently took aggressive action to eliminate it within five years.⁹⁹ As in the U.S., Iceland had equal pay laws for over fifty years, but pay

⁸⁸ CAL. LAB. CODE § 1197.5 (Deering 2016); Helen M. McFarland & Shari Dunn, *California Fair Pay Act: New Obligations for Employers or a Paper Tiger*, ARTHUR J. GALLAGHER & CO. (2015), <https://www.ajg.com/media/1697914/california-fair-pay-act-new-obligations-foremployers-or-a-paper-tiger.pdf>. California has also enacted a bill that extends the Fair Pay Act’s increased protections to those discriminated on the basis of race or ethnicity. Matthew Lewis & Eric Sohlgren, *On the Horizon: Laws Going into Effect in Early 2017*, JDSUPRA (Jan. 4, 2017), <http://www.jdsupra.com/legalnews/on-the-horizon-laws-going-into-effect-39556/>.

⁸⁹ McFarland & Dunn, *supra* note 88; see CAL. LAB. CODE § 1197.5(a) (Deering 2016).

⁹⁰ CAL. LAB. CODE § 1197.5(a) (1) (D); McFarland & Dunn, *supra* note 88. A reasonableness standard applies to all factors. Cal. LAB. § 1197.5(a) (2) (Deering 2016).

⁹¹ CAL. LAB. § 1197.5(b) (1) (D) (2016). In January of 2017, California eliminated salary history alone as a justification in compensation disparities; Halasz, *supra* note 82.

⁹² Compare N.Y. LAB. LAW § 194 (Consol. 2016) with CAL. LAB. CODE § 1197.5 (Deering 2016).

⁹³ See N.D. CENT. CODE 34-06.1 (2015).

⁹⁴ *Id.*

⁹⁵ MD. CODE ANN., LAB. & EMPL. § 3–304 (West 2018).

⁹⁶ *Id.*

⁹⁷ MASS. GEN. LAWS ANN. ch. 149, § 105A (West 2018).

⁹⁸ MD. CODE ANN., LAB. & EMPL. § 3–309 (West 2018).

⁹⁹ Alderman, *supra* note 2. Nearly 80% of women work in Iceland. *Id.*

disparities remain.¹⁰⁰ Also like the failed PFA, it sees shifting the burden of proof to the employer as a way to overcome the gap. Iceland became the first country to introduce legislation requiring employers to prove they are paying men and women equally.

The Icelandic legislators reason that unless equal pay laws are applied forcefully, “nothing really changes.”¹⁰¹ The legislation would require the largest companies (those with 250 or over employees) and government agencies to undergo audits in 2018 certifying compliance with equal pay rules.¹⁰² By 2022, companies with more than 25 employees would be required to do the same.¹⁰³ Companies must assess every job, and fix wage gaps of more than five per cent.¹⁰⁴

B. Salary Transparency

Another suggested way to reduce the gap is to promote transparency in salaries.¹⁰⁵ For example, a study by Belogolovsky and Bamberger¹⁰⁶ suggests that transparent pay conditions tend to reduce the gender pay gap. In another study, Rosenfeld and Denice¹⁰⁷ found that salary transparency gives legitimacy to an employee’s wage bargaining, and that even just being aware of discrepancies can change norms. Furthermore, bargaining for better pay is something men are much more likely than women to do. One study showed that 57 percent of men, but only seven percent of women, asked for more money.¹⁰⁸ Additionally, when women did ask for salary raises, they asked for 30 percent less than men.¹⁰⁹ Moreover, studies show that women are more likely than men to fear backlash for asking.¹¹⁰ Of course, there is a cumulative effect of starting at a lower salary over the span of a career. One estimate puts that difference for middle-income jobs at \$750,000, and for high-income jobs at \$2 million.¹¹¹ Having information about comparative salaries is likely to spur more women to negotiate for higher, or at least equal, pay and reduce these gaps. It is also likely to make it harder for managers to turn women down when

¹⁰⁰ Women earn 14-20% less than men in Iceland. *Id.*

¹⁰¹ *Id.* (citing the Social Affairs and Equality Minister in Iceland, Thorsteinn Viglundsson, who noted “History has shown that if you want progress, you need to enforce it.”). Iceland and the Nordic countries have been leaders in gender equality in other areas such as having quotas for women on boards and generous parental leave. *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ David Burkus, *Why Being Transparent About Pay Is Good for Business*, WALL ST. J., May 31, 2016, at R2.

¹⁰⁶ Elena Belogolovsky & Peter A. Bamberger, *Signaling in Secret: Pay-for-Performance and the Incentive and Sorting Effects of Pay Secrecy*, 57 ACAD. MGMT. J. 1706 (2014).

¹⁰⁷ Jake Rosenfeld & Patrick Denice, *The Power of Transparency: Evidence from a British Workplace Survey*, 80 AM. SOC. REV. 1045 (2015).

¹⁰⁸ Linda Babcock et al., *Nice Girls Don’t Ask*, HARV. BUS. REV. (Oct. 2003), <https://hbr.org/2003/10/nice-girls-dont-ask>.

¹⁰⁹ Alicia Adamczyk, *3 Salary Negotiation Tips for Jennifer Lawrence*, MONEY (Oct. 13, 2015),

<http://time.com/money/4071452/jennifer-lawrence-wage-gap-lenny/> (“[J]ust 30% of women negotiate a salary offer, compared with 46% of men”); LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: THE COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE* (2007).

¹¹⁰ See, e.g., Emily Amanatullah & Michael Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating Are Mediated by Women’s Fear of Backlash and Attenuated When Negotiating on Behalf of Others*, 98 J. PERSONALITY & SOC. PSYCHOL. 256, 265 (2010).

¹¹¹ *Id.*

they ask for higher salaries if the pay discrepancy between men and women is known to everyone.

There are many actions that companies can take to promote transparency. Perhaps the easiest is to make it clear that discussing salaries between workers is allowed. There are many reports of employees being sanctioned or fired for discussing and comparing salaries.¹¹² According to a 2011 study, about half the workers said their companies discouraged or prohibited such discussions.¹¹³ This is despite the potential that these prohibitions may be in violation of the labor laws.¹¹⁴ California, for example, which has been particularly aggressive about wage equality, passed legislation in 2015 that prohibits employers from retaliating against workers for discussing pay.¹¹⁵ At least eleven other states have similar protections.¹¹⁶

When employers have encouraged pay discussions or provided information about pay scales, many misconceptions about pay are corrected.¹¹⁷ According to a study conducted by PayScale, out of 7,600 individuals surveyed, only 36 percent of employees thought they were paid fairly, while 73 percent of employers believed that their employees were fairly paid.¹¹⁸ Further, only 21 percent of employees felt that their company was transparent about pay, but that number was 40 percent for employers.¹¹⁹

Transparency may not only help with pay gaps—it may also increase productivity. One study by Emiliano Huet-Vaughn¹²⁰ suggests that workers who know of their placement in the earnings distribution provide significantly more effort on average than those without knowledge of their peers' earnings. Another study found that pay secrecy (as opposed to pay transparency) negatively affected the performance of individuals who were less tolerant of inequity.¹²¹ Thus, despite the traditional mind-set against such comparisons, pay transparency could be good for business.

Salaries are getting easier to compare online. A company, Glassdoor Inc., has created Know Your Worth, which uses an algorithm comparing a few pieces of personal information which it says allows users in “real time” to compare their salary with the database of job listings and data submitted by other users.¹²² It joins other companies such as Salary.com and PayScale.com that give free salary reports.

¹¹² Wal-Mart, the world's largest employer, is discouraging information exchange. It is discouraging employees from downloading an app designed by OUR Walmart, an organization advocating for higher wages and benefits. Wal-Mart has asked managers to tell employees that the app is a scheme to gather personal information. Sarah Nassauer, *Wal-Mart Fights Employee Chat App*, WALL ST. J., Nov. 16, 2016, at B2.

¹¹³ Ariane Hegewisch et al., *Pay Secrecy and Wage Discrimination*, INST. FOR WOMEN'S POL'Y RES. (June. 9, 2011), <https://iwpr.org/publications/pay-secrecy-and-wage-discrimination/>.

¹¹⁴ 29 U.S.C. §§ 157, 158(a) (1) (2016); *Double Eagle Hotel v. NLRB*, 414 F.3d 1249 (10th Cir. 2005).

¹¹⁵ S.B. 358, 2015 Leg., Reg. Sess. (Cal. 2015).

¹¹⁶ *Fact Sheet: Pay Secrecy*, WOMEN'S BUREAU, U.S. DEP'T OF LAB. (Aug. 2014), https://www.dol.gov/wb/media/pay_secrecy.pdf.

¹¹⁷ Burkus, *supra* note 105.

¹¹⁸ *Escape to Comptopia, 2016 Compensation Best Practices Report*, PAYSACLE.COM (2016), <https://www.slideshare.net/ChrisBennett24/payscale2016compensationbestpracticesreport>.

¹¹⁹ *Id.*

¹²⁰ Emiliano Huet-Vaughn, *Striving for Status: A Field Experiment on Relative Earnings and Labor Supply* (UC Berkeley, Working Paper Nov. 2013), http://econgrads.berkeley.edu/emilianohuet-vaughn/files/2012/11/JMP_e.pdf.

¹²¹ Peter A. Bamberger & Elena Belogolovsky, *The Impact of Pay Secrecy on Individual Task Performance*, 63 PERSONNEL PSYCHOL. 965 (2010).

¹²² Lauren Weber, *Glassdoor Tool Helps in Comparing Pay*, WALL ST. J., Oct. 26, 2016, at B8.

Governments at various levels are also looking to transparency to help correct the gender wage gap. For example, California passed legislation in 2010 requiring cities to publish municipal salaries.¹²³ A study of the results of this action shows that greater equality resulted—although through reducing men’s pay, not raising women’s pay.¹²⁴ President Obama also took similar measures on the public employee front through executive action.¹²⁵ One order protects employees/applicants from discrimination by the employer for inquiring about, discussing, or disclosing their compensation or the compensation of other employees/applicants.

Massachusetts enacted legislation in 2016 banning inquiries into previous salaries.¹²⁶ Philadelphia and New York City adopted similar bans.¹²⁷ Over a dozen local legislatures from other cities are examining the idea.¹²⁸ The idea behind such measures is that for most women, basing pay in a new job on prior pay only reifies the inequities and compounds the problem of pay inequity. Rather, companies should figure out how much the job is worth, and pay that amount. Google says that it recently did this.¹²⁹ The federal Office of Personnel Management has adopted a similar rule. This is thought to particularly help women who have taken time off to care for children or elderly parents,¹³⁰ as well as those who have previously worked in the lower-paying nonprofit sector.

C. Judicial Intervention

Consistent with the attempts to shift the burdens of proof in pay equity actions would be to shift the burden of proof to increase the numbers of women in boards and executive positions in companies. To rectify the especial ineffectiveness of Title VII in this regard, we advocate that in cases alleging gender discrimination, courts consider the lack of women, or the presence of only token women, in leadership positions as a rebuttable presumption of discrimination. This presumption would help to address subconscious bias and stereotyping. It would then shift the burden on the employer to prove that such biases do not exist.¹³¹

Currently, an employee must demonstrate disparate impact through the *McDonnell Douglas* framework, laid out in the Supreme Court case *McDonnell Douglas Corp v. Green*.¹³² To shift the burden of proof to the employer, an employee must show 1) she belonged to a

¹²³ S.B. 2064, 2010 Leg., Reg. Sess. (Cal. 2010).

¹²⁴ Alexandre Mas, *Does Transparency Lead to Pay Compression?* (Nat’l Bureau Econ. Res. Working Paper No. 20558, 2014), <http://www.nber.org/papers/w20558.pdf>.

¹²⁵ Exec. Order No. 13,665, 80 Fed. Reg. 54934 (Sept. 11, 2015).

¹²⁶ MASS. GEN. LAWS ANN. ch. 149, § 105A (West 2018).

¹²⁷ Kelsey Gee, *Pay Queries in Job Interviews Under Fire*, WALL ST. J., Apr. 18, 2017, at B6.

¹²⁸ *Id.*

¹²⁹ Miller, *supra* note 58. Google and other companies in Silicon Valley have been struggling to overcome the criticism and the industry is hostile to women, and this was an attempt by Google answer that and increase the number of women in the company. Despite its efforts, Google is being investigated by the Depart of Labor which alleges it underpays its female employees. Georgia Wells, *Google Rebutts Claims It Underpays Women*, WALL ST. J., Apr. 12, 2017, at B4.

¹³⁰ Interestingly, Starbucks is providing an eldercare perk in China because while childcare is not an issue there, elder care has become one. *Starbucks Extends China Health Coverage to Workers’ Parents*, BLOOMBERG NEWS (Apr. 11, 2017, 9:26 AM), <https://www.bloomberg.com/news/articles/2017-04-11/starbucks-offers-health-insurance-for-parents-of-chinese-workers>.

¹³¹ For a more thorough discussion of this proposal, see Dworkin, et al., *supra* note 52, at 64.

¹³² 411 U.S. 792 (1973).

minority, 2) she applied and was qualified for a position in which the employer was seeking applicants, 3) she was rejected from the position and 4) the employer continued to seek applicants from persons with plaintiff's qualifications.¹³³ This framework is ill-fitting in the often secretive and convoluted process of selecting C-suite executives where official job postings are often not made or not public and application submissions often take the form of social network referrals. Further, disparate impact is difficult to establish with the small sample size generated by infrequent executive hiring in any particular company.¹³⁴ The exclusion of token women in the calculus is especially important in the C-suite, as the limited number of positions means one token woman is a larger percentage of the whole, which would unfairly skew the often statistically driven disparate impact calculation.

D. Mentoring

Because women are generally classified as outsiders by those on the top rung of corporate leadership, integrating mentoring programs between those at the top and those a few steps down will expose both parties to the values, beliefs, and assumptions of the other. By sharing cultural backgrounds with corporate leaders, mentoring programs could be particularly useful for women to replace the negative signals of marriage and family with positive signals.¹³⁵ Instead of being perceived as outsiders, women would more frequently be seen as part of the same club as men. Mentoring at the higher levels can also help prepare women for leadership positions on boards. As companies look for women to diversify boards, they will be likely to call on, and find out about qualified women from mentors.

Furthermore, access to networks and mentors has proven to play a crucial role in climbing the corporate ladder.¹³⁶ In many industries, such as law firms, there is an implicit "up or out" policy that requires the entry-level employees to demonstrate their worth to the firm by a specified time period early on in their careers.¹³⁷ Implementing mentoring programs would therefore provide women fairer access to top corporate leaders and give them an equitable opportunity to dissociate themselves from baseline negative presumptions. Even if this sharing of cultural capital does not completely trump the negative associations of marital status on women's organizational position,¹³⁸ it is surely a step in the right direction.

Those at the top of the organization could utilize another form of mentoring without involving a large time commitment of time. For example, executives could show a commitment to work-family balance by taking time to interact with their own families and encouraging others to do so. Some CEOs are beginning to do this, especially in hi-tech areas where millennials are a

¹³³ See *id.* at 802. While *McDonnell Douglas* was concerned with racial discrimination, the framework was later applied to gender discrimination. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 248, (1981).

¹³⁴ Dworkin, et al., *supra* note 52, at 65 (quoting Melinda K. Burton, *Using Statistics to Prove Disparate Treatment Discrimination*, 17 *YOUNG LAW.* 7 (2013)).

¹³⁵ Terry Morehead Dworkin, et al., *The Role of Networks, Mentors, and the Law in Overcoming Barriers to Organizational Leadership for Women and Children*, 20 *MICH. J. OF GENDER & L.* 82, 109–10 (2013).

¹³⁶ Michael L. McDonald & James D. Westphal, *Access Denied: Low Mentoring of Women and Minority First-Time Directors and Its Negative Effects on Appointments to Additional Boards*, 56 *ACAD. MGMT. J.* 1169, 1171–72 (2012).

¹³⁷ Kathleen L McGinn & Katherine L Milkman, *Looking Up and Looking Out: Career Mobility Effects of Demographic Similarity Among Professionals*, 24 *ORG. SCI.* 1041, 1042 (2013).

¹³⁸ Dworkin, et al., *supra* note 52, at 61.

growing segment of the workforce.¹³⁹ Mark Zuckerberg taking two months off to spend time with his new daughter is one example. For millennials, work-life balance is growing in importance¹⁴⁰ and those in the C-suite are realizing that merely having policies on paper is not enough.

Furthermore, in addition to the transparency steps suggested above to help with the wage gap, mentoring and networking programs could also help. For example, a program that gave women negotiating coaching and tips could make them more effective and more willing to ask for better pay. If they are armed with pay statistics, they are also likely to be more assertive. It would not be necessary to do this on a one-to-one basis, to do it for long-term, or to have those at the top of the organization do it. This would ease the problems with finding enough mentors. This is also something that a networking group could sponsor, especially if the organization is unwilling to do so.

E. Additional Actions

Providing flex-time or setting family-friendly schedules is another approach. The former J.C. Penney chief, Ron Johnson, does not schedule meetings before 9:00 a.m. or after 4:00 p.m. so he can coach his children's sports team.¹⁴¹ Family-friendly scheduling would allow parents to participate in a variety of activities without missing important meetings. Companies need to shape company culture so that employees feel it is not harmful to their careers to use the programs provided. Family-friendly policies can also benefit the companies by making it easier to recruit and retain younger workers.

We encourage more investors to take steps such as those taken by the California Public Employees' Retirement System¹⁴² and State Street Global Advisors, and put pressure on boards to diversify. State Street, for example, stated that it would vote against board members charged with nominating new board members of a company if it does not make progress in adding women. If there is no improvement, the board must show it attempted to increase the number of women by actions such as casting a wider net when seeking job candidates and setting diversity goals.¹⁴³ Additionally, State Street wants companies in which it owns shares to identify problems that may have contributed to the lack of women on the board. State Street is one of the largest passive managers in the world with \$2.47 trillion in asset management, and it is likely to have a significant influence.¹⁴⁴ If companies see a competitive advantage by including women, others may follow.

Conclusion

¹³⁹ Cindy Krischer Goodman, *CEOs Taking Bold Steps to Reshape Work Culture*, SEATTLE TIMES (Jan. 1, 2016, 1:28 AM), <https://www.seattletimes.com/explore/careers/ceos-taking-bold-steps-to-reshape-work-culture/>.

¹⁴⁰ Lindsay Gellman, *Bosses Try to Decode Millennials*, WALL ST. J., May 18, 2016, at B1.

¹⁴¹ Rachel Feintzeig, *Male CEOs Tell Us Their Work-Life Rules*, WALL ST. J. (June 14, 2016, 9:47 AM), <https://www.wsj.com/articles/male-ceos-tell-us-their-work-life-rules-1465896602>.

¹⁴² See Lubin & Krouse, *supra* note 36 and accompanying text.

¹⁴³ *Id.* State Street plans to give a year to make changes before it votes against the re-election of heads of committees nominating new members. *Id.*

¹⁴⁴ *Id.*

The inequities discussed herein are important not just to women, but to society as a whole. For example, homelessness is one of the “most urgent and pressing issues facing America today.”¹⁴⁵ In 2013, one in eight families who rented their home could not pay their rent, and a similar number thought they would be unlikely to do so.¹⁴⁶ A large number of these families are headed by single, working women. Greater pay equity for women would help reduce the homelessness crisis. Another example is shown by a recent Harvard study demonstrating that young, single MBAs who desired to marry lowered their desired yearly compensation, their willingness to travel, and their assertiveness in order to attract a mate.¹⁴⁷

Although gender discrimination in the workplace is now less frequently overt since the passage of the Civil Rights Act,¹⁴⁸ it is more frequently in the form of subconscious, yet just as invidious, bias. These prejudices continue to plague gender equality in the employment context, hindering women’s ability to reach the top ranks of corporate leadership. To combat this inequality, we offer a number of suggestions. First, we urge states to pass legislation requiring paycheck fairness and we urge firms to institute policies of salary transparency. Next, when there is a lack of women in the highest corporate ranks of the company in question, a presumption of discrimination should replace the current legal framework in the courts for disparate treatment analysis in Title VII cases of gender discrimination. We further suggest that firms would do well to improve mentoring and networking programs for women to help even the playing field for access at the top of the corporate ladder. Finally, we urge firms to improve the environment for women in the work place—by adopting and sincerely promoting utilization of family friendly policies. Not only would these recommendations be just, they would also likely increase productivity in the corporate world, and help resolve the paradox surrounding the paucity of women in top leadership positions.

¹⁴⁵ MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY*, Prologue (2016).

¹⁴⁶ Matthew Desmond, *Unaffordable America: Poverty, Housing and Eviction*, INST. FOR RES. ON POVERTY (Mar. 2015), <http://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>.

¹⁴⁷ Lauren Weber, *Women Trim Ambitions for Marriage, Study Says*, WALL ST. J., Jan. 25, 2017, at B6.

¹⁴⁸ 42 U.S.C. § 2000e-2 (1964).