

# PATHWAYS FOR WOMEN TO SENIOR MANAGEMENT POSITIONS AND BOARD SEATS: AN A TO Z LIST

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## INTRODUCTION

The Symposium title, “Pipeline to Power,” does not fit the corporate governance area. Although women have been graduated from law, graduate business (MBA), and medical schools since the mid-1970s at a 30% rate, escalating to well over 40% in the 1990s, women constitute only 3.5% of the corporate CEOs, 14% of the executive managers, and 12.5% of the corporate directors, holding approximately 16% of the board seats in the *Fortune 500*.<sup>1</sup> So, obviously, no pipeline carries women smoothly from entry-level to executive positions. Women are now approximately 50% of the middle managers and 50% of the U.S. workforce overall but in scant evidence near the top in business organizations.<sup>2</sup>

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1. See, e.g., Press Release, Catalyst, No News Is Bad News: Women’s Leadership Still Stalled in Corporate America (December 14, 2011), available at <http://www.catalyst.org/press-release/199/no-news-is-bad-news-womens-leadership-still-stalled-in-corporate-america>; cf. John Bussey, *Women, Welch Clash at Forum*, WALL ST. J., May 4, 2012, at B1 (discussing a McKinsey Consulting finding that in sixty of largest U.S. corporations, women hold 19% of C-suite positions).

2. See, e.g., Barbara Black, Address at the University of Dayton School of Law Law and Business Ethics Symposium: Perspectives on Gender and Business Ethics: Women in Corporate Governance (Feb. 25, 2011) (showing that women occupy 51.4% of middle

The expectations for the emergence of women in the corporate sphere have been high, justifiably so, for thirty-five years now, but the numbers are lackluster and the reality lags even behind the reported numbers.<sup>3</sup> If a pipeline to power exists, there are a lot of leaks in it. A robust stream enters at the intake end; a barely discernible trickle emerges.

Pathway may be a better description than pipeline in corporate governance, an area still dominated by the “good ole boys’ club.”<sup>4</sup> Even pathway may be too strong a word for it connotes a relatively straightforward journey to the destination. The sojourn women must undertake often is a circuitous one, especially compared to the similarly situated male.

For example, in order to reach the prestigious position of corporate director, a woman may have to leave business, make her way upward in academe, the not-for-profit profit sphere, government or consulting, or smaller corporations, areas in which women fare far better, and then re-emerge in the business world’s main arena as a director. Approximately 67.3% of women directors have reached the corporate board of directors by “side stepping” in this fashion, sometimes with two or three sidesteps, rather than ascending vertically in business organizations.<sup>5</sup> A woman’s best chance of becoming a corporate director may be to be a tenured professor in business, engineering, or the health sciences at a prestige university rather than having patiently worked her way up through corporate organizations.<sup>6</sup> By contrast, in business, the male’s ascent seems to be a decidedly more linear one.

I have written and published two books and several articles on diversity in corporate governance.<sup>7</sup> A third book, about the paradox of female success at the very top but not beneath that level in the all-important information technology industry, is underway.<sup>8</sup> Despite the European debt crisis and other headline grabbing events, women’s progress in corporate govern-

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management positions) (notes on file with author); *see also* Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7 (2011) [hereinafter Black, *Stalled*]; Floyd Norris, *In This Recession, More Men Are Losing Jobs*, N.Y. TIMES, Mar. 14, 2009, at B3; *cf.* Bussey, *supra* note 1, at B3 (showing that women hold 40% of manager positions in companies McKinsey analyzed).

3. “Progress has come but the numbers, especially of women at the boardroom and CEO level, lag far behind expectations.” DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 2* (2007); *see also id.* at 151-52 (describing matriculant and graduate statistics for women, law, and MBA schools, 1970-2001).

4. *See, e.g.*, RAKESH KHURANA, *SEARCHING FOR A CORPORATE SAVIOR: THE IRRATIONAL QUEST FOR CHARISMATIC CEOs 203-04* (2002).

5. *See* BRANSON, *supra* note 3, at 102-03, 105.

6. *Id.* at 87, 91.

7. DOUGLAS M. BRANSON, *THE LAST MALE BASTION: GENDER AND THE CEO SUITE IN AMERICA’S PUBLIC COMPANIES* (2010); *see also* BRANSON, *supra* note 3 at 2, 151-52.

8. DOUGLAS M. BRANSON, *A BOO LIST AND THE PARADOX: FEMALE CEOs IN THE INFORMATION TECHNOLOGY INDUSTRY* (forthcoming).

ance has been a hot button issue in Europe, as well as in Australia, New Zealand, and around the Pacific Rim. Norway adopted a 40% quota law in 2003 and reached the 40% plateau in 2008.<sup>9</sup> Within the European Union (EU), Spain, France, Belgium, the Netherlands, and Italy have followed Norway's lead, enacting quota laws for female representation on corporate boards.<sup>10</sup> The EU aside, Israel, Iceland, Switzerland, and others have adopted laws mandating a quota for female representation of corporate boards of directors.<sup>11</sup> Even Malaysia, a Muslim country, has adopted a quota law.<sup>12</sup>

The U.S. represents a countertrend. Here in the U.S. the issue has been a dormant one, receiving little attention since 2006. The available numbers have been flat since that time, representing "no significant gains" in six years.<sup>13</sup> Few authoritative voices call for a quota law, or anything similar.<sup>14</sup>

The subject of diversity in corporate governance is a broad one, one in which I have been involved since 1999. I dare not attempt to cover the waterfront on the subject in this, a symposium piece. On the other hand, judging from the content I have seen at other women's studies or feminist jurisprudence conferences, diversity in governance is a subject that receives short shrift, as opposed to women as judges, or as law firm partners, or as elected officials. Women in corporate governance often is limited to no more than ten to fifteen minutes, in a two day meeting, consigned to the smallest meeting room, in the most distant corner of the hotel, or not discussed at all. The subject begs for exposition because I strongly believe that women's increased participation in the upper echelons of Corporate America is the most promising pipeline to power existent.

The compromise I have decided upon involves compiling an A to Z list of sub-topics on diversity. The list will by no means cover the water-

9. See, e.g., Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 61-67 (2009).

10. See, e.g., James Kanter, *Europe to Study Quotas for Women on Boards*, N.Y. TIMES, Mar. 5, 2012, at B3; Gabriele Steinhauser, *EU Eyes Quotas for Women on Company Boards*, ASSOCIATED PRESS, Mar. 5, 2012, available at <http://news.yahoo.com/eu-eyes-quotas-women-company-boards-113130411.html>.

11. See Steinhauser, *supra* note 10.

12. Leonie Lamont, *Time Male Bosses Walked the Talk on Equality*, SYDNEY MORNING HERALD (Austl.), Oct. 15, 2011, available at <http://www.smh.com.au/business/time-male-bosses-walked-the-talk-on-equality-20111014-11p2x.html> (requiring 30% women directors by 2015).

13. See Catalyst, *supra* note 1 (providing that women are "no further along on the corporate ladder than they were six years ago"); see also Press Release, Catalyst, Latest Catalyst Census Shows Women Still Not Scaling the Corporate Ladder in 2010; New Study Indicates Clue to Reversing Trend (December 13, 2011), <http://www.catalyst.org/press-release/181/latest-catalyst-census-shows-women-still-not-scaling-the-corporate-ladder-in-2010-new-study-indicates-clue-to-reversing-trend> ("This is our fifth report where the annual change in female leadership remained flat. If this trend line represented a patient's pulse—she'd be dead." (quoting Irene Lang, President and CEO of Catalyst)).

14. Cf. Rosenblum, *supra* note 9, at 68-88.

front, but it should give the reader an introduction to this all-important subject.

### I. ETYMOLOGY OF INTEREST IN THE SUBJECT

I am frequently invited to speak on the subject, both by conferences here in the U.S. and by law and business schools abroad. In both places, the first question audience members ask is how did I, a middle-aged male, get interested in subject of women on corporate boards and in executive positions? I reply with three answers.

First, I published the first treatise on corporate governance in the United States in 1993, which I supplemented yearly thereafter.<sup>15</sup> I consider myself a pioneer in the governance field. An important topic in the field is the makeup of public corporations' boards of directors, or board composition. Board composition necessarily includes the sub-topic of diversity and women on corporate boards. I have been interested in questions surrounding board composition for a long time.<sup>16</sup>

Second, I am the father of two daughters, both of whom are university educated, each with a master's degree. In my research and travels on the subject, I find that a principal exception to the "good ole boy's club" attitude comes from corporate directors and officers who are, like me, the fathers of daughters. When a study group of which I am a member interviewed company chairpersons (all male) in Australia, the group asked each chair why he took time out of his undoubtedly busy day to meet with our group researching pathways women directors actually have taken in their careers. With no prompting whatsoever, every company chair replied that he was the father of daughters. They regarded it as essential that women have the same opportunities as men in the arts, in sport, or in business. Many (most) fathers are not overly protective of daughters as they may once have been. Instead, they regard their daughters as equal to and in many respects the same as sons.

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15. DOUGLAS M. BRANSON, *CORPORATE GOVERNANCE* (1993) (with annual supplements).

16. A recent mega study (study of studies) regarding gender and board composition is James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. REV. 901 (2011) (finding no correlation between corporate performance and women's board presence). An earlier study, reaching a similar conclusion is Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999). See also Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 815 (2011) (a study actually finding that the presence of women on a corporate board has a negative effect on corporate profits and share prices).

## II. A PRACTICAL RAMIFICATION

Fields that thirty years ago were perceived as hostile to women, such as oil and gas, chemicals, agribusiness, or utilities, now may be receptive to aspiring women, at least those with suitable backgrounds and moxie. I entitled a chapter of my book, *The Last Male Bastion*, about female CEOs, "Go Where They Aren't," meaning female competitors are fewer in number in traditionally male-dominated industries, but those industries are far more welcoming to women than one would expect.<sup>17</sup> Two oil and gas majors now have or have had female high-level executives or CEOs (Chevron and Sunoco),<sup>18</sup> as does the largest publicly held agribusiness company (Archer Daniels Midland) and a major chemicals company (DuPont).<sup>19</sup> Susan Ivey became CEO of a major tobacco company (Reynolds America) while Paula Rosport Reynolds worked her way up in the utilities field before becoming CEO of a major insurance firm (Safeco).<sup>20</sup> Personally, I think that many of the males who hold sway in those companies are fathers of daughters. Times and attitudes have changed.

## III. THE ELITES' VIEW: U.S. CORPORATE GOVERNANCE HAD ACHIEVED PERFECTION

Third, when in 2000 I returned from my second of four trips to Indonesia, where I had been a State Department-sponsored consultant on corporate law and corporate governance, I attended an American Association of Law Schools (AALS) annual meeting. At the Business Associations Section meeting, the speakers were, as usual, from elite law schools; the subject was global convergence in corporate governance. All the speakers solemnly agreed that convergence was rapidly occurring. All developed and developing nations would soon be on the same governance page, which they would learn about through e-mail, the Internet, and low cost international travel. Globalization meant that the world was again shrinking, very rapidly, including the corporate governance world.

The page and text to which all nation and systems of the world would converge, all speakers at AALS solemnly agreed, was the American system

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17. See BRANSON, *supra* note 7, at 65.

18. See BRANSON, *supra* note 7, at 71-72, 105-07 (discussing Patricia Woertz, CEO at Chevron and Lynn Elsenhaus, CEO at Sunoco). Recently, however, Sunoco was acquired by Energy Transfer Partners.

19. See *id.* at 73-74, 113-14 (discussing Patricia Woertz, CEO at ADM, Inc. and Ellen Kullman, CEO at DuPont).

20. For discussion of Susan Ivey, see *id.* at 64-68. For discussion of Paula Rosport Reynolds, see *id.* at 68-71. See also Douglas M. Branson, *Susan Ivey Made It Happen for Women*, DIRECTORS & BOARDS, Third Quarter 2011, at 26. Susan Ivey retired from her CEO position in 2011. *Id.*

of corporate governance, with a board comprised of a majority of independent directors; audit, governance and compensation committees; considerable play for hostile takeover bids; and derivative suits by activist shareholders, which would keep managements accountable; and so on. The apotheosis was an article by two professors at elite law schools entitled "The End of History," which proclaimed that the competition among competing visions of corporate governance was over: the U.S. had vanquished all competitors.<sup>21</sup> To paraphrase the comic figure Pogo, the two professors concluded that, in corporate governance, "We have met perfection and he is us."

#### IV. THE YEAR OF CORPORATE GOVERNANCE DISCONTENT AND THE INCOMPATIBILITY OF PATRICIAN CONVERGENCE VIEWS WITH REALITY

Now much of this occurred a year or less before the titanic governance debacles at Enron and WorldCom, followed by catastrophic failures of American-style governance at Adelphia Communications, Tyco, Quest Communications, and other household name corporations.

Then, too, while these speakers from elite law schools had comparative experience, that exposure was strictly of the patrician kind, involving glasses of white wine and erudite conversation with counterparts at German universities, or conversations in broken English with regulators and business leaders in Japan. My comparative experience was much more of the plebian, roll-up-your-sleeves variety. I had been on consulting contracts in Indonesia, as aforesaid, as well as in Bulgaria, Serbia, Slovakia, Ukraine, and the Philippines. I knew that the ruggedly individualistic governance model of the U.S. never would take, for example, in those Pacific Rim countries where post-Confucian values dominate. An individual told since birth that "the shiny nail is the first to feel the sting of the hammer" is highly unlikely to seek removal of an underperforming corporate CEO or to lead the shareholder coalition exploring fling a derivative suit.

In the 1998 East Asia economic crisis, thirty-eight publicly held banks in Indonesia failed, resulting in \$90 billion USD in losses.<sup>22</sup> Under Indonesian corporate law, the right of shareholders to file a derivative suit was clear.<sup>23</sup> Despite that clarity, not one shareholder suit, derivative or other-

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21. Reinier Kraakman & Henry Hansmann, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2000). Other of the elites edited and published an entire volume devoted to the convergence thesis. See CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004). Gordon and Roe found the "End of Corporate History" piece to be "boldly argue[d]," "articulate[ing] the 'strong' convergence position." *Id.* at 6-7.

22. See, e.g., KEITH LOVEARD, SUHARTO: INDONESIA'S LAST SULTAN 380 (1999).

23. See Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 345-46 (2001).

wise, was filed in a nation of 230 million persons.<sup>24</sup> Had those events occurred in the U.S., thirty to forty shareholder suits would have been filed, per bank.

#### V. ONE GLARING DISCONNECT

So this vaulted U.S. model of corporate governance would not be a good fit for companies in a clear majority of nations. The “end of history” theory was poppycock from the get-go. Moreover, as Enron and WorldCom had shown, the U.S. model had many gaps and defects.

One defect, glaringly apparent, was the lack of progress Corporate America had had in promoting women to director and senior management positions, or in helping to develop the pathway by which women could in increasing numbers enter into the pool from which directors and senior managers would to be chosen.

#### VI. AN A TO Z LIST ON WOMEN AND CORPORATE GOVERNANCE

**A** *Aggressiveness/Assertiveness.* The advice books (the how-to books) for women who aspire to succeed in corporate settings are uniform, and universally wrong. They are anecdotal: “I did this,” or “my friend did that.” Universally, they counsel unrelenting aggressiveness, a variety of which Hillary Clinton refers to as “shoulder-pad feminism.”<sup>25</sup> Many advice book authors use sports metaphors: “Be the quarterback,” “Score the touchdown,” “Throw a knockout punch,” “Hit a home run,” “Be the team leader.”

Publication of management and advice books for women has been a land office business. Titles include:

Susan Adams, *The New Success Rules for Women* (2000).

Esther Wachs Book, *Why the Best Man for the Job Is a Woman* (2000).

Donna Brooks & Lynn Brooks, *Seven Secrets of Successful Women* (1997).

Catalyst, Inc., *Advancing Women in Business* (1998).

Nina DiSesa, *Seducing the Boys Club* (2008).

Gail Evans, *Play Like a Man, Win Like a Woman* (2000).

Carol Gallagher, *Going to the Top* (2000).

Pamela B. Gilberd, *The Eleven Commandments of Wildly Successful Women* (1996).

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24. *Id.*

25. See Maureen Dowd, Editorial, *Dueling Victims: Should the Democrats Overcome Misogyny or Racism First?*, PITTSBURGH POST-GAZETTE, Mar. 6, 2008, at B5.

Sylvia A. Hewlett, *Off Ramps and On Ramps* (2007).

Pat Heim & Susan Golant, *Hardball for Women* (1992, rev. ed. 2005).

Pat Heim & Susan Golant, *Smashing the Glass Ceiling* (1993).

Linda Hirshman, *Get to Work* (2006).

Kelly L. Johnson, *Skirt! Rules: For the Workplace* (2008).

Ann Morrison et al., *Breaking the Glass Ceiling* (1987; rev. ed. 1992).

Anthony Stith, *Breaking the Glass Ceiling* (1998).

Sheila Wellington, *Be Your Own Mentor* (2002).

Certain of these advice books suggest women take up golf, or watch Monday Night Football with male co-workers. Others counsel the “iron maiden” approach, which involves pinstriped pant suits and a severe appearance coupled with heavy doses of assertiveness.

The latest generation of advice books actually espouses use of feminine wiles with co-workers and superiors:

I play on [men’s] masculine pride and natural instincts to protect the “weaker” sex.

“I can’t figure this out, and I’m exhausted,” I will say, . . . “[I]f it’s not done by tomorrow, I’m dead.”

“I’ll do it,” he’ll invariably say.

But his rescue mission won’t be truly satisfying to him unless I show appreciation for the sacrifice he is making . . . .

“No, no, you’re swamped, too,” I’ll say.

“I’ll make the time for it.”

“Thank you. I love you.”

“I know. You’re welcome.”

*It’s like great sex. Everyone walks away fulfilled.*<sup>26</sup>

An examination of the careers of women who actually have succeeded in business demonstrates, conclusively so, that while aggressiveness may aid a woman in obtaining her initial promotion, thereafter the most likely outcome will be to sidetrack or derail a career altogether.

**B**ully Broad. In fact, organizational psychologist Jean Hollands has coined the somewhat infelicitous term “bully broad” to describe the overly aggressive woman manager.<sup>27</sup> She has con-

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26. NINA DI SESA, *SEDUCING THE BOYS CLUB: UNCENSORED TACTICS FROM A WOMAN AT THE TOP 39* (2008).

27. JEAN HOLLANDS, *SAME GAME, DIFFERENT RULES: HOW TO GET AHEAD WITHOUT BEING A BULLY BROAD, ICE QUEEN, OR “MS. UNDERSTOOD”* (2002).

sulted with Cisco, Intel, Wells Fargo, Oracle, and a number of other major corporations.<sup>28</sup> She finds that invariably the Bully Broad reputation dead ends a woman's career.<sup>29</sup>

The Women's National Basketball Association (WNBA) started out in the 1990s with women coaches.<sup>30</sup> Quickly, owners and general managers weeded out women coaches, replacing them with men.<sup>31</sup> One of the principal reasons, Hollands reports, is that the first generation coaches were Bully Broads.<sup>32</sup> What had caused those women to succeed in their careers as players and in coaching in the lower ranks of the game, did them in when they reached coaching's upper echelons. "Why have . . . women . . . washed out as coaches? For the same reason they have washed out in the corporate . . . world[. . . Women can't get away with the harsh and command-and-control style that many male coaches and [managers] can."<sup>33</sup> Although it is doubtful that anyone, man or woman, can succeed today with such a management style, it certainly holds true for women.<sup>34</sup>

**C** *Comply or Explain.* Foreign stock exchanges, such as those in London and in Sydney, have corporate governance regimes but they are not mandatory.<sup>35</sup> Instead, in their annual disclosures, listed companies need only elaborate on those governance attributes or recommendations with which they are not in compliance.<sup>36</sup> They must further state why the company is out of step.<sup>37</sup>

*The UK Corporate Governance Code* elaborates:

The "comply or explain" approach [has been] the trademark of corporate governance in the UK. It has been in operation since the Code's beginnings . . . . It is strongly supported by both companies and shareholders and has been widely admired and imitated internationally.<sup>38</sup>

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28. *Id.* at 142.

29. *Id.* at 23.

30. *Id.* at 163.

31. *Id.*

32. *Id.*

33. *Id.* at 164.

34. Ice queens remain silent but appear judgmental in the extreme and are rigid, feeling that their way is the only way to accomplish a task. *Id.* at 19. "[The ice queen] is reserved and steely. People shy away from her because they expect her to judge them." *Id.* at 5.

35. See FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 4-5 (2010), available at <http://frc.org.uk/getattachment/b0832de2-5c94-48c0-b771-ebb249fe1fec/The-UK-Corporate-Governance-Code.aspx>; AUSTR. SEC. EXCH. LISTING R. 4.10.3 (2010).

36. See FIN. REPORTING COUNCIL, *supra* note 35, at 4.

37. *Id.*

38. *Id.* The Australian Securities Exchange (ASX) Listing Rules are similar: annual disclosures must include "[a] statement disclosing the extent to which the [listed company]

In the UK, in 2010, the Council included within the new Governance Code a diversity statement: “The search for board candidates should be conducted, and appointments made, on merit, against objective criteria and due regard for the benefits of diversity on the board, *including gender*.”<sup>39</sup>

In 2010, similarly the Australian Stock Exchange (ASX) sharpened its pencil with regard to addition of women on corporate boards. Effective January 1, 2012, Australian public corporations must “comply or explain.” “Companies should establish a policy concerning diversity and disclose the policy or a summary of that policy.”<sup>40</sup> Further, “The policy should include requirements for the board to establish measurable objectives for achieving gender diversity for the board to assess annually both the objectives and progress in achieving them.”<sup>41</sup> The Australian guidelines even reach beyond corporate governance to recommend disclosures on the proportion of women in the company’s work force overall and in the ranks of senior management.<sup>42</sup> Despite grumbling about the unprecedented reach of the ASX regulations, and the increase in workload compliance entails, most Australian corporations will comply and disclose what steps they have taken, adding to the pressure both to enlarge the pool from which women candidates to the board may be chosen and to name additional women to the board.

The ASX and the business press term the requirement the “if not, why not rule” perhaps as code that the rule contains more of an imperative than the other “comply or explain” ASX rules which exist.<sup>43</sup> In the last several years, Australia has seen a sea change on the subject of women on corporate boards, evidenced by the “if not, why not rule” of the stock exchange.<sup>44</sup> “My impression is that in many of these [corporate] boardrooms the con-

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has followed the recommendations set by the ASX Corporate Governance Council.” AUSTL. SEC. EXCH. LISTING R. 4.10.3.

39. FIN. REPORTING COUNCIL, *supra* note 35, at 13.

40. AUSTL. SEC. EXCH., CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS WITH 2010 AMENDMENTS, RECOMMENDATION 3.3 (2d ed. 2010) (effective Jan. 1, 2011), *available at* [http://www.asxgroup.com.au/media/PDFs/cg\\_principles\\_recommendations\\_with\\_2010\\_amendments.pdf](http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf). “Companies should disclose in each annual report the measurable objectives for achieving gender diversity set by the board in accordance with the diversity policy and progress towards achieving them.” *Id.* RECOMMENDATION 3.3.

41. *Id.* RECOMMENDATION 3.2.

42. *Id.* RECOMMENDATION 3.4.

43. Ruth Williams, *Crunching the Gender Numbers*, SYDNEY MORNING HERALD (Austl.), October 15, 2011, <http://www.smh.com.au/business/crunching-the-gender-numbers-20111014-11p8l.html>; *see also* E. MERVYN DAVIES, WOMEN ON CORPORATE BOARDS 27 (Feb. 2011), *available at* <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf> (discussing the addition of “if not why not” imperative to the overall “comply or explain” ASX governance schematic).

44. Williams, *supra* note 43.

versation has changed, and the conversation is not “should we do it?” but how best to do it.”<sup>45</sup>

In the United States, neither the New York Stock Exchange nor the NASDAQ has either a regulation or a proposal for a regulation regarding diversity and board composition.

**D** *Disclosure Regimes.* Since February 28, 2010, however, the U.S. Securities and Exchange Commission (SEC) has had in place a mandatory rather than comply or explain diversity disclosure requirement for the approximately 16,500 corporations who file periodic reports with it.<sup>46</sup> With little fanfare, the U.S. SEC’s “Proxy Rule Disclosure and Solicitation Enhancements” amendments took effect, amending SEC omnibus disclosure Regulation SK.<sup>47</sup> Regulation SK is the umbrella disclosure regulation which dictates what material public companies must disclose and sometimes in what format they must disclose it, across the breadth of documents corporations file with the SEC (registration statements, tender offer documents, proxy statements, periodic disclosure documents (8Ks, 10Qs and 10Ks)).<sup>48</sup>

With regard to diversity on their boards, U.S. publicly held companies must disclose:

- (1.) Whether diversity is a factor in considering candidates for the company’s board of directors;
- (2.) How diversity is considered in the process of selecting board candidates;
- (3.) How the company assesses the effectiveness of whatever policy and process it has chosen to adopt.<sup>49</sup>

Appraisal thus far has been that corporate compliance with the new disclosure regulation has been spotty at best.<sup>50</sup>

45. *Id.* (comment of corporate director Jillian Segal). Between April 2010, and November, 2010, the percentage of women directors on Australian corporate boards increased 2%, from 8.5% to 10.4%, and has continued to increase thereafter. Teresa Ooi, *Women Groomed in the Art of Smashing the Glass Ceiling*, AUSTRALIAN, Jan. 25, 2011, <http://www.theaustralian.com.au/business/women-groomed-in-art-of-smashing-glass-ceilings/story-e6frg8zx-1225993879008> (8.5 to 10.6%). The percentage reached 13.8% by March 2012. Elizabeth Proust, *Time Has Failed Women: A Quota May Insure Equal Rights*, NAT’L TIMES (Austl.), Mar. 14, 2012, <http://www.smh.com.au/opinion/society-and-culture/time-has-failed-women-a-quota-may-just-ensure-equal-rights-20110313-1bsty.html>.

46. *See, e.g.*, ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 162 n.20 (3d ed. 2009).

47. *See* Proxy Disclosure at Solicitation Enhancements, 74 Fed. Reg. 35,076 (July 17, 2009); *see also* Securities Act Release Nos. 33-9809; 34-61175 (Dec. 16, 2009), available at <http://www.sec.gov/rules/final/2009/33-9089.pdf> (disclosing, *inter alia*, February 28, 2010 effective date).

48. *See* 17 C.F.R. pt. 229 (2012).

49. *Id.* § 229.407(b)(2)(vi).

Viewed charitably, many corporate draftspersons may not have developed a feeling for what the SEC and Regulation SK now require. As the years progress, additional corporations will improve their disclosures. As a result, many reporting companies will enhance the processes on which they are reporting, with a resulting increase in diversity on boards of directors.

By contrast, viewed less charitably, early reports are that a significant number of companies opt out of the diversity disclosure process altogether by means of a simple one-line disclosure, "The Company has no fixed policy dealing with the diversity of candidates for election to the board of directors,"<sup>51</sup> or no disclosure at all. Wal-Mart, America's largest corporation by revenue, remained silent in both its 2010 and 2011 proxy statements.<sup>52</sup> Brazen corporations such as Wal-Mart may short-circuit the SEC mandated disclosure requirements, negating altogether the intended effect, or any effect, of the disclosure requirement. The "no policy" alternative seems to be what our English colleagues would term "the coach and horses" exception to the board diversity disclosure requirement.

**E**levator (*Glass*). Most women and many men are familiar with the term "glass ceiling," a term commonly used to describe that impenetrable but transparent barrier that allows women to see but not to climb the highest rungs of the corporate promotion ladder.<sup>53</sup> Even lower on the ladder, however, women complain of obstacles which prevent even horizontal movement within corporate organizations. One common phenomenon is that women tend to be shunted toward what are called (again, infelicitously) "pink collar jobs," such as human resources, staff marketing positions, or jobs with the corporate foundation.

But women complain that once in such positions they encounter insuperable obstacles to re-joining the upward promotion march. Thus, they see male counterparts ascending the promotion ladder, but those males seem to be ascending in a transparent elevator, rising in a transparent elevator shaft. The women in the HR or staff jobs remain "stuck." Other women complain that when they seek to move laterally, say, to obtain a "line position" (one with bottom line revenue, cost and profit responsibilities), they run smack

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50. See, e.g., Bryce Holtzer, Proxy Statement Diversity Disclosure, University of Washington School of Law Seminar: Diversity in Corporate Governance Seminar (Fall 2010) (finding that only seven of twenty-four large cap public companies met the regulation's disclosure mandate) (on file with author).

51. See Black, *supra* note 2.

52. See Theodore C. Tanski, Disclosure Enhancement, University of Pittsburgh School of Law Seminar: Diversity in Corporate Governance (2012) (on file with author).

53. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 172-74 (1st ed. 1999).

dab into a glass wall. The glass wall allows them to see but not to obtain the varied experience thought necessary to reach the higher heights.<sup>54</sup>

**F***Financial Literacy.* After Jill Barad became the first female CEO in the *Fortune 500*, at Mattel Toy in 1997, she did not last long. She had made her way upward as a marketing whiz, responsible for the record setting sales of Barbie dolls. As CEO, though, she made overly optimistic projections of sales, revenues, and profits. Seemingly, she had no feel for how important financial analysts and investors regard making your numbers, or how those numbers had been complied, or how much confidence should be placed, or not placed, in them. The story of Carleton Fiorina at Hewlett-Packard is similar, although she remained in office for six rather than two years. The paradox is that Fiorina had MBAs, two of them, from the University of Maryland and MIT. Perhaps she just did not know when to duck.

Women who aspire in business need not major in accounting or finance. Often specialists cannot see the forest for the trees, making them not the best candidates for the top-most positions. Managers uppermost in the hierarchy too will have lawyers, accountants, and financial people around them who can help answer the questions, or seek out responses and answers. But the top dogs need to evaluate what underlings are saying as well as have a certain feel for and confidence in their understanding of markets, share prices, accounting numbers, projections, and the like.

Of what does financial literacy consist? For women who actually have become CEOs, the bar has been high. Of twenty female CEOs analyzed in 2010, twelve had MBAs, one an MSEE (Ursula Burns at Xerox), and one a JD (Angela Braley at Wellpoint).<sup>55</sup> But immersion need not be that deep.

I tell aspirants that they should at least have a course in a managerial accounting (not debits and credits but what are financial statements, what do they demonstrate and, more importantly what do they *not* tell you); a course in finance (corporate, not personal—leave that to Susie Orman); economics 101 (to develop a feel for supply and demand, for markets, and for how they work); and perhaps a course in stocks, commodities, and investments (useful as well for managing personal finances). After that, major in French (Laura Sen, CEO at BJ's Wholesale Club did, as well as did Mary Sammons, CEO at Rite Aid), or geography (Christina Gold at Western Union),

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54. A third variation is the glass or rubber floor. When males fall from grace, and tumble out of the firmament, they fall only so far. Often, they then bounce up to achieve another management position. Or, like major league baseball managers, five to six years later they re-appear as CEO or COO at some other company. By contrast, when women corporate executives fall from grace, there is no rubber floor, they do not bounce up, and usually they are never seen or heard from again. See, e.g., BRANSON, *supra* note 3, at 11.

55. See BRANSON, *supra* note 7, at 195.

or psychology (Irene Rosenfeld at Kraft Foods). Literacy and feel, not necessarily deep expertise, are the goals.

**G** *The Glass Cliff Theory*. The recent take on gender and corporate governance, which British theorists hypothesize, is the glass cliff theory.<sup>56</sup> They posit that corporations are more likely to turn to a female for an officer or CEO position when events magnify the risk of failure.<sup>57</sup> Psychologists Michelle Ryan and Alexander Haslam found that businesses appoint women to corporate leadership positions “in problematic . . . circumstances.”<sup>58</sup> Their appointments “hence [were] more precarious [than men’s appointments].”<sup>59</sup> If she succeeds, of a woman CEO, directors and senior executive say: “We expected nothing less.” If she falls from grace, many will say: “I told you so,” leaving unstated that failure must have been due to gender.<sup>60</sup>

Using U.S. *Fortune 500* female CEOs as the sample, the glass cliff theory seems to bear up under examination. Patricia Woertz became CEO after Archer Daniels Midland had reached a nadir, with the former CEO’s son beginning a term in prison for price fixing on ADM’s behalf.<sup>61</sup> Susan Ivey became CEO at Reynolds American when the \$368.5 billion settlement with forty-six states and other adverse judicial outcomes had laid the tobacco industry low.<sup>62</sup> Brenda Barnes got the reins at Sara Lee after overdiversification and lackluster returns had driven the company down.<sup>63</sup> Ann Mulcahy got the top job at Xerox only after a sea of red ink flowed and the company’s future was uncertain.<sup>64</sup> Mary Sammons became the CEO of Rite Aid in the midst of deeply troubled times, with former CEO Martin Grass beginning a prison term and the share price reduced to a few dollars and cents.<sup>65</sup> Patricia Russo became CEO of Lucent after it had laid off over 64,000 employees and the shares price flirted with the \$1.00 barrier.<sup>66</sup> Carol Bartz came to the CEO suite at Yahoo! after a badly botched response to a takeover proposal from Microsoft and continuing losses had caused previ-

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56. See, e.g., Mark Henderson, *Women Who Break Through Glass Ceiling Face a Cliffhanger*, TIMES (U.K.), Sept. 7, 2004, at 3.

57. *Id.*

58. Michelle K. Ryan & Alexander Haslam, *The Glass Cliff: Evidence That Women Are Over-Represented in Precarious Leadership Positions*, 16 BRIT. J. MGMT. 81, 87 (2005).

59. *Id.* at 83, 87.

60. See generally *id.* See also Jayne W. Barnard, *At the Top of the Pyramid: Lessons from the Alpha Woman and the Elite Eight*, 65 MD. L. REV. 315, 329-35 (2006).

61. See BRANSON, *supra* note 7, at 73.

62. *Id.* at 66.

63. *Id.* at 81-82.

64. Xerox’s market share had gone from 90% to 13%. *Id.* at 52-53.

65. *Id.* at 100-01.

66. *Id.* at 58-59.

ous management to resign.<sup>67</sup> In fact, a near majority, ten of twenty-two, of the female CEOs my book portrays came to power only when the corporation faced telling and uncertain circumstances, or worse.<sup>68</sup> The glass cliff phenomenon has explanatory power in the U.S. as well as in Great Britain, where it originated.

**H** *Harvard/Hewlett Packard.* As I stated previously,<sup>69</sup> your best chance of becoming a female director at a *Fortune 500* company may be to side step from a position as professor or dean at a university. The leader in that regard, at least in 2001, was Harvard University. “Thirteen women professors from Harvard held twenty-one Fortune 500 board seats . . . .”<sup>70</sup>

Hewlett Packard (H-P) is a legendary Silicon Valley pioneer, a corporation about which several books have been written.<sup>71</sup> Bill Hewlett and Dave Packard espoused “management by walking around,” whereby each company founder spent time walking the shop floor and visiting with engineers and other workers. In a sense, H-P was a bottom-up organization in which all managers who had company cars, from the lowest to the highest, had the same model—a Ford Taurus.<sup>72</sup> But by the mid-1990s, H-P had stagnated. Pundits described it as the company that would sell sushi as “cold dead fish.”<sup>73</sup>

The H-P directors then reached out to name a female CEO, only the third (after Jill Barad at Mattel and Andrea Jung at Avon Products) in the current era and of the 17th largest company in the U.S. She was Carleton Fiorina, daughter of a highly regarded federal court of appeals judge. Suddenly, H-P became a top-down organization. Armani Carl, as she was known, appeared on forty-plus magazine covers in her first year as CEO alone. She caused the company to buy a top of the line Gulfstream jet,

67. See, e.g., *id.* at 111.

68. Those women CEOs who came to power in precarious corporate settings (10) include: Jill Barad at Mattel; Andrea Jung at Avon; Ann Mulcahy at Xerox; Patricia Russo at Lucent; Susan Ivery at Reynolds America; Patricia Woertz at AMD; Brenda Barnes at Sara Lee; Mary Sammons at Rite Aid; Christina Gold at Western Union; and Carol Bartz at Yahoo. See generally *id.* Those female CEOs of whom the same thing cannot be said (12) include Carleton Fiorina at Hewlett-Packard; Marion Sandler at Golden West Financial; Paula Rosport Reynolds at Safeco; Angela Braly at Wellpoint; IndraNooyi at Pepsico; Carol Meyerowitz at TJX; Meg Whitman at Ebay; Lynn Elsenahns at Sunoco; Ellen Kullman at DuPont; Irene Rosenfeld at Kraft; Ursula Burns at Xerox; and Laura Sen at BJ’s Wholesale Club. *Id.*

69. See BRANSON, *supra* note 7.

70. See BRANSON, *supra* note 3, at 87.

71. Hewlett-Packard was the inspiration for JAMES C. COLLINS & JERRY I. PORRAS, *BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES* (1st ed. 1994) and DAVID PACKARD, *THE HP WAY: HOW BILL HEWLETT AND I BUILT OUR COMPANY* (1995).

72. See BRANSON, *supra* note 7, at 19.

73. *Id.*

which we used to fly around the world, making eighteen stops, in one week. Chainsaw Carly, as she also was known, laid off tens of thousands of H-P workers. "The H-P Way . . . had become an excuse for all sorts of bad habits, particularly slowness and risk-aversion . . ."74 "Preserve the best, reinvent the rest," she told reporters and H-P employees.<sup>75</sup> Rank-and-file H-P did not appreciate her disdain for the vaunted H-P Way.

Under Fiorina, H-P's share price fell drastically, to less than half the price when she took office. She adamantly refused to hire a "number two" (chief operating officer or COO) despite director requests that she do so.<sup>76</sup> The H-P board then removed her from office in February 2005.<sup>77</sup>

Hewlett-Packard is noteworthy not only for hiring a female CEO once but also for naming a second, and accomplished woman, to the top post. In January 2012, the H-P board named Meg Whitman, former CEO of eBay and unsuccessful 2010 candidate for governor of California, to the top position of what now is the world's largest information technology company.<sup>78</sup> It is too soon to evaluate Ms. Whitman's tenure at H-P but, by virtue of its chief executive selections, the company deserves a place in the A to Z list.

**I**ron Maiden/Ice Queen. Previous entries on this list have described the iron maiden<sup>79</sup> and ice queen stereotypes.<sup>80</sup> Recollection of those identifiers as well as others (mother figure, mascot, clown, queen bee) can segue into a discussion of stereotypes generally. Some women in business seek out a role which, more likely than not, will carry with it a stereotype. Role playing (the mother figure, the clown) may lead to a sanctuary, putting a safety net under the woman or other minority person. For example, co-workers, whether peers or superiors, may regard the mother figure as different, less vulnerable to the vicissitudes that buffet others, or not subject to the criticisms they launch against one another.

Other women, however, do not retreat to stereotypes, dreading application to them by others. The reason is that a stereotype, while perceived as providing a safety net of sorts, also is perceived as lessening, or masking altogether, achievement. Many capable women feel that they do not need a safety net. They further feel that they can and will produce, for which production they want, a full measure of recognition, undiluted by application of

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74. *Rebuilding the Garage*, ECONOMIST, July 15, 2000, at 85.

75. *Id.*

76. See BRANSON, *supra* note 7, at 26-27.

77. See *id.*

78. See, e.g., Nick Wingfield, *H.P. Board Selects Whitman as New Chief*, N.Y. TIMES, Sept. 23, 2011, at B1; see also Andrea Chang, *Can Whitman Find a Way to Reboot HP?*; *Wall Street Awaits Signs of a Turnaround, Unexcited by Her 6-Month Tenure as CEO*, L.A. TIMES, April 5, 2012, at B1.

79. See *supra* Part VI.

80. See *supra* text accompanying note 34.

a stereotype.<sup>81</sup> Stereotypes and analyses of them are vital to an understanding of diversity issues. On balance, or even without it, generally speaking they are not good or desirable things.

**J** *Japan (Portugal Too)*. Among developed nations, these two nations (one facing the Atlantic, the other facing the Pacific) are the caboosees, the last on the Boo Lists for their respective hemispheres. In Japan, women hold 1.4% of the available board seats,<sup>82</sup> compared with 13.8% in Australia, 10% in New Zealand, and 8.9% in Hong Kong.<sup>83</sup> The comparable number for Portugal has been as low as .6%.<sup>84</sup> European numbers (not necessarily European Union) include Norway at 40%+, 28.2% in Sweden, 26% in Finland, and over 20% in the Netherlands and France.<sup>85</sup>

**K** *Keep Humble*. Arrogance and high-handedness, just as excessive assertiveness or aggressiveness, can derail a woman's career even before her progress has reached full stride. Australia is an egalitarian country. One manifestation of that egalitarian spirit is the tendency to cut down anyone who has become a "tall poppy." Americans do much the same, taking down a notch or two those who "have become too big for their britches." It behooves a woman who seeks to rise to the higher heights of an organization to avoid accumulating a reputation as a tall poppy, or "too big for her britches."

Hewlett-Packard CEO Carly Fiorina avoided it, just barely, in her ascent to the CEO suite, but she did very much become a tall poppy CEO once she got there. In the end it contributed to her downfall. She traveled too much, as explained in her biography, describing travel to Korea, Belgium, France, Switzerland, the Netherlands, Brazil, and China for her previ-

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81. See, e.g., Bussey, *supra* note 1, at B2 (quoting ex-General Electric CEO Jack Welch: "The best of the women would come to me and say, 'I don't want to be in a special group. I'm not in the victim's unit. I'm a star. I want to be compared with the best of your best.'").

82. Irene Natividad, *There Is No Denying the Effectiveness of Quotas: Why Europe Will Surpass the U.S. in Changing the Face of the Corporate Board*, DIRECTORS & BOARDS, Third Quarter 2010, at 23, 24.

83. See Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors*, 37 J. CORP. L. 793, 797-799 (2012).

84. Press Release, European Prof'l Women's Network, Fourth Bi-Annual European PWN Board Women Monitor 2010 (Oct. 4, 2010); see also EUROPEAN PROF'L WOMEN'S NETWORK, EPWN BOARD WOMEN MONITOR 2010: 4TH EDITION (2010), available at [http://www.europeanpwn.net/files/europeanpwn\\_boardmonitor\\_2010.pdf](http://www.europeanpwn.net/files/europeanpwn_boardmonitor_2010.pdf). Cf. Natividad, *supra* note 82, at 24 (3%).

85. See Branson, *supra* note 83.

ous employer, Lucent, alone.<sup>86</sup> As has been seen, the “Fiorina Palooza” jetted to eighteen H-P and customer sites on three continents in one week.<sup>87</sup>

In her autobiography, written after H-P fired her:

Ms. Fiorina is disingenuous. She talks of the media invitations she turned down<sup>88</sup> but never about all those she accepted, the countless feature stories about her, the magazine covers which featured her, the sixty or more off-campus speeches she gave each year, her monthly telecasts to all H-P employees, and more. At times her ego knew no bounds. She set herself up for a comeuppance.<sup>89</sup>

Women managers who do similar things will find themselves vulnerable as well.

**L** *The Labyrinth of Leadership*. In 2007, Alice H. Eagly and Linda L. Carli, professors at Wellesley College and Northwestern University, respectively, published an apologia for Corporate America of the type one sees from time to time. The co-authors previewed the book, *Through the Labyrinth: The Truth About How Women Become Leaders*,<sup>90</sup> in a lead article in the *Harvard Business Review*.<sup>91</sup> Their thesis was that because women had achieved promotion, including advancement to the highest positions, in the not-for-profit and political spheres; no glass ceiling exists.<sup>92</sup> The routes toward the top thus are in all probability free and clear in the business world as well.<sup>93</sup>

Of course, the Eagly–Carli expositions beg the question, which is given that fewer barriers to advancement exist in the not-for-profit and political fields, why do those barriers persist in the business world?<sup>94</sup> We also have wondered about women’s progress in the political sphere: women seem to have stalled at 17% in both the U.S. Senate and the House of Representatives for some years now.<sup>95</sup>

86. See CARLY FIORINA, TOUGH CHOICES 96, 97, 101, 104, 146, and 147 (2006).

87. See BRANSON, *supra* note 7, at 28.

88. FIORINA, *supra* note 86, at 172 (“Over the years that followed I turned down numerous requests from *Glamour*, *People*, *Vogue*, Diane Sawyer, Oprah Winfrey and more.”).

89. See BRANSON, *supra* note 7, at 28.

90. ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS (2007).

91. Alice H. Eagly & Linda L. Carli, *Women and the Labyrinth of Leadership*, HARV. BUS. REV., Sept. 2007, at 63. “Times have changed . . . and the glass ceiling metaphor is now more wrong than right. . . . [T]here have been female chief executives, university presidents, state governors, and presidents of nations [which] give[] the lie to that charge.” *Id.* at 64.

92. EAGLY & CARLI, *supra* note 90.

93. Eagly & Carli, *supra* note 91, at 63-64.

94. See EAGLY & CARLI, *supra* note 90.

95. Women comprise 17% of the U.S. Senate and 17% of the House of Representatives. *The United States Congress Quick Facts*, THISNATION.COM, <http://thisnation.com>

Along similar apologia lines, three-fourths of male CEOs of large corporations aver that no such thing as the glass ceiling exists.<sup>96</sup> According to Catalyst, over 80% of the CEOs they interviewed had an alternative explanation about why women have not advanced to the very top in their organizations, namely women's lack of line experience and of profit-and-loss responsibilities.<sup>97</sup>

Conservative economists, who have spawned a "human capital" literature, assert similar propositions.<sup>98</sup> One proposition is that women have disadvantageous positions because they "self-select" into jobs that require less education or less skill.<sup>99</sup> The second proposition is that labor markets, including the market for managers, are efficient.<sup>100</sup> Gender discrimination, and the glass ceiling that is a component of it, does not exist because they could not survive in a market that is competitive. It is inefficient to exclude managers from promotion on the basis of sex. Firms that did so would not survive in the Darwinian product markets and business worlds generally. Instead women do not rise to the top for a variety of reasons: they self-select; lack line experience; allow themselves to get "stuck" in dead-end positions; prefer to go onto the "mummy track" to raise children; and so on.<sup>101</sup>

A symposium piece does not permit refutation of these arguments which, to an extent, are belied by the numbers and the lack of progress on

/congress-facts.html (last visited Sept. 24, 2012). The proportion of women in the houses of Congress has stayed flat for some time. See JENNIFER L. LAWLESS & RICHARD L. FOX, MEN RULE: THE CONTINUED UNDER-REPRESENTATION OF WOMEN IN U.S. POLITICS 6 (2012), available at <http://www.american.edu/spa/wpi/upload/2012-Men-Rule-Report-final-web.pdf>. But see Jennifer Steinhauer, *Once Few, Women Hold More Power in the Senate*, N.Y. TIMES, Mar. 20, 2013 (20 female senators now in office).

96. FED. GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 144 (Mar. 1995), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1118&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1118&context=key_workplace).

97. CATALYST, WOMEN IN CORPORATE LEADERSHIP: PROGRESS AND PROSPECTS 36, 38 (1996), available at <http://www.catalyst.org/publication/75/women-in-corporate-leadership-progress-prospects>.

98. See, e.g., Nadja Zalokar, *Male-Female Differences in Occupational Choice and the Demand for General and Occupation-Specific Human Capital*, 26 ECON. INQUIRY 59, 71 (1988) (analyzing a human capital model of occupational choice to show how women's professional choices change in relation to lifetime labor force participation patterns); Solomon William Polachek, *Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structure*, 63 REV. ECON. & STATS. 60, 64 (1981) (proposing to incorporate individual differences in the kind of human capital analyzed to further explain earnings distribution within a population).

99. See Zalokar, *supra* note 98, at 71; Polachek, *supra* note 98, at 64.

100. See Zalokar, *supra* note 98; Polachek, *supra* note 98.

101. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 41-42 (1992) (noting that an employer's decision not to hire a person based on race, sex, or age will limit their own opportunities for advancement); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1315 (1989).

these issues. But anyone desirous of a primer on the issues should know that another side, quite a robust one in fact, exists.

**M***Mentoring.* Women should have almost as many mentors as stocks in their investment portfolio. They should not only have female as well as male mentors, but they should also have them inside and outside the company, even at a competitor company, and in finance, engineering, marketing, accountancy, and so on.<sup>102</sup> Certain recipes for advancement by women ascribe the paucity or lack of mentors as a principal reason why women have not advanced in the numbers and to the extent one would expect.<sup>103</sup>

One can easily conjure up three negatives, or more, about mentoring that the how-to books never discuss. One is that mentoring, by and large a good thing, may disguise a “star system,” generally a bad thing.<sup>104</sup> In a star system, stars of the first magnitude, which directly report to the CEO, have trailing behind them stars of the third, fourth, and fifth magnitude.<sup>105</sup> When and if the star of the first magnitude falls from grace, stars of the lower orders may never be seen or heard from again.<sup>106</sup> Inside, with their star systems, some corporate hierarchies still function as did medieval satrapies.<sup>107</sup>

Second is that a mentor may morph into an overly protective “office uncle.”<sup>108</sup> Rather than conferring with a mentee about how to approach and work through problems, the office uncle tries to steer his mentees, females especially, away from problems.<sup>109</sup> At the extreme, the office uncle may attempt to steer the mentee into a pink-collar or dead-end, but placid, position.<sup>110</sup> “Plastic bubble” is another name for the phenomenon derived from

102. See BRANSON, *supra* note 3, at 82-83; BRANSON, *supra* note 7, at 200-01, 202 n.23 (listing fourteen possible sources for mentors).

103. A leading exponent of this view is Sheila Wellington. See SHEILA WELLINGTON & CATALYST WITH BETTY SPENCE, *BE YOUR OWN MENTOR: STRATEGIES FROM TOP WOMEN ON THE SECRETS OF SUCCESS* 3 (2001) (“[T]he single most important reason why . . . equally talented[] men tend to rise faster than women is that most men have mentors and most women do not.”). Ms. Wellington was the president of Catalyst, Inc., for a number of years. See also John Bussey, *How Women Can Get Ahead: Advice from Female CEOs*, WALL ST. J., May 18, 2012, at B1 (“Mentors were key in the careers of several of the CEOs. . . . Ms. Wilderotter [Frontier Communication] says she regularly picked the brains of a range of senior execs. ‘I had many mentors, and they didn’t know it.’”); see generally *Everyone Who Makes It has a Mentor: Interviews with F.J. Lunding, G.L. Clements, and D.S. Perkins*, HARV. BUS. REV., July-Aug. 1978, at 89 (highlighting the importance of a mentor’s influence on mentees’ professional development).

104. See BRANSON, *supra* note 3, at 84-85; BRANSON, *supra* note 7, at 201-02.

105. BRANSON, *supra* note 3, at 84; BRANSON, *supra* note 7, at 202.

106. BRANSON, *supra* note 3, at 85; BRANSON, *supra* note 7, at 202.

107. See BRANSON, *supra* note 3, at 85; BRANSON, *supra* note 7, at 202.

108. See BRANSON, *supra* note 3, at 83; BRANSON, *supra* note 7, at 201.

109. BRANSON, *supra* note 7, at 201.

110. *Id.*

the cocoon-like placement that the office uncle may attempt to procure for his mentee.<sup>111</sup>

Third is that recent criticisms have complained that mentoring is less of a benefit than many of the advice-givers maintain. These critics point out that it is mentoring plus some form of sponsorship, rather than mentoring alone, that will produce the desired results.<sup>112</sup>

**O** *Opting Out.* One of the principal leaks farther along the pipeline is that educated women, with law, MBA, or engineering degrees, win managerial positions followed by promotions. In doing so, they have postponed childbearing until their early or mid-thirties. When they do bear children then, they do not return to the workplace. Or alternatively, if they do return, they do not return after giving birth to a second child. Lisa Belkin wrote a celebrated piece discussing these issues for the *New York Times Magazine* titled simply *The Opt-Out Revolution*.<sup>113</sup>

The reasons for opting out are varied and many. Many accomplished women want to work but the emphasis on 24/7 availability, maximum face time in the office, travel on short or no notice, and other features of turbo capitalism turn them off. Women know that if they take any more time off than a single minimum maternity leave, say to have a second child, to see their children off to school for the first time, go part time, or seek flex time employment, at age forty they will earn 60% or so of what a comparable male makes. Knowing that such an outsized discount to their worth may be in their future many accomplished women opt out in early middle age.

Enlightened corporations realize that the loss of institutional memory, specialized expertise, customer relationships, and so on when women opt out are significant costs. Moreover, the difference between a male who works thirty-seven years and a female who works thirty-five years is statistically insignificant. With alumnae and welcome back programs, those corporations are attempting to take away the more permanent aspects of opting out.

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111. See BRANSON, *supra* note 3, at 84; BRANSON, *supra* note 7, at 201.

112. See generally Press Release, Catalyst, Catalyst Study Shows Sponsorship Is Key to Women's Success (Aug. 17, 2011), available at <http://www.catalyst.org/press-release/190/catalyst-study-shows-sponsorship-is-key-to-womens-success> (noting the key findings of a 2011 Catalyst study that focused on women and sponsorship); Joann S. Lublin, *Coaching Urged for Women*, WALL ST. J., Apr. 4, 2011, at B8 (addressing findings from a study by McKinsey & Co., which call for more than a diversity program in order to groom females for upper management positions).

113. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 23, 2003, at 42; see also ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED (2001).

**P***lastic Bubble/Plow Horse.* I have already talked of the plastic bubble phenomenon that gives some women misgivings about some mentors.<sup>114</sup> The “plow horse” designation comes from the business best seller *Good to Great* by Jim Collins.<sup>115</sup> Collins found that the CEOs of what he and his staff, after extensive research, found to be exceptional companies, were all plow horses: not flashy, emotionally intelligent, good people managers, adept at listening, and the like.<sup>116</sup> He also coined the term “show horse” for the type of CEO who is flashy, listens to no one else (indeed, ignores everyone), pursues his own personal vision for the company at all costs, and so on.<sup>117</sup>

About the time Collins published his book, a psychologist, Michael Macoby, published another best seller, *The Productive Narcissist: The Promise and Peril of Visionary Leadership*.<sup>118</sup> Although he did not use the term show horse, Macoby’s viewpoint was the exact opposite of Collins’s: the best CEO candidates are productive narcissists, or in other words, show horses.<sup>119</sup>

I cannot answer the question of who makes the best CEO. But in his book, Macoby uses one hundred past and present CEOs as examples of his paradigm.<sup>120</sup> Not one, save perhaps Carleton Fiorina, CEO at Hewlett-Packard 1999-2005, is female. Of the twenty-two women CEOs I chronicle in my book, every one, save perhaps Fiorina, is a plow horse. None fits either the show horse or the productive narcissist specification.

**Q***uota Laws/Queen Bee Stereotype.* The literature labels as a “queen bee” the woman who relishes her status as the only woman in a work group, at a certain management level (e.g., regional sales directors, or vice presidents) or otherwise among her peers.<sup>121</sup> The Queen Bee thus makes it difficult, sometimes extremely so, for any woman who would fain attempt to follow in the Queen Bee’s footsteps.<sup>122</sup> Once she is safely on her perch, the Queen Bee pulls up the rope ladder she used to get there.<sup>123</sup>

114. See *supra* text accompanying note 111.

115. JIM COLLINS, *GOOD TO GREAT: WHY SOME COMPANIES MAKE THE LEAP . . . AND OTHERS DON'T* 33, 39 (2001).

116. *Id.*

117. *Id.*

118. MICHAEL MACOBY, *THE PRODUCTIVE NARCISSIST: THE PROMISE AND PERIL OF VISIONARY LEADERSHIP* 151-53 (2003).

119. *Id.*

120. See generally *id.*

121. See, e.g., BRANSON, *supra* note 3, at 67.

122. *Id.*

123. *Id.*

In 2003, Norway enacted a quota law, which stated that as many as 40% of a public corporation's directors had to be of the opposite sex of the other directors.<sup>124</sup> The deadline for achievement of that goal, which public companies in Norway by and large reached, was 2008.<sup>125</sup>

Several EU member nations (Belgium, France, Italy, the Netherlands, and Spain) have followed Norway, a non-EU member, in adopting quota laws, as have Iceland, Israel, Switzerland, and Malaysia, among non-member states.<sup>126</sup> Impatience with the continued male dominance of seats on corporate boards is growing.

Parliaments in Italy, the Netherlands, and Belgium have followed Norway, enacting gender-based director laws.<sup>127</sup> Spain, the second nation to act, ordered achievement of the 40% level by 2016, a significant jump from the 5% level that prevailed in Spain at the time of the law's adoption.<sup>128</sup> The Spanish statute, though, is largely aspirational while the Norwegian law has severe penalties. Norwegian companies that do not comply are not only subject to delisting on the stock exchange or monetary penalties, but to outright dissolution as well.<sup>129</sup>

France, the third nation to act, adopted a 40% quota law early in 2011.<sup>130</sup> Looking northward to Norway, a deputy of the *l'Assemblée Nationale* introduced a 20% quota bill in 2006. Thereafter the notion of gender parity, at least in French corporate governance, had to negotiate a twisting route. In 2009, besides looking northward towards Norway, and adding to the momentum for adoption of a quota statute, the French quota measure's supporters found that only 8% of directors in France's largest one hundred corporations were women. Further, they bemoaned that in that year French

124. See Rosenblum, *supra* note 9, at 56-57.

125. See *id.* at 63.

126. See Steinhäuser, *supra* note 10.

127. *Id.*; EUROPEAN PROF'L WOMEN'S NETWORK BOARD, *supra* note 84, at tbl.8.

128. Ley Orgánica 3/2007, de 22 marzo, para la Igualdad Efectiva de Mujeres y Hombres [Organic Law 3/2007, March 22, on the Effective Equality between Women and Men], BOLETÍN OFICIAL DEL ESTADO [B.O.E.] [OFFICIAL GAZETTE OF SPAIN], Mar. 22, 2011, p. 12611-645 (Sp.), available at <http://www.boe.es/buscar/doc.php?id=BOE-A-2007-6115>.

129. Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449, 450 (2012); see also Rosenblum, *supra* note 9, at 71 (characterizing the Norwegian quota law as a "radical" response to anti-interventionist arguments).

130. Loi no. 2011-103 du 27 Janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Law 2011-103 of January 27, 2011 Relating to the Balanced Representation of Women and Men on Boards of Directors and Supervisory and Professional Equality], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 27, 2011, p.2 (Fr.), available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023487662&dateTexte=&categorieLien=id>.

public companies added only six new women directors to corporate boards.<sup>131</sup>

The recently enacted French quota mandate is staged. Public companies' boards must have 20% women directors within three years of the enactment and 40% within six years (2017).<sup>132</sup> Thus far, large French corporations are out in front of the 2014 objective, having passed women on 24% of directors on boards by early 2012.<sup>133</sup>

Sweden, Finland, Germany, and the UK have all come out in opposition to quota laws, for various reasons. Sweden (28.2%) and Finland (26%) already have meaningful representation of women on their boards.<sup>134</sup> On the other hand, Germany and the UK have middling to poor and so-so records, respectively, on the issue. Both countries have long traditions of bucking trends and becoming recalcitrant when told what to do.<sup>135</sup> Outside of the European Union, besides Norway, Israel, Iceland, and Switzerland have adopted quota laws.<sup>136</sup>

Quota laws have unintended as well as intended consequences. In the rush to name females to directorships, for instance, Norwegian companies named one—no doubt very capable—woman to eleven corporate boards.<sup>137</sup>

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131. RAPPORT PRÉPARATOIRE À LA CONCERTATION AVEC LES PARTENAIRES SOCIAUX SUR L'ÉGALITÉ PROFESSIONNELLE ENTRE LES FEMMES ET LES HOMMES [PREPARATORY REPORT FOR CONSULTATION WITH THE SOCIAL PARTNERS ON EQUALITY BETWEEN WOMEN AND MEN] (July 2009) (Fr.), available at <http://www.ladocumentationfrancaise.fr/rapports-publics/094000313/index.shtml>. The 2008 level of women on boards in France was 7.6%. *Id.* at 24.

132. See Suk, *supra* note 129, at 462.

133. Steinhauser, *supra* note 10. Cf. Liz Bolshaw, *Glass Ceilings Starting to Crack Across Europe*, WOMEN AT THE TOP BLOG (Dec. 12, 2011, 3:54 PM), <http://blogs.ft.com/women-at-the-top/2011/12/12/glass-ceilings-starting-to-crack-in-europe/#axzz24fzMT4C5> (stating that France has attained 20.1% in compliance with the quota law).

134. See, e.g., Margareta Neld, *Gender Quotas Would Benefit Sweden's Corporate Boards*, LOCAL (Swed.) (Mar. 8, 2011), <http://www.thelocal.se/32466/2011/0308>; Nicola Clark, *Getting Women into Boardrooms, by Law*, N.Y. TIMES, Jan. 27, 2010, <http://www.nytimes.com/2010/01/28/world/europe/28iht-quota.html?pagewanted=all> (opposition of G. Rustad in Sweden).

135. Although the UK government opposes a quota law, that opposition has not prevented a government sponsored study group from releasing a lengthy report setting 25% as a goal for achievement by 2015. Julia Werdigier, *In Britain, A Big Push for More Women to Serve on Corporate Boards*, N.Y. TIMES, Feb. 25, 2011, at B6.

136. See Steinhauser, *supra* note 10.

137. Joann Lublin, *Behind the Rush to Add Women to Norway's Boards*, WALL ST. J., Dec. 10, 2007, at B1 ("She spurned about [forty] other offers . . ."). By contrast, the new French quota law limits any individual, including a women director, from service on more than four boards of directors. Darren Rosenblum, *Corporate Governance—Sex and Quotas: A Transnational Perspective*, University of Dayton, School of Law Seminar: Perspectives on Gender and Business Ethics: Women in Corporate Governance, Feb. 25, 2011 (on file with author). In Norway, as an upshot of the scramble for talent that followed enactment of the

No one, not even Superwoman, can serve adequately on more than three or perhaps four boards, especially in the current era with its emphasis on proactive, hands-on directors. Quota laws produce a surfeit of women trophy directors, which may help produce unqualified, figurehead (token) female directors.<sup>138</sup>

Quota laws also may result in a surfeit of celebrity directors, who also may be regarded as tokens. Allegedly that has happened in France where board seats have gone to former first lady Bernadette Chirac (luxury goods retailer LVMH); Nicole Dassault, wife of the controlling shareholder (Dassault Aviation); Florence Woerth, spouse of the former Minister for Labor (Hermes); Brigitte Longuet, wife of the former Minister of Defence (broadcaster Canal Plus); and Amélie Oudéa-Casteras, former tennis professional and wife of Société Générale CEO (media group Lagardere).<sup>139</sup>

Other consequences thought due to the enactment of a quota law include companies downsizing their boards of directors so as to reduce the number of women candidates necessary, and thus, search costs. An extreme consequence is that some companies may go private in order to evade a quota law's requirements altogether.<sup>140</sup>

Opposition to enactment of a quota law is strong in nations such as New Zealand, a country in which women make up 59% of the work force and which recently was governed by a female prime minister, yet in which many corporate executives oppose mandatory or other guidelines.<sup>141</sup> The New Zealand Stock Exchange has publicly stated that it will not even follow its Australian counterpart, the Australia Stock Exchange (ASX), which has a requirement for companies to set and meet voluntary quotas for increasing the number of women at the top.<sup>142</sup> In the United Kingdom, a recent government reports urges a voluntary quota of 25% by 2015 but pointedly stops short of any recommendation that the UK adopt a compulsory quota, as France, Spain, Belgium, the Netherlands, Norway and other states have

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quota law, an elite group of 70 women held 300 board seats. They were dubbed "[t]he golden skirts." Clark, *supra* note 134 (internal quotations omitted).

138. Another unintended consequence of a quota law is for public companies to go private and thus to go dark rather than to attempt compliance with the law. *See, e.g.*, Lublin, *supra* note 137, at B1 ("Rather than comply with the gender law, more than [thirty] affected companies [in Norway] are going private . . .").

139. *See* Bolshaw, *supra* note 133.

140. Lublin, *supra* note 137; Rosenblum, *supra* note 9, at 64-65.

141. Martin Johnston, *Women Lose Boardroom Gains: Report*, NEW ZEALAND HERALD, Nov. 8, 2010, [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10686154](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10686154).

142. Maria Slade, *Gender Quotas Panned*, NEW ZEALAND HERALD (N.Z.), Mar. 21, 2010, [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10633287](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10633287). By contrast, the Australian Minister for the Status of Women has stated that the option of mandatory quotas in Australia is "still 'on the table.'" Williams, *supra* note 43.

done.<sup>143</sup> By contrast, the Malaysian government has imposed a quota that publicly held companies there have 30% women directors by 2016.<sup>144</sup>

**R**ubber Floors/The Rooney Rule/Risk Taking. The entry above about glass elevators and elevator shafts discusses the rubber floor as well.<sup>145</sup>

A discussion of the Rooney Rule might begin with discussion of the Dutch 2008 “Talent to the Top” pledge, which requires public corporations to add women to their board if they voluntarily subscribe to the pledge.<sup>146</sup> The 110 largest Dutch companies have done so, including many very large household name corporations such as Shell, Phillips, Heineken, Reed Elsevier, and Unilever.<sup>147</sup> These actions, and the follow through which succeeds the pledges, have played a part in raising Dutch corporate boards from approximately 7% women in 2006 to 20.9% in 2010.<sup>148</sup>

The U.S. has its advocates of a pledge program. In two luncheon speeches, in November 2010, Securities and Exchange Commission (SEC) Commissioner Luis Aguilar commended the U.S. National Football League’s (NFL’s) Rooney Rule as a model for corporate pledges in the board composition area.<sup>149</sup> *Board Diversity: Why It Matters and How to Improve It* was his principal address on the subject; *Changing the Dialogue on Diversity to Achieve Results* preceded it by several weeks.<sup>150</sup> Dan Rooney, a principal owner of the Pittsburgh Steelers Professional Football Club, chaired the NFL Committee on Diversity.<sup>151</sup> The committee drafted and the National Football League adopted the Rooney Rule, which requires each professional team to pledge to include a minority candidate among the

143. Werdigier, *supra* note 135, at B6.

144. Lamont, *supra* note 12. Impatient with their government’s inactivity, in some cases dominant shareholders and executives have engaged in self-ordering. In Korea, for instance, “Samsung Electronic’s billionaire chairman Lee Kun-hee wants 10% of executive positions to be filled by women by 2020.” *Id.*; see also Bolshaw, *supra* note 133.

145. See Bolshaw, *supra* note 133 and accompanying text.

146. BUS. & INDUS. ADVISORY COMM. TO THE OECD, TALENT NAAR DE TOP 3 (2008), available at [http://biac.org/members/elsa/mtg/2012-02-workshop/Charter\\_TalentNaarDeTop\\_EN\\_03.pdf](http://biac.org/members/elsa/mtg/2012-02-workshop/Charter_TalentNaarDeTop_EN_03.pdf).

147. COMM’N MONITORING TALENT TO THE TOP, MONITOR TALENT TO THE TOP 2010 (2011), available at [http://www.talentnaardetop.nl/uploaded\\_files/document/Monitor\\_r\\_Talent\\_naar\\_de\\_Top\\_2010.pdf](http://www.talentnaardetop.nl/uploaded_files/document/Monitor_r_Talent_naar_de_Top_2010.pdf).

148. Luis A. Aguilar, Comm’r, Sec. Exch. Comm’n, Speech, Board Diversity: Why It Matters and How to Improve It (Nov. 4, 2010), <http://www.sec.gov/news/speech/2010/spch110410laa.htm>.

149. *Id.*

150. Luis A. Aguilar, Comm’r, Sec. Exch. Comm’n, Speech, Changing the Dialogue on Diversity to Achieve Results (Oct. 4, 2010), <http://www.sec.gov/news/speech/2010/spch100410laa.htm>.

151. Damon Hack, *The N.F.L. Spells Out New Hiring Guidelines*, N.Y. TIMES, Dec. 9, 2003, at D3.

finalists for each coaching vacancy and general manager position, and to conduct an on-site interview with that finalist.<sup>152</sup> Since the rule was adopted in 2003, the number of black head coaches in the NFL increased from 6% to 22%.<sup>153</sup> Commissioner Aguilar stated that “[t]he NFL moved from lip service to action and the results are self-explanatory. Let’s face it—many corporate boards need their own Rooney Rule.”<sup>154</sup>

But not all certificate or pledge programs have met with success. The European Union followed the Netherlands example when it requested large publicly held companies in Europe to pledge voluntarily to achieve the 30% level by 2015. The program failed miserably. After a year, only twenty-four companies in the EU had signed the pledge.<sup>155</sup> Calling for quota laws, EU Justice Commissioner Viviane Reding explained: “One year ago, I asked companies to voluntarily increase women’s presence on corporate boards . . . I regret to see that despite our calls, self-regulation so far has not brought about satisfactory results.”<sup>156</sup>

Recent interviews with female CEOs highlight the necessity of an aspiring woman taking risks in mid-career and thereafter. “I have stepped up to many ‘ugly’ assignments that others didn’t want,” remembers Beth Mooney, CEO at KeyCorp.<sup>157</sup> “The most important factor in determining whether you will succeed . . . [is to] [b]e open to opportunity and take risks. In fact, take the . . . most challenging assignment you can find, and then take control.”<sup>158</sup>

**S** *Star Systems/Stereotypes/Shoulder Pad Feminism.* These all are topics germane to the subject of this Article, but they have been addressed in various of the headings *supra*.

**T** *Trophy Directors.* Many male CEOs’ boards limit them to one outside directorship, or to none at all. By contrast, large publicly held corporations in the U.S. have a penchant for naming the same women over and over. In fact, the largest growth sector among female directors is of trophy directors, those who serve on more than four public companies’ boards of directors, growing from thirty in 2001 to seventy-nine

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152. See *id.*; David Poole Anderson, *Minority Candidates Should Get Fairer Shake*, N.Y. TIMES, Dec. 16, 2003, at D3; see also William C. Rhoden, *Working with the NFL on Diversity*, N.Y. TIMES, Dec. 24, 2009, at B10 (noting the NFL extension of the Rooney Rule to hiring processes for assistant coach vacancies).

153. See Aguilar, *supra* note 150.

154. See Aguilar, *supra* note 148.

155. Steinhauser, *supra* note 10.

156. *Id.*

157. Bussey, *supra* note 1, at B2.

158. *Id.* (quoting of Angela Braly, CEO of WellPoint).

in 2005.<sup>159</sup> Thus one woman, whose husband happened to be a U.S. Senator at the time, served on eight boards of directors while a number of other women served on five, six, or seven boards.<sup>160</sup>

It is doubtful that any person can do an adequate job serving on more than three boards. In my book, *No Seat at the Table*, I term anyone who serves on four or more boards a “trophy director.”<sup>161</sup> What is wrong with trophy directors, besides perhaps an inability to do the job expected of a corporate director? One argument against trophy directors is that the practice of naming the same women over and over crowds out more deserving and younger women. The penchant for trophy directors also deprives other deserving women of the opportunity to “show their stuff” and to gain the boardroom experience, which may help propel them to other companies and other boards.

**U***rgency.* At present rates of inclusion, Lord Mervyn Davies calculates that it will take at least until 2080 for women to achieve a measure of parity in the boardroom,<sup>162</sup> and that is without any stumbles or steps backward. The latter are bound to occur. The glacial pace toward a respectable percentage of women among the directors of public companies (not parity but perhaps 30% or 35%) adds to the sense of urgency many feel in discussing the issue.

**V***erbal Hedges.* Many men in positions of power (CEOs, board chairs, directors) downplay the contribution any woman could make to corporate success, terming women “too emotional,” “intuitive rather than analytical,” and the like.<sup>163</sup> Linguists, such as Robin Lakoff at the University of California Berkeley, or Deborah Tannen at Georgetown University, have studied and written about the phenomenon. In our society, as in many other societies, women tend to act and speak differently than men (“in a different register”).<sup>164</sup> Women tend to avoid the use of imperatives while men do not.<sup>165</sup> Women tend to have a rising intonation in their sentences while men do that only in asking questions.<sup>166</sup> Women use modal verbs (“might,” “should,” “ought”) while men use imperatives, as

159. BRANSON, *supra* note 3, at 97.

160. *See, e.g., id.* at 99-101.

161. *Id.* at 97.

162. DAVIES, *supra* note 43 (2011) (“At the current rate of change it will take over [seventy] years to achieve gender-balanced boardrooms in the UK.”).

163. BRANSON, *supra* note 7, at 155.

164. *See* BRANSON, *supra* note 3, at 55; *see generally* ROBIN T. LAKOFF, LANGUAGE AND WOMAN’S PLACE (1975); DEBORAH TANNEN, GENDER AND DISCOURSE (1994); DEBORAH TANNEN, YOU JUST DON’T UNDERSTAND (1991); *see also* BRANSON, *supra* note 3, at 55-64.

165. BRANSON, *supra* note 7, at 155.

166. *Id.* at 159.

stated (“do,” “run the numbers,” “make that sale,” etc.).<sup>167</sup> Women tend to end sentences with verbal hedges (“maybe,” “I suppose,” “perhaps,” “kind of,” “about,” or “around”).<sup>168</sup>

Professors Lakoff and Tannen demonstrate that acting or speaking “in a different register,” means little.<sup>169</sup> The different speech patterns do not bear any correlation to the behaviors that men in power tend to recite.<sup>170</sup> Women are not necessarily less analytical or emotional because they speak differently.

Nonetheless, the how-to books advise women who aspire to succeed in business to lower and deepen their voices.<sup>171</sup> Women, they are told, never should remain quiet or acquiesce in the face of arguments or directions.<sup>172</sup> They should respond even if no response is necessary. Evidently, the authors of these advice books have neither read nor examined the conclusions reached by Professors Lakoff and Tannen.

**W***ork/Life Issues.* The whole panoply of issues, including child bearing, child rearing, household work, cooking, and the like is subsumed under the umbrella of work/life issues. The necessity of women giving birth to and to a great extent caring for children, at least in their early years, is an inescapable biological fact. That fact is accompanied by the uneven breakdowns of stereotypes, which leave women still with the bulk of household responsibilities. The combination of inescapable biological fact and uneven assumption of household burdens holds many, but not all, women back from achievement in business careers.<sup>173</sup> Centers exist for the discussion and analysis of these issues.<sup>174</sup> Women who have succeeded in business universally describe how they

167. *Id.* at 158-59.

168. *Id.* at 157-58.

169. BRANSON, *supra* note 3, at 55.

170. BRANSON, *supra* note 7, at 160-61.

171. *See, e.g.*, WELLINGTON, *supra* note 103, at 92 (“Lower the pitch of your voice. A lower voice commands more attention and respect.”); *see also id.* at 85 (“Eschew emotion. Certain behaviors work against you in the workplace . . . . Emoting about anything . . . is one surefire way to make others uncomfortable in the workplace.”).

172. *Id.* at 90-91.

173. When asked, “What would men be without women?” Mark Twain replied, “Scarce, sir, mighty scarce.” NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* xi (2009).

174. University of California Hastings College of Law in San Francisco has a center dedicated to the study of work/life issues. *See Center for WorkLife Law*, UNIV. OF CAL. HASTINGS COLL. OF LAW, <http://www.uchastings.edu/centers/worklife-law.html> (last visited Sept. 24, 2012). Funded by the National Science Foundation, the University of Wisconsin has undertaken extensive study of worklife among its faculty and staff. *See Study of Academic-Staff Worklife at UW-Madison*, WISELI: WOMEN IN SCI. & ENG’G LEADERSHIP INST., UNIV. OF WISC.-MADISON, <http://wiseli.engr.wisc.edu/acstaffwl.php> (last visited Sept. 24, 2012).

compartmentalize their lives rather than continuing to be all things to many people.<sup>175</sup> Other women who have succeeded testify as to how, earlier in their careers, they reached understandings with their spouses about whose career had the most upward trajectory and to which they would devote the most resources.<sup>176</sup>

There are, however, no silver bullets. “‘The myth,’ [says] Ms. Braly [CEO of Wellpoint] ‘is that women and their families don’t have to make tradeoffs to have an “extreme career”; they absolutely do.’”<sup>177</sup> “The myth, continues Deanna Mulligan, CEO of Guardian Life Insurance, is ‘that you can have a “balanced” life at all times.’”<sup>178</sup> Those reservations made, “Ms. Wilderotter of Frontier [Communications] believes women are better at multitasking than men. ‘We do it naturally.’”<sup>179</sup>

**X**XEROX. From the 1970s until Ann Mulcahy took office as CEO in 2002, Xerox’s market share fell from 90% to 13%. The stock fell from \$63.69 to \$4.93 in one year (2000) alone. The Xerox board plucked Mulcahy from a supposed dead-end, pink-collar job. She was the head of human resources. But, by most accounts, she fixed Xerox, to paraphrase the title of the *BusinessWeek* article heralding her ascension.<sup>180</sup> She oversaw the company’s return to profitability and the stock’s rise back to some level of respectability.<sup>181</sup>

When Mulcahy left office in 2009, Xerox became noteworthy, at least for purposes of this subject, because the Xerox board chose a second female as CEO, just as Hewlett-Packard later did when its board hired Meg Whitman. Xerox does H-P one better, though, at least in terms of diversity. Xerox became the first *Fortune 500* company to choose an African-American female CEO.<sup>182</sup> She is Ursula Burns, an engineer who holds an MSEE from Columbia University.<sup>183</sup>

**Y**Yahoo!. For more reasons than one, Yahoo! is a company on the boo list. The reason to highlight Yahoo! here is Yahoo!’s recruitment of Carol Bartz to be CEO. Bartz had had a successful tenure as CEO of Autodesk, a leading manufacturer of software, which aids in the design of everything from kitchen cabinets to boats or

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175. See, e.g., BRANSON, *supra* note 3, at 38, 40–41.

176. See BRANSON, *supra* note 7, at 211.

177. Bussey, *supra* note 1, at B2.

178. *Id.*

179. *Id.*

180. Pamela L. Moore, *She’s Here to Fix the Xerox*, BUSINESSWEEK, Aug. 6, 2001, at 47.

181. See BRANSON, *supra* note 7, at 57.

182. *Id.* at 118.

183. *Id.*

airplanes.<sup>184</sup> Bartz had a degree in computer science and was well-known in the industry.<sup>185</sup> But she also had three children and had suffered a bout of breast cancer, undergoing a radical mastectomy while she was CEO of Autodesk.<sup>186</sup> Sometime later she stepped down as CEO of Autodesk voluntarily,<sup>187</sup> perhaps for a rest, perhaps for a change of pace.

It was Yahoo! then, a company in trouble, that recruited Bartz, coaxing her out of her semi-retirement, early in 2009.<sup>188</sup> By 2012, the Yahoo! board had grown dissatisfied with her, although they had barely given her a chance to prove herself (serving as “Exhibit A” for the Glass Cliff theory *supra*). The gang that couldn’t shoot straight (the Yahoo! Board) then hired Scott Thompson, ex-CEO of PayPal, as Bartz’s replacement. They did so only effectively to force Thompson’s resignation a few months later, on grounds that he had falsified his credentials. He had listed two undergraduate majors, accounting and computer science, when he had only majored in accounting.<sup>189</sup> The effective dismissal seemed pretextual, indicative of why Yahoo! deserves a prominent position on the Boo List.

**Z** *Zenith*. The zenith is “the point of the celestial sphere that is vertically above the observer and directly opposite the nadir.”<sup>190</sup> If the nadir is zero, as in no female directors, would the zenith be 50%, or would it be 100%, women directors of large publicly held companies? I believe either answer to be academic, as I do not believe that the proportion of directors who are women will ever reach either height.

When an alternative definition of zenith is sought, the denotation is “the upper region of the heavens.”<sup>191</sup> I take that to mean that the zenith for which we should aim is 35%, perhaps 40%. That would satisfy my sense of social justice and remedy promises not kept, that male executives and Corporate America have for decades made: “it is only a matter of time,” or “next year,” “or next decade.” The point for which we aim should be high but need not necessarily be “vertically above” and “directly opposite the nadir.”

That is my A to Z list on the subject of gender and diversity in corporate governance.

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184. *Id.* at 110.

185. *Id.* at 109.

186. *Id.* at 110-11.

187. *Id.* at 111.

188. *Id.*

189. Amir Efrati & Joann S. Lublin, *Yahoo CEO's Downfall*, WALL ST. J., May 15, 2012, at B5.

190. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2657 (1981).

191. *Id.*

