From Governess to Governance: Advancing Gender Equity in Corporate Leadership

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Abstract

Even as corporate influence on every aspect of life continues to grow, women (overall, and especially women of color) remain woefully under-represented in corporate governance roles, particularly on boards of directors. This lack of gender diversity in the corporate boardroom is prevalent not only in more established companies but also persists—often at even higher levels—in new ventures as well. This Essay details the persistent lack of progress over more than a half century in diversifying leadership in corporate governance. This progress is especially concerning given that the benefits of diversity for sound decisionmaking and overall corporate welfare have been established empirically, putting into question whether those boards that fall short on gender equity are meeting their fiduciary duties of good governance. The Essay confronts and debunks the common reasons given for slow progress and outlines specific steps that corporate boards and others seeking to improve gender equity in corporate governance can deploy to make faster and more consistent progress.

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Introduction

A governess. Quick, who comes to mind? Was your first thought General Motors' CEO Mary Barra? Former U.K. Prime Minister The-

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resa May? U.S. Senator from Minnesota Amy Klobuchar? Oregon governor Kate Brown? None of the above? Right.

Depending on your age, it was more likely that you thought of Julie Andrews or Emily Blunt—that is, Mary Poppins. While the word "governess" originally meant "a woman who governs," that connotation long gave way to "nanny."[1]

That change of meaning is more than history. We are, it seems, still more comfortable asking women to take care of the house and the children than the company, state, or country. To the topic of Professor Fairfax's timely symposium, we prefer women as governess over women in corporate governance. Moreover, the governess metaphor is not confined to the domestic sphere. Consider the woman effectively running the company behind the scenes but excluded from the C-suite or the boardroom.

Beyond anecdotes and our own intimate knowledge of gender dynamics in the workplace, the statistics on corporate leadership paint a very clear picture. To put them into context, recall that roughly 50% of the world's population is women, who now earn college degrees—associate through doctorate—at higher percentages than men.[2]

At the beginning of 2019, 9 of 50 governors were women and 25 of 100 senators were women.[3] Near the end of 2018, women CEOs ran only 25 Fortune 500 companies.[4] Of the 5,670 directors of Fortune 500 companies, just 1,278 or 22.5% are women.[5] Among Fortune 100 companies, the percentage of women board members grew to 25.7% in

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1 *Governess*, Merriam-Webster, https://www.merriam-webster.com/dictionary/governess [https://perma.cc/92EB-QZR5].

2 *See* Michael W. Kirst, *Women Earn More Degrees than Men; Gap Keeps Increasing*, Stanford: The College Puzzle (May 28, 2013), https://collegepuzzle.stanford.edu/women-earn-more-degrees-than-men-gap-keeps-increasing/ [https://perma.cc/L7NK-9J75].

3 *Women in Elective Office 2019*, Ctr. for Am. Women & Politics, http://www.cawp.rutgers.edu/women-elective-office-2019 [https://perma.cc/K6LC-R4AW].

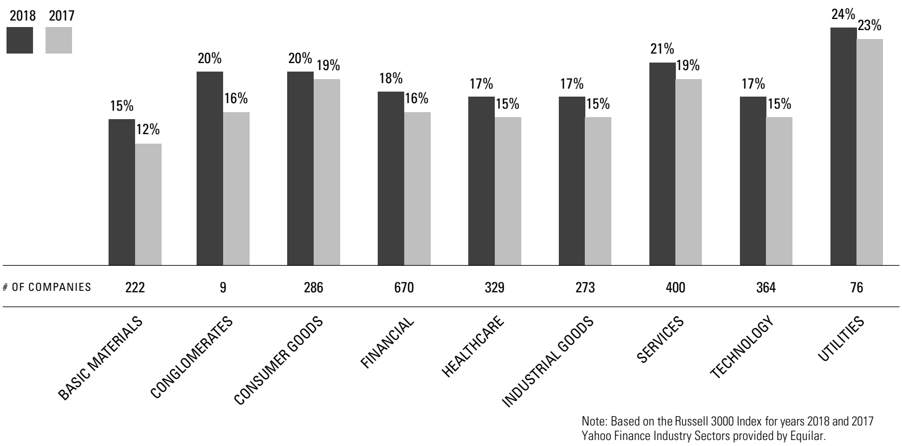
4 Mark Abadi, *There Are Only 25 Women CEOs in the Fortune 500—Here's the Full List*, Bus. Insider (Aug. 13, 2018, 1:11 PM), https://www.businessinsider.com/fortune-500-companies-women-ceos-2018-8 [https://perma.cc/L5BJ-PYWG].

5 Deloitte & Alliance for Board Diversity, Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on *Fortune* 500 Boards 17 (2019), http://theabd.org/wp-content/uploads/2019/01/Missing-Pieces-Report_01142019_FINAL.pdf [https://perma.cc/5R7U-KRFT]; *see also* Heidrick & Struggles, The Heidrick & Struggles Board Monitor: Appointments of Women to Boards Hit Record High 2 (2018), https://heidrick.com/Knowledge-Center/Publication/Board_Monitor_2018 [https://perma.cc/23KQ-6HCH] (reporting that in 2017 "the percentage of women on Fortune 500 boards rose only to 22.2%, up only 1.2 percentage points from the figure of 21% the previous year").

2018, up from 19.6% in 2011.[6] At that rate, it will be 2055 before gender parity is achieved in corporate boardrooms.[7] At smaller companies, the statistics are worse. For example, women hold 25.3% of the board seats among Russell 100 companies, but only 21.3% of the board seats among Russell 1000 companies, 17.2% among Russell 1001–2000 companies, and only 13.0% among Russell 2001–3000 companies.[8]

Some industries particularly lag. As shown in the figure below, basic materials, technology, healthcare, and industrial goods, for instance, have 17% or fewer women board members and few CEOs.[9]

2018–2017 PERCENTAGE OF BOARD SEATS HELD BY WOMEN BY INDUSTRY SECTOR[10]



Interestingly, new IPO companies lag far behind established companies when it comes to the gender diversity of their boards.[11] According to *2020 Women on Boards*, "[w]omen hold just 9.2% of the board seats in the largest 25 IPO companies in 2017," and the four-year average is not much better, with only 9.4% of the board seats held by women.[12] Additionally, "[t]welve of the 25 companies went public

6 2020 WOMEN ON BOARDS 4 (2018), https://www.2020wob.com/sites/default/files/2020WOB_GDI_Report_2018_FINAL.pdf [https://perma.cc/7SXM-SC4G].

7 Patrick McGreevy, *Gov. Jerry Brown Signs Bill Requiring California Corporate Boards to Include Women*, L.A. TIMES (Sept. 30, 2018) https://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html [https://perma.cc/S94D-HZ25].

8 2020 WOMEN ON BOARDS, *supra* note 6, at 4.

9 *Id.* at 5.

10 *Id.* at 5.

11 *See id.* at 7.

12 *Id.*

with no women" on their boards in 2017 and 80% went public with none or only one woman on their boards.[13]

I. Making Real Change

When reviewing the statistics on women's equity in corporate leadership, it is common to both bemoan the persistent gender gap while making every effort to applaud any progress, no matter how slight. Organizations, such as Catalyst, that advocate for more women in corporate governance prioritize positive reinforcement through a strong focus on awards and other recognition programs for companies that have made strides in gender equity in corporate governance.[14] Without taking anything away from those who are working hard to make change, it may be time for a less patient approach.

Consider the following statement:

> There are more women in executive jobs today than there were 15 years ago, five years ago, or a year ago, and men's reluctance to give them executive rank seems to be diminishing. That is not to say that the historic barriers against women in top positions have crumbled. But the surface cracks are widening.[15]

Was this said last year? No. A decade ago? No. A quarter century ago? No. A half century ago? No. It was written in 1956.[16] That is right, over 60 years ago. Donald Trump was 10, Dwight D. Eisenhower was President, Elvis Presley had his first hit,[17] *My Fair Lady* (Julie Andrews again!) opened in New York City,[18] IBM released a

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13 *Id.*

14 *See What We Do*, Catalyst, https://www.catalyst.org/what-we-do/ [https://perma.cc/AN4C-DEU9].

15 Zameena Mejia, *Just 24 Female CEOs Lead the Companies on the 2018 Fortune 500—Fewer than Last Year*, CNBC (May 21, 2018, 12:37 PM) (quoting Fortune Editors, *Women as Bosses (Fortune, 1956)*, Fortune (Sept. 23, 2012), https://fortune.com/2012/09/23/women-as-bosses-fortune-1956/), https://www.cnbc.com/2018/05/21/2018s-fortune-500-companies-have-just-24-female-ceos.html [https://perma.cc/4CL3-VJUS].

16 *Id.*

17 *See* Randy Boswell, *Solving the Mystery of Heartbreak Hotel*, Rolling Stone (July 15, 2016, 1:00 PM), https://www.rollingstone.com/music/music-news/solving-the-mystery-of-heartbreak-hotel-61745/ [https://perma.cc/D8NN-QVF2].

18 *See* Megan Dekic, *Vintage Playbill: My Fair Lady, 1956*, Playbill (Sept. 29, 2014), http://www.playbill.com/article/vintage-playbill-my-fair-lady-1956-com-331589 [https://perma.cc/Q2HB-SFXR].

one-ton computer with the first hard drive,[19] and Yogi Berra was the catcher for the World Series-winning Yankees.[20]

We have indeed come to a fork in the road and, as Yogi urged, we should take it. It is past time to make more meaningful progress on equity in corporate leadership. Much is at stake. The influence of corporate activity on our lives continues to expand, not only in consumerism, but also politics and media. In this increasingly polarized political environment, where there is little public support for government spending or focus on the common good, government entities struggle to effect change and the influence of business grows.

The issues facing corporations are likewise urgent: advancing global competition; rapid technological changes that continue to displace many workers; urgent environmental and other issues stemming from climate change; heightened political instability around the globe; deep racial and ethnic disparities, including achievement gaps and disparities in funding in education and high incarceration rates in our criminal justice systems; and the many damages and disruptions from persistent sexual harassment in the workplace. We need our best leaders at the helm and that means those leaders should be drawn from all segments of our population.

For many, the need to have our best leaders in the C-suite and the boardroom will be uncontroversial. Further, many will also agree that "best" must include diversity of gender, race, class, thought, and other forms. And yet, why so little progress for so long? For the same reason that other change is hard: everyone is all for it until it is personal. The great Albert King sang, "everybody wants to go to heaven, but nobody wants to die."[21] In recently helping to lead my own organization through a ground-up reorganization, I experienced the truth that everyone wanted the organization to change, but when it got to the personal level for the people there, it was clear we were far from heaven.

Change involves loss, and losses are hard, even losing things that we all agree need to go. We miss the old house, not because it is better than the new one, but because it was familiar. Harder yet is any change where a gain for one means a loss for another. More women in

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19 *See* Wired Staff, *Tech Time Warp of the Week: The World's First Hard Drive, 1956*, WIRED (Jan. 3, 2014, 9:38 AM), https://www.wired.com/2014/01/tech-time-warp-ibm-ramac/ [https://perma.cc/7FB4-5MCF].

20 *See Yogi Berra*, NAT'L BASEBALL HALL FAME, https://baseballhall.org/hall-of-famers/berra-yogi [https://perma.cc/Y8LS-9UTG].

21 ALBERT KING, *Everybody Wants to Go to Heaven*, *on* LOVEJOY (Stax Records, Inc. 1971).

CEO and board seats generally means fewer men in those same seats. No wonder organizations such as Catalyst try so hard to be nice. We may need a few spoons full of sugar for this medicine to go down.

For more and better progress on gender equity in corporate leadership, we need new approaches and more action. Below are several ideas offered in the hopeful spirit of spurring greater progress, with the belief that the welfare of our world may well depend more upon effective and just corporate governance than political governance. Making corporate leadership as strong as possible is in our collective best interest.

Understand the problem. The problem of gender equity in corporate governance is one of will. With sufficient will, gender equity in corporate leadership could be achieved in a very short time. We need not wring our hands over what to do; rather, we need to do it.

Pick up the phone. Some organizations continue to assert that they are committed to gender equity in corporate leadership but cannot find qualified women to serve.[22] This tired refrain is frequently spoken even to women who themselves would be excellent candidates. Women often feel that they are relegated to corporate "governess" (getting all of the work done) instead of corporate governance. There are hosts of organizations that work to help advance women in corporate leadership,[23] but if that is not convenient, just write or call me or any other woman in corporate leadership. I know most of us can provide you with referrals to at least ten qualified women to consider and at least three organizations that are working to advance women in corporate leadership. If they do not fit your organization, then I am confident they can suggest still others. My contact information is in the first footnote.

Focus on fiduciary duty. The duty of care in corporate law requires that corporate officers and directors manage and lead the company with the care that a reasonably prudent person would exercise.[24]

22 *See* LAURA TYSON, THE TYSON REPORT ON THE RECRUITMENT AND DEVELOPMENT OF NON-EXECUTIVE DIRECTORS 6 (2003), http://facultyresearch.london.edu/docs/TysonReport.pdf [https://perma.cc/7AD3-GRER] ("[They are] often informal in nature and rely[] on personal networks," which means "many directors have been selected from relatively narrow pools of people sharing common experiences, career patterns and backgrounds.").

23 *See, e.g.*, *Partners and Friends*, CATALYST, https://www.catalyst.org/partners/ [https://perma.cc/XGA6-2CKN]; *Who We Are*, THIRTY PERCENT COALITION, https://www.30percentcoalition.org/who-we-are [https://perma.cc/V4PH-ZSGE]; *Working Hard to Raise the Bar*, 2020 WOMEN ON BOARDS, https://www.2020wob.com/about [https://perma.cc/A32X-4UA7].

24 *See, e.g.*, Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 948 (1990).

As we approach the third decade of the 21st Century, I would assert that any reasonably prudent person would not only make sure that the corporation was acting lawfully with respect to gender equity but that it was also meeting best practices for equity and inclusion. As a result, it is difficult to see how a board can meet its duty of care if the company has no or very few women officers and directors. Today, that absence speaks for itself as loudly as the famous "toe in chewing tobacco" case many of us studied in torts.[25] That absence should at least put the burden of proving that the duty of care was met on the board, particularly given that for many years, and across many studies, the economic advantages to the corporation of greater board diversity have been shown.[26] At a minimum, corporations that do not have gender equity should have to demonstrate efforts to address the issue. In short, meet your fiduciary duties by making measurable progress on gender and other forms of equity.

Address biases. Conscious bias against women in corporate leadership is less common today than in the past.[27] At the same time, there remains a huge gulf between being "against" women in corporate leadership and being "for" women in corporate leadership. We need more people of all genders to work affirmatively—consciously—to advance gender equity rather than standing by on the sidelines. Women are under-represented in corporate leadership as a class, but subgroups of women (e.g., women of color, women with disabilities, women from LGBTQI+ communities) are particularly under-represented.[28] We also need more focus on the complexities of intersectionality, where multiple marginalized identities interlock (e.g., gender, race, class) to create higher barriers.[29]

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25 *See* Pillars v. R.J. Reynolds Tobacco Co., 78 So. 365, 365 (Miss. 1918).

26 *See* Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. (forthcoming 2019) (manuscript at 42–44) (on file with author) (discussing "[p]rior [c]ases for [d]iversity" including "business, social good, and better decisionmaking").

27 *See* Kathy Caprino, *Gender Bias at Work—Why Men Call Forceful Women 'Hysterical' and Try to Silence Them*, FORBES (June 15, 2017, 12:00 PM), https://www.forbes.com/sites/kathycaprino/2017/06/15/gender-bias-at-work-why-men-call-forceful-women-hysterical-and-try-to-silence-them/ [https://perma.cc/2DPY-XUNU].

28 *See* DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 5, at 17 (showing that minority women held 4.6% of Fortune 500 board seats).

29 ALEXIS KRIVKOVICH ET AL., WOMEN IN THE WORKPLACE 2017, at 2–4 (2017), https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Gender%20Equality/Women%20in%20the%20Workplace%202017/Women-in-the-Workplace-2017-v2.ashx [https://perma.cc/B9D4-YCAT].

At the same time, we also must address unconscious biases that are impeding gender equity. Those come in many forms, including gendered definitions or images of "leadership" that impede seeing accomplished women as suitable for corporate leadership;[30] over-reliance on informal networks of recruitment that make it more likely to repeat, rather than disrupt, board demographics;[31] and structural biases embedded in leadership qualifications that unnecessarily restrict the pool of potential candidates (for instance, if only CEOs can be board members, then the gender inequity in the CEO pool is reinscribed on the board pool). There is rich literature on combatting structural bias in the workplace, and it should be known and implemented.[32]

Expand the board or set term limits. There is no magic number that makes up an effective board, and there are few limits on how a company structures senior corporate leadership roles. One consideration is the imposition of board and other leadership term limits that better balance the need for continuity with change.[33] For both board and senior leadership roles, terms can be deployed to recruit new talent, including more diverse talent. Term limits are more common in other nations and have helped to advance gender equity.[34] Yes, some incumbents may wish for longer terms, but why should their disappointment at being asked to step down trump the disappointment of so many qualified women who are never invited to step up? Alternatively, if the board has had 10 members for decades, be bold—try 12! As the forces of technological innovation and globalization continue to transform business at warp speeds, it will behoove corporations to have the benefit of new and more diverse perspectives and experiences.[35]

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30 Emily Bazelon, *A Seat at the Head of the Table*, N.Y. TIMES, https://www.nytimes.com/interactive/2019/02/21/magazine/women-corporate-america.html [https://perma.cc/3EY6-HQ8G].

31 *See* TYSON, *supra* note 22, at 6.

32 *See, e.g.*, VICTORIA W. JACKSON, INSTITUTIONAL INTERVENTIONS TO PREVENT IMPLICIT BIAS FROM UNDERMINING ORGANIZATIONAL DIVERSITY (2018), http://kirwaninstitute.osu.edu/wp-content/uploads/2018/04/Combating-Implicit-Bias-in-the-workplace.pdf [https://perma.cc/7SWM-U8WK].

33 *See* Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. (forthcoming 2019) (on file with author).

34 *See, e.g.*, Cynthia Soledad et al., *2018 Global Board Diversity Tracker: Who's Really on Board?*, EGONZEHNDER (Jan. 3, 2019), https://www.egonzehnder.com/what-we-do/board-advisory/insights/2018-global-board-diversity-tracker-whos-really-on-board [https://perma.cc/4N2R-CAWK].

35 *See* Elena Bajic, *Why Companies Need to Build More Diverse Boards*, FORBES (Aug. 11,

Develop the pool. All corporations have an interest in talent development, and that effort must include a strong focus on diversity, equity, and inclusion to be effective. Diversity is part of excellence. There is no problem that is not better solved by having a diverse set of eyes and hands upon it. Nurture diverse leadership so that when it is time for your or another company to search for its next CEO or board members there is a strong pool at the ready. Again, there is rich literature and many consultants who can help an organization develop a diverse talent pool.[36] Make it someone's job to engage it and be accountable for progress.

Broaden vision. Gender equity in corporate leadership will benefit in the long term if companies start now to widen their lens on who can serve as an effective board member. CEOs from other companies (or former CEOs) can be good board members, to be sure, but they are not alone. Moreover, a truly effective board is comprised of members with diverse experiences so that their perspectives can illuminate all sides of an issue. Look more broadly to find the best set of talent for the board and officer roles. Look just below the C-suite to those who have been leading key areas of the company.

Look also to lawyers, particularly those who specialize in corporate law and governance or other fields critical to the welfare of corporations (e.g., privacy, cybersecurity, employment). Lawyers are creative problem solvers who can "look around corners" and have the analytical and leadership skills to make any group more than a sum of its parts. Gone are the days when it was the lawyer's job to just spot risk and say "no." Today, lawyers are educated to be and are innovative and ethical business partners.

Further, look to leaders from other sectors, including higher education, nonprofits (many of which are huge and whose operations are quite similar to the for-profit sector), technology, and government. The experience of running a large organization or launching a new one translates very well across sectors. Indeed, it is often more challenging to work in the nonprofit sector because of the need to be more creative with resources.

2015, 8:00 AM), https://www.forbes.com/sites/elenabajic/2015/08/11/why-companies-need-to-build-more-diverse-boards/#7fea7796662c [https://perma.cc/8M42-76A4].

36 *E.g.*, Vivian Hunt et al., Delivering Through Diversity 4–18 (2018), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx [https://perma.cc/TF7Q-UJQ7].

As we make the turn from women as governesses to women in corporate governance, we might even start interviewing the nanny. To take just two famous examples of women who began as a governess: Mary Wollstonecraft (1759–1797), author of the early feminist classic *A Vindication of the Rights of Woman*;[37] and Marie Curie (1867–1934), who became the first woman to win a Nobel prize, first person to win two, and first person to win two in different sciences.[38] Talent is everywhere once our vision is broad enough to see it, nurture it, and let it shine.

Conclusion

Frustrated with the lack of progress on gender equity in corporate leadership, California turned to legislative action with SB 826, mandating that progress.[39] Others have addressed the wisdom and legality of this bill, but regardless of the outcome on the legislation itself,[40] we should all hear its message of change loud and clear. Likewise, how much longer will we need year-in-review articles that count how many more male CEOs of Fortune 500 companies named John there are than women in total?[41] It is indeed time for change, and not just gradual change. We can and must do better. In Ernest Hemingway's *The Sun Also Rises*, one character asks another:

> "How did you go bankrupt?" Bill asked.
> "Two ways," Mike said. "Gradually and then suddenly."[42]

Good things can happen this way, too. For gender equity in corporate leadership, we have had over 60 years of the gradual. It is now time for the sudden.

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37 *See Mary Wollstonecraft Biography*, Biography (June 26, 2019), https://www.biography.com/scholar/mary-wollstonecraft [https://perma.cc/XP4Q-MQ5F].

38 *See Marie Curie Biography*, Biography (Aug. 29, 2019), https://www.biography.com/scientist/marie-curie [https://perma.cc/CN25-69VA].

39 *See* David A. Bell, *New California Law Requires Representation of Women on Public Company Boards*, Fenwick & West LLP (Oct. 2, 2018), https://www.fenwick.com/publications/Pages/New-California-Law-Requires-Representation-of-Women-on-Public-Company-Boards.aspx [https://perma.cc/EZ7M-U4BJ]. *See generally* Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* (Stanford Law Sch. & Rock Ctr. for Corp. Governance, Working Paper No. 232, 2018) (arguing against the wisdom of the legislative approach while also noting the continued persistence of inequity in board membership).

40 *See, e.g.*, Grundfest, *supra* note 39, at 2–4, 8–12.

41 *E.g.*, Claire Cain Miller et al., *The Top Jobs Where Women Are Outnumbered by Men Named John*, N.Y. Times (Apr. 24, 2018), https://www.nytimes.com/interactive/2018/04/24/upshot/women-and-men-named-john.html [https://perma.cc/3NNK-JQAR].

42 Ernest Hemingway, The Sun Also Rises 72 (1926).