

Bias in the Boardroom: Implicit Bias in the Selection and Treatment of Women Directors

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BIAS IN THE BOARDROOM: IMPLICIT BIAS IN THE SELECTION AND TREATMENT OF WOMEN DIRECTORS

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In light of the stagnation in growth of women directors on corporate boards, board diversity advocates and corporate leaders should look to the role implicit gender bias plays in the board nomination process and in challenges women directors face while serving on boards. Relevant stakeholders often overlook how implicit bias barriers prevent women from reaching the boardroom and persist as obstacles once women directors have earned their seats on the board. Incorporating social psychological research on implicit bias and recognized strategies to work around bias, such as objective assessments and guidelines, data analytics, and accountability mechanisms, this Article encourages companies to offer tailored, research-oriented implicit bias trainings to directors and corporate executives to tackle bias concerns. It also suggests modifications to the SEC board diversity disclosure rule to account for the effect of implicit gender bias and advocates collaborative action within companies—including voluntary targets and diversity task forces—to address impediments to women’s advancement in leadership.

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“Too often we are resigned to what happens in the blink of an eye. It doesn’t seem like we have much control over whatever bubbles to the surface from our unconscious. But we do, and if we can control the environment in which rapid cognition takes place, then we can control rapid cognition.”¹

Malcolm Gladwell

I. INTRODUCTION

In 2016, the number of women appointed to Fortune 500 boards declined by 2%, reversing a seven-year trend of growth.² Despite increasing efforts to achieve gender parity on corporate boards, progress in moving the needle has been slow.³ This disappointing trend presents challenges in closing the gender

1. MALCOM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 252 (2005).

2. Jena McGregor, *The Number of New Female Board Members Actually Dropped Last Year*, WASH. POST (June 19, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/06/19/the-number-of-new-female-board-members-actually-dropped-last-year/?utm_term=.0875db076b58 [<https://perma.cc/W96X-ZJ2Y>].

3. Ernst & Young reported in 2015 that women held only 16% of board seats of S&P 1500 companies, which is less than the percent of seats held by directors with the names John, Robert, James, and William. EY Ctr. for Bd. Matters, *Women on US Boards: What Are We Seeing?*, ERNST & YOUNG (Feb. 2015), https://www.ey.com/Publication/vwLUAssets/EY_-_Women_on_US_boards:_what_are_we_seeing/%24FILE/EY-women-on-us-boards-what-are-we-seeing.pdf [<https://perma.cc/SVW8-4RAZ>] [hereinafter *Women on US Boards: What Are We Seeing*]; 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>

leadership gap. It also exposes unconscious gender bias as part of the persisting problem.

Scientific research and public awareness of unconscious or implicit bias have grown dramatically in recent years.⁴ At the same time, efforts to combat implicit bias have largely focused on hiring and workplace behavior, not corporate governance.⁵ Corporate leaders tend to overlook the effect of implicit bias on board diversity and advancement opportunities for women in leadership.⁶ And while advocates strive to make the case for board diversity, they often fail to address the underlying barrier of implicit bias, which precludes a gender-neutral process in the first place.

This Article argues that U.S. scholars, lawmakers, and members of the business community should shift their focus to how bias preempts a gender-neutral nomination process and holds women directors back.⁷ Implicit gender bias affects both the director nomination process and the challenges women directors face in the boardroom.⁸ As such, I suggest addressing implicit bias through recognized strategies and methods aimed at reducing and working around bias to better ensure all qualified candidates have a fair opportunity to serve on boards. One key way that U.S. companies can do this is by offering implicit bias trainings to directors and officers and implementing measures such as targets and task forces to help reduce bias. Companies have an incentive to have qualified individuals serving as their leaders. Accordingly, they also have an incentive to eliminate barriers preventing capable individuals from realizing that opportunity.

Part II of this Article begins by examining the underrepresentation of women on boards of U.S. companies. It considers rationales for diversity, the U.S. Securities and Exchange Commission (SEC) disclosure rule about diversity, and two issues affecting women board candidates and directors: the pool problem and tokenism. Part II also addresses the stagnation in the growth of women directors. While many advocates emphasize business and moral rationales for diversity in order to address this stagnation, they often fail to recognize implicit bias as a critical barrier to women's representation on boards.

named-john.html [<https://perma.cc/NW6G-3F63>]. While this number has since increased to 19%, women continue to face obstacles in gaining representation. *Women on US Boards: What Are We Seeing*, *supra*; Miller et al., *supra*.

4. See PROJECT IMPLICIT, <https://www.projectimplicit.net/index.html> [<https://perma.cc/UU75-9P94>] (last visited Dec. 12, 2017).

5. See *infra* Section III.C.

6. *Infra* Section II.C.

7. While issues of racial and ethnic diversity as well as other marginalized identities are also critical, the focus of this Article is the underrepresentation of women on boards of U.S. companies.

8. *Infra* Section III.C.

To further explain the concept of implicit bias, Part III gathers insights from social psychology and summarizes research on interventions that may reduce bias and other tools to work around it. Then, Part III explores how implicit bias manifests in the board nomination process and in the challenges women directors face in the boardroom.

Part IV proposes three complementary ways to reduce implicit bias in selecting nominees and in the treatment of women directors, taking into account recognized strategies to reduce bias and its effects, including trainings, objective assessments and guidelines, accountability mechanisms, and increased exposure to counter-stereotypic exemplars. First, companies should offer voluntary implicit bias trainings to directors and officers. Second, the SEC should amend its disclosure rule to define diversity to include gender diversity, and to require disclosure of the demographic identities of directors and officers. The rule should also require companies to disclose whether they offer implicit bias trainings to directors and officers as part of a diversity policy. Third, companies should implement voluntary targets and task forces to address implicit gender bias concerns.

II. MISGUIDED EFFORTS AND THE GENDER-BIASED PROCESS

Despite efforts to increase gender diversity and the SEC board diversity rule, growth of women on boards has stalled. Part II of this Article explains why a shift is necessary. Section II.A describes two justifications for board diversity—the business case and the moral case—and how they form the basis for most efforts to increase diversity. Section II.B assesses one such effort, the SEC board diversity disclosure rule, which expressly relied on the business case but problematically left the term “diversity” undefined. Even after the implementation of the SEC’s disclosure rule, growth in gender diversity has been slow. As discussed in Section II.C, one problem is that the dominant rationales for diversity seek to increase the number of women on boards without first fixing inherently gender-biased structures. Finally, Section II.D analyzes how the pool problem and tokenism also point to implicit bias.

A. Rationales for Board Diversity

Legal scholars recognize the board’s central role in corporate governance.⁹ State corporate laws provide that the “business and affairs of every

9. See Donald C. Langevoort, *Commentary: Puzzles About Corporate Boards and Board Diversity*, 89 N.C. L. REV. 841, 842–44 (2011) (discussing three “prevailing accounts” for what boards do, given the apparent tension between the theories of board primacy and managerial primacy); see also Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate*

corporation . . . shall be managed by or under the direction of a board of directors.”¹⁰ In addition, the board performs essential functions. It plays an advisory role¹¹ and monitors managers.¹² It also operates as a group of peers making decisions together, which psychology suggests produces better decisions on issues that require judgment.¹³ In light of the importance of the board, selection of directors is critical.¹⁴

Two main rationales justify efforts to bring more diverse directors on boards: the business case and the moral case. The business case contends that diversity creates better governance, which makes the business more profitable.¹⁵ This rationale has dominated the conversation about diversifying the board.¹⁶ However, evidence for the business case in terms of financial results is mixed and inconclusive.¹⁷ Various studies have found both a positive relationship and a negative (or no significant) relationship in this regard.¹⁸

Other more promising strands of the business case invoke evidence that diversity improves a company’s performance through enhanced decision-making and positive corporate image.¹⁹ A diverse board may improve

Boards, 66 STAN. L. REV. 1051, 1053 (2014); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 679–80 (2007).

10. DEL. CODE ANN. tit. 8, § 141(a) (2016); MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS’N, amended 2005).

11. Langevoort, *supra* note 9, at 844.

12. Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89, 101 (2004); Bainbridge & Henderson, *supra* note 9, at 1053 (citing ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 6, 84–89 (1932)).

13. Gevurtz, *supra* note 12, at 94, 96.

14. *See* Bainbridge & Henderson, *supra* note 9, at 1053–55 (“The importance of the board of directors is further illustrated by the considerable extent to which academics hoping to improve corporate governance focus on the role and composition of the board.”); Bebchuk, *supra* note 9, at 679–80 (discussing the central role of the board, including selecting the CEO and other executives and making major corporate decisions).

15. David A. Carter et al., *The Gender and Ethnic Diversity of U.S. Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOVERNANCE: AN INT’L REV. 396, 397 (2010).

16. Even the U.S. Supreme Court recognized the business case for diversity in its affirmative action jurisprudence. *See* Grutter v. Bollinger, 539 U.S. 306, 326, 330 (2003) (holding that diversity is a compelling state interest justifying the use of race in admissions to public universities because the “benefits that flow from student body diversity” include promoting learning outcomes and better preparing students to become professionals).

17. Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 383 (2014).

18. *Id.* at 384–90.

19. *Id.* at 396, 399.

decision-making because heterogeneous perspectives can lead to more thorough analysis.²⁰ Likewise, a diverse board may signal to consumers that the firm embodies equal opportunity and progressiveness.²¹ Still, even with regard to these strands of the business case, Deborah Rhode and Amanda Packel conclude that empirical evidence can vary.²²

On the other hand, the moral case holds that based on equity and fairness, more competent women and minorities deserve the opportunity to sit on corporate boards.²³ Those who extol the moral case assert “values such as fairness, justice, and equal opportunity, as well as the symbolic message it sends to corporate stakeholders.”²⁴ Apart from the bottom line, they also emphasize normative frameworks, including antidiscrimination norms and values underlying our laws.²⁵

However, as described in Section II.C, the dominant rationales are often misguided. Both focus on producing more gender diversity without first recognizing how bias taints the nomination process itself and prevents qualified women from earning board seats.

B. *The SEC Rule*

In response to concerns about board diversity, the SEC promulgated a rule in 2009 that amended Regulation S-K to require companies to disclose whether the board nominating committee considers diversity in identifying nominees.²⁶

20. *Id.* at 396. Research has shown that a diverse board with a variety of perspectives and backgrounds can combat a psychological phenomenon known as groupthink, in which “a decision-making group is so cohesive that its members become reluctant to criticize . . . the judgments and ideas of their colleagues and leaders.” Kimberly D. Krawiec et al., *The Danger of Difference: Tensions in Directors’ Views of Corporate Board Diversity*, 2013 ILL. L. REV. 919, 930–35. Interestingly, while many directors report their belief in the need to avoid groupthink, they also emphasize the importance of collegiality. *Id.*

21. Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 448 (2008).

22. See Rhode & Packel, *supra* note 17, at 397, 399, 401.

23. See Carter et al., *supra* note 15, at 397 (contrasting the positions of those who believe boards should be more diverse “because it is the right thing to do and those who think [boards] should be more diverse because it actually enhances shareholder value”).

24. Rhode & Packel, *supra* note 17, at 401. The *Grutter* Court also noted that diversity is important because it can help reduce racial stereotypes. *Grutter v. Bollinger*, 539 U.S. 306, 326, 330 (2003).

25. James A. Fanto et al., *Justifying Board Diversity*, 89 N.C. L. REV. 901, 930–31 (2011). In a sense, counteracting implicit bias could fall into the category of moral or social rationales because it invokes antidiscrimination norms, as well as the need for fairness. See *id.* at 930 n.133 (citing Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1075 (2006)).

26. 17 C.F.R. § 229.407(c)(2)(vi) (2009).

The rule also requires the company to disclose whether the nominating committee or board has a policy with regard to diversity and the selection of nominees.²⁷ Unlike other countries whose regulatory approaches employ quotas or the stronger “comply or explain” disclosure approach, U.S. law imposes no affirmative obligation to consider diversity, and only requires disclosing whether or not the company considers it.²⁸

The SEC relied on both the financial and better governance strands of the business case as justification for the rule.²⁹ In explaining its reasons for implementing the rule, the SEC cited a positive relationship between diverse boards and corporate financial performance.³⁰ It also explained that board diversity is important to some investors because more diverse directors may increase independence and improve decision-making.³¹

Notably, the rule does not require companies to specify the gender, racial, or ethnic identities of their directors.³² The rule also does not define diversity, but allows companies to define it however they choose.³³ One empirical study found that without guidance on the meaning of diversity, most companies define it in experiential terms.³⁴ While the rule gives companies that flexibility, in doing so, it obscures the adverse effect of implicit gender bias.³⁵ It also fails to shame companies into changing their conduct.

Recognizing the shortcomings of the rule, many have suggested modifications to require disclosure of the sociodemographic backgrounds of

27. *Id.*

28. See Angela R. Foster, Comment, *A Quest to Increase Women in Corporate Board Leadership: Comparing the Law in Norway and the U.S.*, 26 WASH. INT'L L.J. 381, 383–84 (2017). Many European countries such as the United Kingdom and most of the European Union use the comply or explain regulatory model. See *Regulatory Board Diversity*, CATALYST, <http://www.catalyst.org/regulatory-board-diversity> [<https://perma.cc/7QZ2-LSLG>] (last visited Aug. 9, 2018).

29. Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 23, 2009) (to be codified at 17 C.F.R. pt. 229).

30. *Id.* at 68,334, 68,343.

31. *Id.* at 68,355. The SEC stated the purpose of the rule was to “enhance the information provided in annual reports, and proxy information statements to better enable shareholders to evaluate the leadership of public companies.” *Id.* at 68,334.

32. See *id.* at 68,344.

33. See *id.*

34. AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 213 (2015). After comparing the disclosure-based model of board diversity regulation (e.g. United States) with target- and quota-based models (e.g. Norway), Dhir contends that the tendency of U.S. companies to define diversity experientially is a key flaw in the effectiveness of the SEC rule. *Id.* at 191–200, 230–32.

35. See *infra* Section IV.B.

directors.³⁶ Part IV of this Article will advocate this change in order to better recognize the role of identity-based implicit bias. However, additional changes are necessary to account for the presence of implicit bias on the board.

C. Confronting the Stagnation

The increasing salience of diversity concerns and the SEC disclosure rule have not led to a corresponding growth of women on boards. In fact, in recent years, growth has stagnated.³⁷ Between 2009 and 2012, before and after the adoption of the SEC rule, the number of women on Fortune 500 company boards grew to 16.6%, an increase of less than 2%.³⁸ According to the nonprofit organization Catalyst, women still make up only 19.9% of S&P 500 boards.³⁹

At least one commentator, Lisa Fairfax, notes that the business case rationale for board diversity may have contributed to this stagnation.⁴⁰ Fairfax explains that a strategic focus on the business case has prevented advocates from “legitimiz[ing] noneconomic rationales for board diversity.”⁴¹ She concludes that the overemphasis on the business case best explains the recent

36. See Dave Michaels, *SEC Drafting Rule Requiring Firms Reveal Board Diversity*, WALL ST. J. (June 28, 2016), <https://www.wsj.com/articles/sec-drafting-rule-requiring-firms-reveal-board-diversity-1467078153> [<https://perma.cc/KU9R-X2ER>] (describing former SEC Chair Mary White’s push for more disclosure about diversity and her criticism of the current rule as leading to “vague” reports that have not altered board diversity numbers). In 2017, the Advisory Committee on Small and Emerging Companies recommended an amendment to the disclosure rule requiring issuers to describe the extent to which the board of directors is diverse. Letter from Stephen M. Graham, Comm. Co-Chair, and Sara Hanks, Comm. Co-Chair, to Michael S. Piwowar, Acting Chairman, U.S. Securities & Exchange Comm’n, Feb. 16, 2017, <https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-021617-corporate-board-diversity.pdf> [<https://perma.cc/2LVP-6UT2>]. However, the Advisory Committee did not recommend defining diversity, stating each issuer should be free to determine its own definition. *Id.*

37. Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7, 8 (2011).

38. Foster, *supra* note 28, at 401.

39. 2015 *Catalyst Census: Women and Men Board Directors*, CATALYST (June 14, 2016), <http://www.catalyst.org/knowledge/2015-catalyst-census-women-and-men-board-directors> [<https://perma.cc/22P5-89DM>]. The percentage of women on boards varies depending on the size of the company, with larger companies having more diversity than relatively smaller ones. *Women on US Boards: What Are We Seeing*, *supra* note 3. For example, in 2014, women held 22% of Fortune 100 company board seats, 19% of S&P 500 seats, and 16% of S&P 1500 seats. *Id.* The report by Ernst & Young also observed that many companies increased the size of the board in order to add more female directors. *Id.*

40. See Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855 (2011) (examining empirical data indicating a rhetorical shift in justifying diversity in terms of the business case but a lack of a corresponding increase in board diversity).

41. *Id.* at 884–85.

stagnation and that moral or social rationales may be better for addressing obstacles such as “ingrained biases.”⁴²

However, this Article takes a different tack. To be sure, moral and economic rationales are relevant and often compelling. Many view the rise of the business case as a strategic imperative, and the moral case works within the context of “a long legacy of discrimination and inequality.”⁴³ Still, regardless of the rationale, the larger problem is that the board nomination process is affected by implicit bias against women. Both of the dominant rationales seek to justify measures to increase the number of women on boards. However, in order to see more women on boards, we must first address the underlying obstacle of implicit bias. By working to eliminate biased structures in the first place, we can better ensure a gender-neutral nomination process in which competent candidates have a fair chance to serve on boards.

D. *The Pool Problem and Tokenism*

Understanding barriers to gender diversity also requires assessing the pool problem and tokenism. Both problems are two commonly cited obstacles for women in accessing the board and thriving while on it.⁴⁴ Importantly, both issues also point to the need for a board nomination process and board structure without bias.

The pool problem refers to the perceived limited pool of women candidates for directorships, often based on adherence to traditional criteria from which women are excluded.⁴⁵ Corporations are free to decide their own director

42. *Id.* at 859, 883.

43. Langevoort explains why the business case for diversity has become a seemingly “strategic necessity.”

In a perfect world, board diversity follows naturally from the fair distribution of talent and skill between the genders and among ethnicities when selection is based on merit. But our world is grossly imperfect, with residual bias (conscious and implicit), a long legacy of discrimination and inequality, and pervasive, artificial, and self-serving social construals of what merit-based selection means.

Langevoort, *supra* note 9, at 841.

Likewise, many view the business case as better aligning with corporate officers and directors’ fiduciary duty “to maximize firm value, and presumably to enhance shareholder returns.” Fairfax, *supra* note 40, at 858. In their article Kang and Banaji contrast two conventional ways of viewing affirmative action: a “backward-looking frame of corrective justice” (such as moral rationales for redressing historic discrimination) and a “forward-looking frame of utilitarian engineering” (such as potential benefits of diversity). Kang & Banaji, *supra* note 25, at 1067–71, 1075 (arguing instead for a “presentist” frame of affirmative action that responds to implicit bias).

44. See Foster, *supra* note 28, at 386.

45. *Id.*

qualifications, a task usually assigned to the nominating committee.⁴⁶ Despite this flexibility, most corporations use similar criteria.⁴⁷ The traditional criteria to which most companies adhere are prior executive level and board experience.⁴⁸ Thus, the fact that women also comprise a small number of top C-suite executives in public corporations tends to obstruct their ability to access directorships.⁴⁹ It is clear expanding the criteria for directors is important in increasing the number of women. In fact, exemplar companies with high gender diversity have integrated practices such as expanding criteria beyond the C-suite and prior board experience.⁵⁰

However, merely expanding criteria is not enough.⁵¹ Aaron Dhir and Catalyst assert that the pool problem oversimplifies a complex issue. They point to the large percentage of women in higher education and in other non-CEO senior management positions—including CFOs, chief legal officers, and other executive officers—who are in the pool, but not selected to serve.⁵²

46. MODEL BUS. CORP. ACT § 8.02 (AM. BAR ASS'N, amended 2005) (“The articles of incorporation or bylaws may prescribe qualifications for directors.”); Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 599 (2006) [hereinafter Fairfax, *Clogs in the Pipeline*].

47. Fairfax, *Clogs in the Pipeline*, *supra* note 46, at 599.

48. *Id.*

49. *Id.* at 600.

50. Celia Huber & Sara O'Rourke, *How to Accelerate Gender Diversity on Boards*, MCKINSEY & CO. (Jan. 2017), <https://www.mckinsey.com/featured-insights/leadership/how-to-accelerate-gender-diversity-on-boards> [<https://perma.cc/JQ9L-TT2Y>] (discussing how looking for candidates in fields such as law, academia, and the social sector can bring different perspectives and experiences to the board); see also David F. Larcker & Brian Tayan, *Pioneering Women on Boards: Pathways of the First Female Directors*, STAN. CLOSER LOOK SERIES (Sept. 3, 2013), <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-35-women-boards.pdf> [<https://perma.cc/D4FD-BAYA>] (observing that 41% of the first female directors had significant business experience, 17% had legal or consulting experience, and 14% had academic or research experience). In the case of lawyers serving as directors of their corporate clients, there are both advantages and disadvantages, but one advantage may be helping women ““crack the glass ceiling.”” Felix J. Bronstein, Note, *The Lawyer as Director of the Corporate Client in the Wake of Sarbanes-Oxley*, 23 J.L. & COM. 53, 54–55 (2003) (quoting John F. X. Peloso & Irwin H. Warren, *The Lawyer-Director: Implications for Independence*, 1998 ABA SECTION ON LITIGATION REPORT OF THE TASK FORCE OF THE INDEPENDENT LAWYER 3).

51. Fairfax, *Clogs in the Pipeline*, *supra* note 46, at 606. Jennifer Brown also discusses the limitations of “blaming the pipeline” in addressing diversity issues in the workplace and how it can lead to inaction by corporate leadership. JENNIFER BROWN, INCLUSION: DIVERSITY, THE NEW WORKPLACE & THE WILL TO CHANGE 8 (2016) (“When all roads lead back to blaming the pipeline . . . most managers consider the case closed, saying with a shrug that it’s outside their span of influence.”).

52. DHIR, *supra* note 34, at 38–42; *The Supply Problem Myth: Fortune 500 Boards*, CATALYST (Sept. 27, 2012), <http://www.catalyst.org/knowledge/supply-problem-myth-fortune-500-boards> [<https://perma.cc/LT5B-5YG7>]. Despite the statistics illustrating women’s rapid educational success

Indeed, other factors beyond the pool problem tend to deny women the opportunity to reach the boardroom.

Two critical factors are inadequate mentorship and stereotypes.⁵³ In addition to lacking the traditional required experience,⁵⁴ women also lack the same mentoring relationships and networking opportunities.⁵⁵ Inadequate mentorship and sponsorship hurt female candidates on an individual level. According to research by McKinsey, women attribute challenges in advancing up the corporate ladder to factors such as lack of access to informal networks and lack of female role models and sponsors to provide opportunities.⁵⁶ On a broader level, the dearth of mentorship and sponsorship can also deprive women of advocates who will support efforts to recruit and advance women as part of board agendas.⁵⁷

Importantly, women also face stereotypes and bias, which lead to perceptions that they lack the qualities of effective leaders.⁵⁸ Evidence shows

and the perpetuation of the “smart girl” stereotype in the last fifty years, women must still navigate the political, social, and economic contexts in which sexism persists:

Rather than being a cause for celebration, these highly publicized findings instigated panic. Condemned as the “feminization” of schooling, feminist interventions were blamed for the perceived failure of boys. . . . [W]omen now earn 60 percent of master’s degrees, close to half of law and medicine degrees, and 42 percent of MBAs. Women now also earn close to 60 percent of all bachelor’s degrees, meaning that, for the first time in history, women receive more education than men.

SHAUNA POMERANTZ & REBECCA RABY, *SMART GIRLS: SUCCESS, SCHOOL, AND THE MYTH OF POST-FEMINISM* 9–16 (2017).

53. Fairfax, *Clogs in the Pipeline*, *supra* note 46, at 601–02.

54. See, e.g., Seletha R. Butler, “*Financial Expert*”: *A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards*, 14 *GEO. J. GENDER & L.* 1, 20 (2013) (arguing that the requirement in the Sarbanes-Oxley Act of 2002 that issuers disclose whether their audit committee has at least one person who is a financial expert negatively impacts the ability of women to become board members).

55. See SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 65–67 (2013) (discussing the importance of mentoring and sponsoring relationships for women’s advancement opportunities); Diana Bilimoria & Sandy Kristin Piderit, *Board Committee Membership: Effects of Sex-Based Bias*, 37 *ACAD. MGMT. J.* 1453, 1454, 1456 (1994).

56. MCKINSEY & CO., *UNLOCKING THE FULL POTENTIAL OF WOMEN IN THE U.S. ECONOMY* 6 (2011), https://www.mckinsey.com/~media/McKinsey/dotcom/client_service/Organization/PDFs/Exec_Summary_WSJ_Preview_Special_Report.ashx [<https://perma.cc/E66E-6BSN>].

57. Bilimoria & Piderit, *supra* note 55, at 1456.

58. CATALYST, *WOMEN “TAKE CARE,” MEN “TAKE CHARGE:” STEREOTYPING OF U.S. BUSINESS LEADERS EXPOSED* 6 (2005), http://www.catalyst.org/system/files/Women_Take_Care_Men_Take_Charge_Stereotyping_of_U.S._Business_Leaders_Exposed.pdf [<https://perma.cc/8FES-YKEU>][hereinafter *WOMEN “TAKE CARE”*].

that gender bias impedes women's advancement opportunities and plays a role in gender disparities within corporate executive leadership.⁵⁹ For example, one survey of corporate leaders found that based on stereotypes—that men “take charge” and women “take care”—senior managers tend to believe inaccurately that women are relatively poor problem solvers.⁶⁰ This fuels negative perceptions of women's leadership competence.⁶¹

While the pool problem relates to challenges of women getting onto boards, tokenism refers to challenges and stereotypes women directors face after earning their seats.⁶² The perspectives of women directors who are viewed as tokens may not be heard because of a lack of a “critical mass” of women on the board.⁶³ This is especially true if a woman is the single diverse director or one of relatively few. Thus, many commentators advocate for a critical mass of women directors to avoid tokenism.⁶⁴ Otherwise, qualified token women “become subject to excessive scrutiny” and negative stereotypes.⁶⁵

To fully address both tokenism and the pool problem, we must recognize how conscious and unconscious biases marginalize women in the first place.

III. IMPLICIT BIAS AND BOARD DIVERSITY

Shifting to a focus on removing inherently biased structures requires an understanding of implicit intergroup bias. This section explores the concept of implicit bias and its effect on board diversity. Section III.A defines implicit intergroup bias and how it can lead to negative outcomes. Then, Section III.B

59. ANIKA K. WARREN, CATALYST, CASCADING GENDER BIASES, COMPOUNDING EFFECTS: AN ASSESSMENT OF TALENT MANAGEMENT SYSTEMS 3 (2009), http://www.catalyst.org/system/files/Cascading_Gender_Biases_Compounding_Effects_An_Assessment_of_Talent_Management_Systems.pdf [<https://perma.cc/5NM9-DM68>].

60. WOMEN “TAKE CARE”, *supra* note 58, at 10–12, 18. Furthermore, in the same survey of corporate leaders, the male respondents believed that male leaders were also better than women at delegating and influencing upward, which were classified as “taking charge” behaviors. *Id.* at 11. On the other hand, the men believed that women were better at supporting and rewarding, which are considered “taking care” behaviors. *Id.* at 12.

61. *Id.* at 7. At the same time, when a woman is considered competent and successful at her job, she faces backlash from others, including being labeled as “too aggressive” or “difficult.” SANDBERG, *supra* note 55, at 41; *see also* discussion *infra* note 146.

62. *See* Rhode & Packel, *supra* note 17, at 408–09.

63. *Id.*; Lissa Lamkin Broome, *The Corporate Boardroom: Still a Male Club*, 33 IOWA J. CORP. L. 665, 679 (2008) (reviewing DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* (2007)) (“With three or more women on a board, every comment by a woman director ceases to be marginalized or scrutinized as the woman's view and is instead valued for its own merit.”).

64. Broome, *supra* note 63, at 679.

65. Bilimoria & Piderit, *supra* note 55, at 1457.

explains psychological interventions that may reduce implicit bias. Section III.C examines implicit bias in the nomination process and in the treatment of women directors. Section III.C concludes by exploring current diversity training practices and areas for improvement.

A. *We All Have “Mindbugs”*

The psychology of implicit social cognition provides insight into the role of implicit bias on boards. Implicit social cognition describes the unconscious thoughts and feelings regarding social psychological constructs, such as attitudes and stereotypes.⁶⁶ In other words, implicit social cognition describes the unconscious processes underneath judgments and behavior.⁶⁷

1. Implicit Bias and Tools to Measure It

One important form of implicit social cognition is implicit intergroup bias. In contrast to explicit bias, which is consciously detectable, implicit intergroup bias is not directly inferable “through introspective awareness.”⁶⁸ The main types of implicit intergroup bias are (1) implicit stereotyping, (2) implicit evaluative bias, which involves favorable or unfavorable attitudes, and (3) implicit affective bias, which refers to automatic feelings or emotional responses.⁶⁹

In explaining implicit bias, Banaji and Greenwald use the term “mindbug,”⁷⁰ a cognitive and social error in which “ingrained habits of thought . . . lead to errors in how we perceive, remember, reason, and make decisions.”⁷¹ Others describe implicit bias as a “discriminatory bias[] based on implicit attitudes or implicit stereotypes.”⁷² Similar to implicit bias is in-group

66. Brian A. Nosek et al., *Implicit Social Cognition*, in THE SAGE HANDBOOK OF SOCIAL COGNITION 31, 32 (Susan T. Fiske & C. Neil Macrae eds., 2012).

67. B. Keith Payne & Bertram Gawronski, *A History of Implicit Social Cognition: Where Is It Coming From? Where Is It Now? Where Is It Going?*, in HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 1, 1 (Bertram Gawronski & B. Keith Payne eds., 2010).

68. David M. Amodio & Saaid A. Mendoza, *Implicit Intergroup Bias: Cognitive, Affective, and Motivational Underpinnings*, in HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS, *supra* note 67, at 353, 355.

69. *Id.* at 356–60; *see also* John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1084, 1084 (Susan T. Fiske et al. eds., 5th ed. 2010).

70. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 4 (2013).

71. *Id.*

72. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006) [hereinafter *Scientific Foundations*].

bias or favoritism. In-group bias refers to favoritism toward one's own group.⁷³ Accordingly, implicit bias can be either favorable or unfavorable, and it is often expressed through in-group favoritism.⁷⁴

With regard to measuring implicit bias, the Implicit Association Test (IAT) is a widely used tool developed to detect implicit bias.⁷⁵ The IAT links “an attitude object . . . with an evaluative dimension . . . and test[s] how response accuracy and speed indicate” implicit bias.⁷⁶ For example, the gender-leadership IAT measures whether the test taker will more quickly associate male or female names with managerial characteristics such as leader, ambitious, and determined.⁷⁷ The IAT's association tasks are based on the fact that we are unable to ignore automatic responses from our brains which have accumulated after years of prior experiences.⁷⁸

73. *Id.*

74. *Id.* at 951–52; AM. ASS'N OF UNIV. WOMEN, BARRIERS AND BIAS: THE STATUS OF WOMEN IN LEADERSHIP 24 (2016), <https://www.aauw.org/research/barriers-and-bias/> [<https://perma.cc/M3WN-6TGR>] [hereinafter BARRIERS AND BIAS] (“[I]mplicit bias often expresses itself through in-group favoritism, which can be hard to detect.”).

75. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006). Not only does the IAT detect implicit bias, but IAT scores may also predict behavior. Research has linked evaluative stereotype IAT scores (specifically, associating negative attributes with out-group members) to harmful behavior such as economic discrimination. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 359–72 (2007). For example, one study found a correlation between associating negative attributes with minorities such as Blacks, Asians, and Jews and recommending budget cuts for the minority group's student organization. *Id.* at 367–68. At the same time, there is also some uncertainty regarding the IAT's ability to predict behavior. Banaji and Greenwald summarize studies on the IAT's predictive validity by stating “IAT scores correlated *moderately* with discriminatory judgments and behavior.” BANAJI & GREENWALD, *supra* note 70, at 50.

76. Justin D. Levinson, *Corporations Law: Biased Corporate Decision-Making?*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 146, 149 (Justin D. Levinson & Robert J. Smith eds., 2012).

77. Kevin Miller, *Are You Biased Against Women Leaders?*, AM. ASS'N UNIV. WOMEN (Feb. 10, 2016), <https://www.aauw.org/article/implicit-association-test/> [<https://perma.cc/9YPU-AHUV>]. Results of the gender-leadership IAT indicate that people tend to associate men, rather than women, with leadership. Catherine Hill, *Get the Facts: Implicit Bias and the AAUW Implicit Association Test on Gender and Leadership*, AM. ASS'N OF UNIV. WOMEN, <https://www.aauw.org/resource/iat/> [<https://perma.cc/UT2F-G3WN>] (last visited Aug. 11, 2018). Another variation of the IAT involving gender results in people associating men with careers and women with homemaking and family. See *Project Implicit*, <https://implicit.harvard.edu/implicit/selectatest.html> [<https://perma.cc/ZM2Z-NXZS>] (last visited Aug. 11, 2018).

78. BANAJI & GREENWALD, *supra* note 70, at 39.

2. Implicit Bias is Pervasive and Can Affect Outcomes

Everyone is subject to implicit biases.⁷⁹ Although we are likely to perceive bias in others, we tend to lack the ability to recognize how it governs our own judgments and perceptions.⁸⁰ Our inability to recognize our own implicit bias helps explain why conscious efforts to address it can be controversial.⁸¹ Indeed, implicit bias can even lead to behavior that is inconsistent with a person's own beliefs.⁸²

Implicit bias is not confined just to thought processes, but also may produce discriminatory behavior. People evaluate others based on stereotypes they associate with the group to which others belong, which may result in automatic or spontaneous discriminatory actions.⁸³ Furthermore, in terms of evaluation, “[w]hen people act in ways that violate our preconceived expectations,” we assess them with more scrutiny than we otherwise would.⁸⁴ For example, women executives may face unfair evaluation compared to their male counterparts. Even where women and men executives perform based on the same objective criteria, “both men and women judge women’s performance lower than men’s.”⁸⁵

79. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002).

80. *Id.*; see also BROWN, *supra* note 51, at 119–20 (citing *Moving Mind-Sets on Gender Diversity: McKinsey Global Survey Results*, MCKINSEY & CO. (Jan. 2014), <https://www.mckinsey.com/business-functions/organization/our-insights/moving-mind-sets-on-gender-diversity-mckinsey-global-survey-results> [<https://perma.cc/C7SE-D66B>] (“Just 19 percent of male respondents strongly agree that reaching top management is harder for women.”)).

81. BANAJI & GREENWALD, *supra* note 70, at 144.

82. *Scientific Foundations*, *supra* note 72, at 951.

83. See *id.* at 961. Often this process of evaluating an individual based on stereotypes occurs quickly and without our awareness:

When we are missing a piece of information, when we are acting quickly, talking fast or maybe too much, or hiring quickly to match our company’s growth, we make an assumption that is more informed by our own background and experience and our own comfort level than it is on the facts [W]e’ll naturally gravitate to certain resumes over others, we’ll think to promote certain folks over others, and we’ll build teams that look like us.

BROWN, *supra* note 51, at 11.

84. SANDBERG, *supra* note 55, at 40 (citing B. Ann Bettencourt et al., *Evaluations of Ingroup and Outgroup Members: The Role of Category-Based Expectancy Violation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 244 (1997)).

85. Marleen A. O’Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 MD. L. REV. 465, 484 (2006).

B. Interventions May Reduce Implicit Bias

Psychologists have explored methods to moderate bias for years. Much research focuses on facilitating personal connections and intergroup interaction to reduce bias generally. For instance, psychologists recognize an effective strategy called the social contact hypothesis.⁸⁶ The theory explains that interaction of people from different groups under certain conditions will weaken stereotypes and prejudice.⁸⁷ Despite its rigid conditions, including interaction with others of equal status and non-superficial contact, it demonstrates the potential to reduce bias.⁸⁸

Research has also begun to suggest that implicit bias may be reduced through various interventions.⁸⁹ Although motivations such as image preservation and social demands often intensify implicit bias, evidence shows certain strategies can moderate automatic stereotypes.⁹⁰

1. Interventions

One key feature of effective interventions to reduce implicit intergroup bias is their long-term duration.⁹¹ For example, one study found that long-term diversity training and education can reduce implicit bias.⁹² Another study examined long-term exposure to female role models through seeing images of female exemplars and through real-life interaction with female math and science professors.⁹³ In that study, women were less likely to hold stereotypical

86. Dovidio & Gaertner, *supra* note 69, at 1094.

87. Kang & Banaji, *supra* note 25, at 1101.

88. *Id.* Introduced in the 1950s, the social contact hypothesis requires that people “(1) [be] exposed to disconfirming data; (2) interact with others of equal status; (3) cooperate; (4) engage in non-superficial contact; and (5) receive clear norms in favor of equality.” *Id.*

89. See Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 244 (2002) (finding that certain moderators including self and social motives and specific strategies to counter stereotypes can impact automatic stereotypes); Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL.: GEN. 1765 (2014) (comparing 17 interventions for reducing the expression of implicit racial prejudice); Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001) (finding that diversity education may reduce automatic intergroup bias).

90. Blair, *supra* note 89, at 244, 247–49.

91. See Nosek et al., *supra* note 66, at 46.

92. Rudman et al., *supra* note 89, at 865 (describing the positive effect of university students’ participation in a seminar on prejudice and conflict).

93. Nilanjana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 654–55 (2004).

beliefs about themselves after exposure to counter-stereotypic exemplars over a period of one year.⁹⁴

In addition, some studies showing a reduction in implicit bias feature certain intervention strategies. These strategies include (1) stereotype replacement, (2) counter-stereotypic imaging, (3) individuation, (4) perspective-taking, and (5) increasing contact with out-group members.⁹⁵ Stereotype replacement refers to recognizing a response is based on stereotypes and replacing a biased response with accurate information.⁹⁶ In counter-stereotypic imaging, one visualizes a counter-stereotypical person to increase the accessibility of a positive exemplar.⁹⁷ Individuation involves viewing others according to personal characteristics.⁹⁸ Perspective-taking refers to personally taking the perspective of a member of a stigmatized group.⁹⁹ Finally, increasing contact with out-group members allows individuals to “seek[] opportunities to encounter and engage in positive interactions with out-group members.”¹⁰⁰

Incorporating these specific strategies in a gender bias habit-changing workshop, a study of gender bias among university STEM faculty members found improved department climate in support of the advancement of women.¹⁰¹ Two years following the study, in those university departments that received the training, the percentage of women faculty hired increased by an

94. *Id.* at 654–55. The part of the study that exposed women to images of famous counter-stereotypic female leaders focused on positive role models in law, science, and politics, including Madeleine Albright, Ruth Bader Ginsburg, and Oprah Winfrey. *Id.* at 655.

95. Molly Carnes et al., *The Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial*, 90 *ACAD. MED.* 221, 223 (2015); Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 *J. EXPERIMENTAL SOC. PSYCHOL.* 1267, 1270–72 (2012). Research comparing a variety of intervention strategies found that strategies using counter-stereotypic exemplars were among the most effective. Lai et al., *supra* note 89.

96. Devine et al., *supra* note 95, at 1270.

97. *Id.* at 1270–71; see also Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 *J. PERSONALITY & SOC. PSYCHOL.* 800, 803–04, 807 (2001) (finding that exposure to admired Black exemplars and disliked White exemplars decreased automatic pro-White attitudes 24 hours after exposure).

98. Devine et al., *supra* note 95, at 1271.

99. *Id.*; see also Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 *J. PERSONALITY & SOC. PSYCHOL.* 708, 721 (2000).

100. Devine et al., *supra* note 95, at 1271.

101. Carnes et al., *supra* note 95, at 228.

estimated 18%.¹⁰² Significantly, these strategies can mutually reinforce one another.¹⁰³ The strategies can also increase the concern individuals feel about discrimination, which helps “translate . . . knowledge of bias-reducing strategies into action.”¹⁰⁴

2. Implications and Working Around Bias

Excluding a relatively modest amount of research showing evidence of change, most studies have only established ways to temporarily reduce the effect of implicit bias.¹⁰⁵ There is currently a lack of firmly established methods for completely eliminating implicit bias.¹⁰⁶ But this is not a reason to give up, as scholars expect further research to expand their understanding of implicit bias.¹⁰⁷ Moreover, corporations that “make a sophisticated commitment to reduce corporate implicit bias through . . . training programs” and other efforts can still make progress.¹⁰⁸

Given the lack of evidence showing implicit bias can be completely eradicated, Banaji and Greenwald note there are effective ways to *work around* it.¹⁰⁹ One is implementing “guidelines to eliminate discretion from judgments that might otherwise afford opportunity for [implicit bias].”¹¹⁰ Similarly, because evidence shows that quick, reflexive judgments exacerbate implicit bias, rational deliberation may overcome it when one evaluates out-group members.¹¹¹

102. Patricia G. Devine et al., *A Gender Bias Habit-Breaking Intervention Led to Increased Hiring of Female Faculty in STEM Departments*, 73 J. EXPERIMENTAL. SOC. PSYCHOL. 211, 211 (2017). The study, which involved STEM faculty at the University of Wisconsin, illustrates the potential of implicit bias trainings to shape behavior. Jessica Nordell, *Does Starbucks Understand the Science of Racial Bias?*, THE ATLANTIC (May 2, 2018), <https://www.theatlantic.com/science/archive/2018/05/starbucks-unconscious-bias-training/559415/> [<https://perma.cc/Q6VX-6HB4>].

103. Devine et al., *supra* note 95, at 1270.

104. *Id.* at 1276.

105. Levinson, *supra* note 76, at 161–62; Nosek et al., *supra* note 66, at 45–46.

106. BANAJI & GREENWALD, *supra* note 70, at 149.

107. *See id.* at 152–53.

108. Levinson, *supra* note 76, at 162.

109. BANAJI & GREENWALD, *supra* note 70, at 153.

110. *Id.* at 166–67.

111. Daniel A. Yudkin et al., *Reflexive Intergroup Bias in Third-Party Punishment*, 145 J. EXPERIMENTAL. PSYCHOL.: GEN. 1448, 1449 (2016). In a social experiment testing whether people had a tendency to punish out-group members, two psychologists made the following observations on how implicit bias may be reduced with rational deliberation:

When people made their decisions swiftly—in a few seconds or less—they were biased in their . . . decisions. Not only did they punish out-group members more harshly, they also treated members of their own group more leniently. . . . But

Another method to work around implicit bias is objective assessments. An influential study examining the Boston Symphony Orchestra demonstrates one type of objective assessment.¹¹² The study found that after the orchestra implemented a curtain as part of a blind audition procedure, female musicians' chances of advancing in the hiring process increased dramatically.¹¹³ While the blind audition device may not be directly translatable to the selection of board nominees, the concept of objective assessments is useful and may be applied to evaluating potential candidates.

Assuming implicit bias exists and can be reduced, some may still question its appropriateness. First, critics may argue the focus should be on explicit discrimination, which is still a serious problem. Although this critique sees implicit bias as causing people to overlook conscious bias, it is possible to focus on both concurrently, and efforts to overcome implicit bias may help address many types of discrimination, including explicit discrimination, implicit bias, and institutional discrimination.¹¹⁴ In addition, a critic may point out conceptual difficulties. Implicit bias challenges legal theory, which assumes

we also found that people could overcome these biased instincts if they engaged in rational deliberation. When people had the chance to reflect on their decision, they were largely unbiased, handing out equal punishments to in-group and out-group members.

Daniel A. Yudkin & Jay Van Bavel, *The Roots of Implicit Bias*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/opinion/sunday/the-roots-of-implicit-bias.html> [<https://perma.cc/7ZHQ-A4U8>].

112. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 715 (2000).

113. *Id.* at 716. Ruth Bader Ginsburg explained her take on the famous U.S. symphony orchestra study as follows:

When I was growing up, one never saw a woman in the symphony orchestra Someone had the simple idea, "Let's drop a curtain. Let's drop a curtain between the people who are auditioning and the people who are judging." . . . Once the curtain was dropped, the testers couldn't tell whether it was a man—or a woman. And they made their judgments based on the quality of the performance.

Irin Carmon, *Exclusive Justice Ruth Bader Ginsburg Interview: Full Transcript*, MSNBC (Feb. 17, 2015, 8:06 PM), <http://www.msnbc.com/msnbc/exclusive-justice-ruth-bader-ginsburg-interview-full-transcript> [<https://perma.cc/U8JA-Q3BY>] (discussing the challenge of addressing unconscious bias as an example of "unfinished business" in gender equality and noting that the blind audition curtain is "not so easy to duplicate in other areas").

114. Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1058–59 (2009); see Olivia Goldhill, *The World is Relying on a Flawed Psychological Test to Fight Racism*, QUARTZ (Dec. 3, 2017), <https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism/> [<https://perma.cc/FU6M-PWCV>] (quoting Anthony Greenwald who explained, "The remedies I advocate are equally suitable for ALL forms of unintended discrimination.").

discrimination by human actors is “guided by their avowed (explicit) beliefs, attitudes, and intentions.”¹¹⁵ However, even if recognizing implicit bias requires a shift in how the law views discrimination, we should not ignore its pervasive impact.

C. *Implicit Bias in the Selection and Treatment of Women Directors*

We should expect that the same implicit biases held by individuals generally are also present in directors and on nominating committees. The presence of implicit bias on the board of directors has consequences for representation of women on boards. Practically, it manifests in the selection of nominees and in the treatment of women directors.

1. Selection of Nominees

Implicit bias can infect the process in which board nominees are chosen. Many have suggested there is gender bias in the director appointment process and that recruiting favors men.¹¹⁶ In a 2015 Government Accountability Office report, almost half of stakeholders surveyed listed unconscious bias as a factor affecting the selection of women on boards.¹¹⁷ To provide context, common sources of director nominations include the CEO, members of the board, executive search firms, and major shareholders.¹¹⁸ When members of the board

115. *Scientific Foundations*, *supra* note 72, at 951.

116. See Juan Manuel García Lara et al., *The Monitoring Role of Female Directors Over Accounting Quality*, 45 J. CORP. FIN. 651, 654 (2017) (noting gender bias in the processes of appointing directors and recruiting). This pattern mirrors the broader workplace hiring process, in which female job candidates may be evaluated as less competent than identical males. RACHEL D. GODSIL ET AL., 2 THE SCIENCE OF EQUALITY: THE EFFECTS OF GENDER ROLES, IMPLICIT BIAS, AND STEREOTYPE THREAT ON THE LIVES OF WOMEN AND GIRLS 36 (2016) (citing Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. NAT'L ACAD. SCI. 16474, 16477) (2012)).

117. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-30, CORPORATE BOARDS: STRATEGIES TO ADDRESS REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS 13 (2015) [hereinafter GAO REPORT].

118. See PRICEWATERHOUSECOOPERS, INSIGHTS FROM THE BOARDROOM 2012: BOARD EVOLUTION: PROGRESS MADE, YET CHALLENGES PERSIST 6–7 (2012), https://www.pwc.com/us/en/corporate-governance/annual-corporate-directors-survey/assets/pdf/pwc-annual-corporate-directors-survey.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link [https://perma.cc/A2ER-74ZU] [hereinafter INSIGHTS FROM THE BOARDROOM]. Following Sarbanes-Oxley, 96% of public corporations have a formal nominating committee. Fairfax, *Clogs in the Pipeline*, *supra* note 46, at 599 n.109 (citing KORN/FERRY INT'L, 31ST ANNUAL BOARD OF DIRECTORS STUDY 12 tbl.B (2004)). The nominating and governance committees of public corporations control board succession, set director selection criteria, and choose the director candidates that are ultimately submitted to shareholders for a vote. EY Ctr. for Bd. Matters, *A Look Inside Nominating and*

make recommendations for nominees, most rely on the opinions of other board members, with 90% of directors surveyed reporting that they look to the recommendations of other directors to recruit new members.¹¹⁹ In addition, 67% of directors use search firms to identify candidates and 54% rely on management recommendations.¹²⁰ Since the sources of most nominee recommendations are CEOs and other directors, implicit bias in selecting nominees appears to manifest as in-group favoritism.¹²¹

Because boards want new members to fit in, directors have a tendency to select nominees that “look and sound like they do.”¹²² Donald Langevoort describes how boards naturally move “away from diversity and toward collegiality” when choosing nominees.¹²³ Similarly, when CEOs make recommendations, they may “select their cultural and demographic clones.”¹²⁴ As such, the combination of unconscious bias and closed social networks means board nominating committees “are likely to recruit new members from existing personal networks” which may be demographically homogenous.¹²⁵ Moreover, when the nominating committee lacks objective criteria for selecting board

Governance Committees, ERNST & YOUNG (Mar. 2017), [https://www.ey.com/Publication/vwLUAssets/EY-center-for-board-matters-a-look-inside-nominating-and-governance-committees/\\$FILE/EY-center-for-board-matters-a-look-inside-nominating-and-governance-committees.pdf](https://www.ey.com/Publication/vwLUAssets/EY-center-for-board-matters-a-look-inside-nominating-and-governance-committees/$FILE/EY-center-for-board-matters-a-look-inside-nominating-and-governance-committees.pdf) [<https://perma.cc/VVH5-LN93>]. In addition, 51% of nominating and governance committees oversee director orientation and continuing education for directors, and therefore could play a role in providing unconscious bias training for directors. *See id.*; *infra* Section IV.A.

119. INSIGHTS FROM THE BOARDROOM, *supra* note 118 at 6–7 (commenting that the high percentage of recruitment recommendations coming from other directors suggests that directors prefer “individuals recommended by someone they know and trust”).

120. *Id.* at 6–7.

121. *See* Aaron A. Dhir, *Towards a Race- and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 QUEEN’S L.J. 569, 580 (2010) (discussing the “human tendency toward in-group favouritism” in the context of promoting individuals to leadership positions).

122. GAO REPORT, *supra* note 117, at 13; Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 811 (2001).

123. Langevoort, *supra* note 122, at 811.

124. Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1591–92 (2004) (“It is only natural that a CEO would prefer someone that is culturally proximate to himself . . .”).

125. DHIR, *supra* note 34, at 47, 53. Indeed, in a *Harvard Business Review* study of the experiences of female directors, even 33% of male directors interviewed believed that women face limited access to boards because of weaker networks and the “old boys’ club.” Boris Groysberg & Deborah Bell, *Dysfunction in the Boardroom*, HARV. BUS. REV., June 2013, at 88, 95.

nominees, nominations tend to come from a small pool of individuals from personal networks.¹²⁶

In addressing issues of bias in workplace hiring in general, companies increasingly utilize tools such as data analytics to address gender gaps and objective assessments to select new hires.¹²⁷ For example, data analytics can incorporate algorithms that screen job candidates through personality tests based on skills and qualities companies seek.¹²⁸ Companies can also use platforms that ask candidates objective questions relating to the job, from which the company evaluates answers without knowing the applicant's identity.¹²⁹ Interestingly, sophisticated screening algorithms have been shown to increase gender diversity by taking human bias out of the equation.¹³⁰

Similar tools can also apply to the board of directors, specifically in the selection of board nominees, to proactively ensure the process is not biased. However, the tools have potential pitfalls that companies must manage. First, as Kang and Banaji explain, our conception of merit must take into account how implicit bias skews outcomes and how seemingly fair assessments can become "mismeasurements" because of bias.¹³¹ In addition, data analytics brings a risk of algorithm bias and discrimination by default to "categorical judgments based on demographic characteristics."¹³² Algorithms are designed

126. Jeff Cunningham, *Women in the Boardroom: A Guide for Journalists*, MEDIUM (Oct. 18, 2017), <https://medium.com/@cunninghamjjeff/women-in-the-boardroom-the-media-is-clueless-2fc94c712fe7> [https://perma.cc/VD4W-SA9L].

127. IRIS BOHNET, WHAT WORKS: GENDER EQUALITY BY DESIGN 109, 139–44 (2016); *see also* Ji-a Min, *5 Google People Analytics Lessons You Can Steal*, IDEAL BLOG (Oct. 4, 2016) <https://ideal.com/google-people-analytics/> [https://perma.cc/F8VB-AWE2].

128. Bourree Lam, *For More Workplace Diversity, Should Algorithms Make Hiring Decisions?*, THE ATLANTIC (Jun. 22, 2015), <https://www.theatlantic.com/business/archive/2015/06/algorithm-hiring-diversity-HR/396374/> [https://perma.cc/N864-LQB7].

129. *See id.*; Matt Reynolds, *Hiring Tool Uses Behavioural Science to Stop Recruitment Bias*, NEWSIDENTIST (Feb. 23, 2017), <https://www.newscientist.com/article/2122323-hiring-tool-uses-behavioural-science-to-stop-recruitment-bias/> [https://perma.cc/KN6M-ELQZ].

130. *See* Henri de Romrée et al., *People Analytics Reveals Three Things HR May Be Getting Wrong*, MCKINSEY Q. (July 2016), <https://www.mckinsey.com/business-functions/organization/our-insights/people-analytics-reveals-three-things-hr-may-be-getting-wrong> [https://perma.cc/YQ6C-GEGX] (describing the success of one company's hiring algorithm in automatically yielding more women through the screening process based on merit, debunking its assumption that "screening conducted by humans would increase gender diversity more effectively").

131. Kang & Banaji, *supra* note 25, at 1089–91. As such, when utilizing tools that seek candidates based on merit, it is important to develop assessments carefully, including making sure that decision makers are aware of their own biases. *Id.* at 1090–92; *see also* discussion *infra* Section IV.A.

132. BOHNET, *supra* note 127, at 118; *see* Gideon Mann & Cathy O'Neil, *Hiring Algorithms Are Not Neutral*, HARV. BUS. REV. (Dec. 9, 2016), <https://hbr.org/2016/12/hiring-algorithms-are-not-neutral> [https://perma.cc/KYQ4-25Q6].

to imitate human decision-making.¹³³ As a result, they may inadvertently incorporate the biases of the humans who build them.¹³⁴ Finally, objective assessments may lead to backlash and resistance from decision makers. For instance, some managers resist pressure to hire people other than whom they want.¹³⁵ Indeed, managers at one company used hiring tests selectively, overlooking results when men failed a math test, but taking note when women failed.¹³⁶

To further tackle the implicit bias that is embedded in the director selection process, Part IV of this Article emphasizes the need to work collectively to implement strategies to eliminate bias. Moreover, because the current SEC disclosure law does not address whether board selection is impacted by bias,¹³⁷ Part IV proposes modifications to the rule to lessen the invisibility of implicit bias.

2. Boardroom Challenges, Stereotypes, and Tokenism

Apart from implicit bias in the nomination process, problems also continue once women join boards. Anecdotal evidence indicates that bias affects boardroom dynamics and the treatment of women directors. One study found that 87% of women directors reported facing challenges based on their gender, including not being heard, not being accepted as part of the “in” group, difficulty establishing credibility, and stereotypes.¹³⁸

Not being accepted and not being heard are particularly challenging for women directors. In one case, a former director on Quiksilver’s board explained that unconscious bias led fellow board members to exclude her from

133. Mann & O’Neil, *supra* note 132, at 2.

134. *Id.*

135. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July–Aug. 2016, at 52, 55.

136. *Id.*

137. See Cheryl L. Wade, *Gender Diversity on Corporate Boards: How Racial Politics Impedes Progress in the United States*, 26 PACE INT’L L. REV. 23, 33 (2014) (discussing how a main problem with the SEC’s board diversity disclosure rule is the failure to define diversity, allowing companies to define it very broadly and ignore the presence of bias).

138. Groysberg & Bell, *supra* note 125, at 94. One female director noted her struggle by explaining, “I often feel that I’m not heard and that I need to put more effort into making sure that others hear and understand my point of view.” *Id.* Another female director described the feeling of not being accepted as follows: “It’s been a challenge earning respect and being treated as an equal member, particularly with the older board members.” *Id.* Data also illustrates that women directors are more likely to be excluded from networks through informal social gatherings such as golf, which “reinforces the tradition of the old boys’ club” and leads some female leaders to feel the need to play golf just to avoid being left out. *Id.* at 93.

important conversations and prompted her to resign.¹³⁹ A disparaging comment by a director at Uber further shows biased dynamics at work. The director mockingly remarked that adding more women to a board only means “it’s much more likely [there will] be more talking.”¹⁴⁰ These reports are in line with research indicating that women face challenges in making their voices heard and being accepted during high-level executive meetings.¹⁴¹

Furthermore, when women directors are viewed as tokens or face a lack of critical mass of women directors on the board, “their attributes are distorted so that they become trapped in stereotypical roles.”¹⁴² According to many scholars, without a critical mass of three or more directors from the same group, the rest of the board will marginalize and scrutinize the minority director’s views.¹⁴³ In the context of tokenism and excessive scrutiny, women business leaders must grapple with the double bind, an important manifestation of gender bias and stereotypes.¹⁴⁴ For instance, women are often stereotyped as being “kind,” “nurturing,” and “helpful”—all “likeable” characteristics, but characteristics that are perceived as inconsistent with competence.¹⁴⁵ Yet women who are dominant and decisive tend to be perceived as competent but unlikeable.¹⁴⁶

139. Liz Dolan, *Gender Bias Forced Me to Quit Quiksilver’s Board*, FORTUNE (June 15, 2015), <http://fortune.com/2015/06/15/liz-dolan-quiksilver-board/> [[<https://perma.cc/HQA6-MAY6>].

140. Mike Isaac & Susan Chira, *David Bonderman Resigns From Uber Board After Sexist Remark*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/technology/uber-sexual-harassment-huffington-bonderman.html> [<https://perma.cc/8KXZ-GR8F>].

141. BONNIE FETCH & JESSICA POLINER, (UN) SKIRTING THE ISSUES: A GUIDE FOR THE WELL-INTENTIONED MAN IN TODAY’S WORKPLACE 108 (2017) (citing KATHRYN HEATH ET AL., SUCCESS ON THE CORPORATE STAGE: WHY MEETINGS MATTER EVEN MORE FOR WOMEN 2 (2014), https://www.flynnheath.com/wp-content/uploads/2016/01/Why-Meetings-Matter-Even-More-for-Women_FHH-Report_June-2014.pdf [<https://perma.cc/72BA-TSVY>]) (“The bottom line: men are rewarded for talking more, and women are not. In addition, women’s ideas are also more harshly scrutinized.”).

142. Bilimoria & Piderit, *supra* note 55, at 1457.

143. Broome, *supra* note 63, at 679.

144. *Damned or Doomed—Catalyst Study on Gender Stereotyping at Work Uncovers Double-Bind Dilemmas for Women*, CATALYST, <https://www.catalyst.org/media/damned-or-doomed-catalyst-study-gender-stereotyping-work-uncovers-double-bind-dilemmas-women> [<https://perma.cc/FG49-JTPS>] (last visited Aug. 15, 2018).

145. FETCH & POLINER *supra* note 141, at 117.

146. *Id.* at 117 (“Success and likeability are positively correlated for men, but they are negatively correlated for women. Sometimes, but not always, women are viewed as competent when they are more out-spoken and aggressive; in essence, when they embody stereotypically masculine traits.”). The double bind is a well-known challenge in which women face criticism for being assertive. Miller et al., *supra* note 3. An experiment involving a Harvard Business School case study about a successful female venture capitalist named Heidi Roizen illustrates the double bind. SANDBERG, *supra* note 55, at 39–40 (citing discussions with Professor Frank J. Flynn and citing Kathleen McGinn & Nicole

As discussed in Part IV, voluntary targets aiming to reach a critical mass can help address these boardroom challenges. However, a critical mass of women directors is important not just because it may help maximize women's contributions to the board. There are also important research-based indications that more women directors could promote increased intergroup contact and counter-stereotypic imaging, two strategies proven to reduce implicit bias.¹⁴⁷

3. Current Efforts to Address Implicit Bias

U.S. corporations spend \$8 billion per year on diversity training.¹⁴⁸ Most corporations offer some form of training, including workshops with trained instructors, web seminars, and strategies for managers in hiring.¹⁴⁹ Notably, many companies strive to address implicit bias in their trainings. Google has implemented unconscious bias trainings, and over half of its employees have participated.¹⁵⁰ In May 2018, Starbucks conducted unconscious bias training for employees as part of a comprehensive diversity and inclusion effort.¹⁵¹

Tempest, *Heidi Roizen, Harvard Business School Case Study 9-800-228* (Jan. 2000 (revised 2010)), <https://www.hbs.edu/faculty/Pages/item.aspx?num=26880> [<https://perma.cc/5WZZ-GCBR>]; see also Joanne Martin, *Gender-Related Material in the New Curriculum*, STAN. GRADUATE SCH. BUS. (Jan. 1, 2007), <https://www.gsb.stanford.edu/experience/news-history/gender-related-material-new-core-curriculum> [<https://perma.cc/Q23N-9HY7>]; Joyce Routson, *Heidi Roizen: Networking Is More Than Collecting Lots of Names*, STAN. GRADUATE SCH. BUS. (Nov. 1, 2009), <https://www.gsb.stanford.edu/insights/heidi-roizen-networking-more-collecting-lots-names> [<https://perma.cc/GZ5C-S4D5>]. In a 2003 experiment conducted by Professor Frank Flynn and Professor Cameron Anderson, students submitted their impressions of the Heidi Roizen case study which was identical for every student, except that half of the students reviewed a case called "Heidi" and the other half received a case called "Howard." SANDBERG, *supra* note 55, at 39–40. The students who evaluated Heidi disliked her and judged her more critically than they judged Howard. *Id.*

147. See *supra* Section III.B, pp. 554–55. Another benefit of increased intergroup contact and counter-stereotypic imagining may be helping by addressing the gender-related obstacles that men too face. See FETCH & POLINER, *supra* note 141, at 60 ("Gender diversity has another, bigger impact that is less often recognized: it helps men to step outside of traditional roles and follow their unique talents. This is important because men also still face challenges when they attempt to pursue roles outside of the norm.").

148. BOHNET, *supra* note 127, at 51.

149. *Id.*

150. Farhad Manjoo, *Exposing Hidden Bias at Google*, N.Y. TIMES (Sept. 24, 2014), <https://www.nytimes.com/2014/09/25/technology/exposing-hidden-biases-at-google-to-improve-diversity.html> [<https://perma.cc/DVW3-NS2F>].

151. Yuki Noguchi, *Starbucks Training Focuses on the Evolving Study of Unconscious Bias*, NAT'L PUB. RADIO (May 17, 2018, 3:30 PM), <https://www.npr.org/2018/05/17/611909506/starbucks-training-focuses-on-the-evolving-study-of-unconscious-bias> [<https://perma.cc/52G3-LTJN>]; Nordell, *supra* note 102; *Starbucks Shares Further Details on Multi-Phase Anti-Bias Training Efforts*, STARBUCKS, <https://news.starbucks.com/views/starbucks-shares-further-details-on-anti-bias-training-efforts> [<https://perma.cc/9DLN-3UTJ>] (last visited Aug. 16, 2018).

Companies that are ranked the “best” in diversity programs also commonly incorporate trainings on cultural sensitivity and recognizing unconscious bias.¹⁵²

At the same time, many corporate diversity trainings are flawed. Despite the extensive resources devoted to trainings, studies show that training has not led to increases in managerial diversity.¹⁵³ Significant reasons for the ineffectiveness of such programs are mandatory attendance, negative messaging, manager resistance, and the need to focus more on “hiring and promotion routines that can quash subjectivity and bias.”¹⁵⁴ For example, mandatory trainings can activate bias because people “rebel against rules to assert their autonomy,” and trainings often have a remedial, negative focus.¹⁵⁵ As a result, managers particularly begin to feel shamed and resent the suggestion that they are “oppressors” responsible for company diversity failures.¹⁵⁶

It is also difficult to say how many companies provide diversity training to senior managers, much less to directors. According to Dhir, efforts to expand diversity training to leaders at the corporate governance level have only recently emerged and their results are untested.¹⁵⁷ Moreover, organizations often provide training program services for directors, including as part of a new director orientation program, but it is unclear if implicit bias training plays any role in such programs.¹⁵⁸

Some prominent firms have begun to offer unconscious bias trainings to key decision makers, though it is less clear whether they involve members of

152. Michael Bush & Kim Peters, *How the Best Companies Do Diversity Right*, FORTUNE (Dec. 5, 2016), <http://fortune.com/2016/12/05/diversity-inclusion-workplaces> [https://perma.cc/5T28-HWDH].

153. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 595 (2006) [hereinafter *Best Practices or Best Guesses?*]; Frank Dobbin et al., *Diversity Management in Corporate America*, CONTEXTS, Fall 2007, at 21, 21 [hereinafter *Diversity Management*].

154. Dobbin & Kalev, *supra* note 135, at 54–55; *Diversity Management*, *supra* note 153, at 26–27.

155. Dobbin & Kalev, *supra* note 135, at 54–55.

156. *Best Practices or Best Guesses?*, *supra* note 153, at 595.

157. DHIR, *supra* note 34, at 51.

158. Joan Conley, *Onboarding New Directors: Beyond the Board Manual*, NASDAQ MARKETINSITE (July 5, 2017), <http://business.nasdaq.com/marketinsite/2017/Onboarding-New-Directors-Beyond-the-Board-Manual.html> [https://perma.cc/3M5C-3R2N]; *In-Boardroom Education Programs*, NAT'L ASS'N CORP. DIRECTORS, <https://www.nacdonline.org/services/content.cfm?itemnumber=53239> [https://perma.cc/7534-Q3BG] (last visited Aug. 26, 2018) (offering customized training programs for directors and C-suite executives, with sample topics such as board and management dynamics, board skills and composition, fiduciary duties, and talent oversight).

the board of directors.¹⁵⁹ For example, BMO Financial Group, which has received praise for its commitment to diversity and inclusion, provides training to managers.¹⁶⁰ The company explains the trainings seek to help managers “recognize key blind spots when they are assessing women’s performance and potential, as well as tools that equip them to make fair and objective decisions related to talent.”¹⁶¹ As a further example, when Facebook announced its unconscious bias training in 2015, over 90% of its senior leadership participated.¹⁶² More companies should not only encourage top officers but also directors to participate in trainings to reduce implicit bias. Part IV of this Article suggests ways to improve corporate diversity practices to address implicit bias.

IV. DEBIASING THE BOARDROOM: TRAINING, DISCLOSURE, AND COLLABORATION

To overcome bias in the nomination process and in the boardroom, a combination of improved training, modified disclosure, and collaborative voluntary action is necessary. Section IV.A discusses how voluntary implicit bias trainings offered to directors and executives will help overcome bias.¹⁶³ Section IV.B proposes modifying Regulation S-K to define diversity and to require disclosure of whether a company offers trainings to directors and officers.¹⁶⁴ Finally, Section IV.C prescribes voluntary actions such as

159. See, e.g., *Mastercard Unconscious Bias*, CEO ACTION FOR DIVERSITY & INCLUSION, <https://www.ceoaction.com/actions/unconscious-bias/> [https://perma.cc/6C39-UZU5] (last visited Aug. 30, 2018) (describing customized training offered to managers and all employees). Many CEOs and presidents of leading companies have signed the CEO Action for Diversity & Inclusion pledge, which, among other things, involves a promise to “implement and expand unconscious bias education.” *We Pledge to Act On Supporting More Inclusive Workplaces!*, CEO ACTION FOR DIVERSITY & INCLUSION, <https://www.ceoaction.com/the-pledge/> [https://perma.cc/6PPP-5A2H] (last visited Aug. 30, 2018); Bonnie Marcus, *What Happens When CEOs Take a Pledge to Improve Diversity and Inclusion*, FORBES (Jan. 19, 2018), <https://www.forbes.com/sites/bonniemarcus/2018/01/19/what-happens-when-ceos-take-a-pledge-to-improve-diversity-and-inclusion/#47237f3a5627> [https://perma.cc/3C2T-C2QY] (interviewing Chief Diversity Officer of PwC, where “everyone that is promoted within the firm is now required to take [an unconscious bias] training”).

160. BMO FIN. GRP., 2016 EMPLOYMENT EQUITY NARRATIVE REPORT 9 (2016) <https://www.bmo.com/cr/files/NarrativeReport2016EN.pdf> [https://perma.cc/A5US-68JD].

161. *Id.*

162. Jessica Guynn, *Facebook Combats Bias with Training*, USA TODAY (July 28, 2015, 1:17 PM), <https://www.usatoday.com/story/tech/2015/07/28/facebook-unconscious-bias-training-sheryl-sandberg/30762747/> [https://perma.cc/X3JQ-7K3W].

163. See *infra* Section IV.A.

164. See *infra* Section IV.B.

business-led targets and corporate board diversity task forces to help foster cooperation and address structural gender diversity issues.¹⁶⁵

A. Improved Trainings

Diversity trainings are the most common component of diversity programs, and are often prompted by the desire to avoid discrimination lawsuits and negative publicity.¹⁶⁶ As such, many companies will likely continue trainings in spite of potential flaws. However, they can improve trainings by incorporating proven implicit bias interventions and by offering voluntary trainings to directors and officers. Recognizing that mere awareness-raising is not enough,¹⁶⁷ they can enhance trainings by arming participants with specific board-oriented tools to reduce bias and its effects.¹⁶⁸ The results of these trainings for directors and officers should also be tested and the trainings should be adjusted accordingly.¹⁶⁹

First, companies should offer the trainings to important insiders, including directors and officers. These trainings should start during new director and officer orientation and occur on an ongoing basis to increase long-term effectiveness.¹⁷⁰ The participation of decision makers is an important part of implicit bias training.¹⁷¹ Not only do directors and officers make personnel and governance decisions that are susceptible to implicit bias, but they have the ability to set the tone at the top. Setting the tone of changing corporate culture to eliminate bias is critical.¹⁷² Research indicates that individuals who feel

165. See *infra* Section IV.C.

166. *Diversity Management*, *supra* note 153, at 21, 26–27.

167. See Adam Grant & Sheryl Sandberg, *When Talking About Bias Backfires*, N.Y. TIMES (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html> [<https://perma.cc/EHX6-Q7C8>] (explaining that merely raising awareness about bias is not only ineffective, but could also be counterproductive, leading to more stereotyping of others).

168. See Joelle Emerson, *Don't Give Up on Unconscious Bias Training—Make it Better*, HARV. BUS. REV. (Apr. 28, 2017), <https://hbr.org/2017/04/dont-give-up-on-unconscious-bias-training-make-it-better> [<https://perma.cc/R29W-PDMA>].

169. See BOHNET *supra* note 127, at 59–60 (“I cannot overstate the importance of testing and measuring what works and what does not.”).

170. Levinson, *supra* note 76, at 163.

171. *Id.*; BROWN, *supra* note 51, at 24 (suggesting that workplace diversity trainings are most effective when customized to “focus on organizational change and the role of the leader in taking concrete steps to lead the conversation about inclusion”).

172. BROWN, *supra* note 51, at 32. Relatedly, many activist CEOs already make their voices heard on social issues, particularly when the issue touches on corporate values. For example, in 2016 PayPal CEO Dan Schulman spoke out against a North Carolina law requiring individuals to use bathrooms that correspond to the gender on their birth certificates. Aaron K. Chatterji & Michael W.

concern about discrimination are able to apply their knowledge of bias-reducing strategies into action.¹⁷³ These trainings should also be voluntary, as research shows that mandatory trainings can create backlash.¹⁷⁴

Next, as described in Part III, research shows the potential of bias-reducing strategies, such as stereotype replacement, counter-stereotypic imaging, and perspective-taking.¹⁷⁵ Since new research is constantly emerging regarding implicit bias and the effectiveness of various interventions aimed at reducing it, trainings should incorporate strategies that have been tested and proven. Along with research-informed content, firms can use a number of effective methods to structure their director and officer implicit bias trainings. One model focuses on implicit bias as a habit that can be broken through being aware of bias, having concern about the consequences and motivation to change, and applying strategies to reduce it.¹⁷⁶ Another possibility is an approach by Paradigm Strategy, Inc., a firm that advises companies on diversity.¹⁷⁷ This method prescribes that companies (1) design trainings to reduce defensiveness while communicating the importance of addressing bias, (2) structure trainings around specific situations, such as recruiting, hiring, and team dynamics, and (3) make trainings “action oriented,” including discussion of “what qualifications matter before making people-related decisions.”¹⁷⁸

To make trainings geared toward directors and governance, trainings should incorporate tasks the board—especially the nominating and governance committee—faces, such as recruiting nominees and engaging in discussion and decision-making. The trainings should equip participants with tools to work around the presence of unconscious bias in these tasks. This will help *avoid* the automatic, intuitive judgments that are vulnerable to biases.¹⁷⁹ For example, trainings could include discussion of how top executives and directors can consistently utilize sophisticated data analytics and objective guidelines and

Toffel, *The New CEO Activists*, HARV. BUS. REV., Jan.–Feb. 2018, at 78, 78–89. Research increasingly indicates that millennials believe CEOs have a responsibility to raise awareness on social issues, although consumer surveys show that Americans approve of CEO activism on economic issues more than social issues. *Id.*

173. *Supra* Section III.B.1, pp. 554–56.

174. *Diversity Management*, *supra* note 153, at 26.

175. *Supra* Section III.B.1, p. 555.

176. See Jessica Nordell, *Is This How Discrimination Ends?*, THE ATLANTIC (May 7, 2017) <https://www.theatlantic.com/science/archive/2017/05/unconscious-bias-training/525405/> [<https://perma.cc/Y389-RBG5>]; Devine et al., *supra* note 95, at 1268; Carnes et al., *supra* note 95, at 228.

177. Emerson, *supra* note 168.

178. *Id.*

179. See BROWN, *supra* note 51, at 10–11.

assessments for potential board nominees. When incorporating objective assessments in the selection of board nominees, it is also important that board nominating committees avoid criteria that traditionally exclude women, such as only prior CEOs or individuals with prior board experience.¹⁸⁰

For the many companies with diversity trainings already in place, it would not be difficult to make modifications to reflect current research and to provide trainings to directors and officers that address board-specific issues. The growing number of unconscious bias trainings offered to senior managers in recent years has already begun to encourage companies to expand their diversity trainings. Expanding implicit bias trainings at the board level simply takes this one step further. Companies should have an incentive to take these steps in order to better ensure qualified candidates can earn board seats.

While improved trainings are a crucial part of overcoming bias, trainings alone are likely not enough to make a marked difference in breaking down barriers. However, training can be effective when combined with other structural efforts to confront implicit bias.¹⁸¹ As such, I propose additional measures to foster accountability¹⁸² and encourage intergroup cooperation.¹⁸³

B. Identity- and Training-Based Disclosures

The SEC should modify its disclosure rule in three ways to address implicit bias. First, the rule should define diversity in a way that expressly includes gender diversity.¹⁸⁴ This is important because the first step to addressing implicit gender bias on boards is recognizing a definition of diversity that unambiguously includes gender. Second, the rule should require companies to disclose whether they have implemented unconscious bias trainings for directors and officers as part of a corporate diversity policy. Third, as others have suggested, the rule should require disclosure of the demographic composition of directors and top executives.¹⁸⁵ These changes acknowledge

180. Cunningham, *supra* note 126.

181. Emerson, *supra* note 168.

182. *Infra* Sections IV.B, IV.C.1.

183. *Infra* Section IV.C.2.

184. See Rachel Orbach, Note, *Bringing Talent off the Bench and into the Game: The Underrepresentation of Women in the Boardroom*, 22 FORDHAM J. CORP. & FIN. L. 203, 255 (2017).

185. Letter from Stephen M. Graham, Comm. Co-Chair, and Sara Hanks, Comm. Co-Chair, to Michael S. Piwowar, *supra* note 36. Moreover, for regulated entities with more than 100 employees, this disclosure would be relatively simple since they are already required to file a report on diversity in the workplace under Title VII. *EEO-1: Who Must File*, EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eo1survey/whomustfile.cfm> [<https://perma.cc/U457-XRFS>] (last visited Aug. 17, 2018); *Sample Employer Information Report EEO-1*, EQUAL EMP. OPPORTUNITY

the potential role of implicit gender bias (and more generally, identity-based bias) in board composition and in the nomination process, instead of assuming that a gender-neutral process exists.

The SEC has begun to recognize related types of disclosure with the implementation of its nonbinding policy statement on joint standards for assessing diversity policies of regulated entities.¹⁸⁶ Starting in January 2018, the SEC now encourages regulated entities to submit a “diversity assessment report” with relevant information about their diversity policies, including the existence of diversity training and steps taken to promote diversity when selecting members of the board.¹⁸⁷ However, submitting the report is only voluntary.¹⁸⁸ As such, the suggested disclosure modifications in this Article go a step further by *requiring* certain additional disclosures and focusing on unconscious bias.

The first benefit of these changes is transparency. Currently, the rule loses effectiveness because of its ambiguity.¹⁸⁹ In leaving diversity undefined, the rule obscures the need to eliminate identity-based obstacles such as implicit gender bias. Instead, diversity becomes just a meaningless narrative.¹⁹⁰ Each of the suggested disclosures—defining diversity and disclosing the demographic composition of directors and officers and whether diversity trainings are provided—creates greater transparency in how companies consider diversity in the nomination process.¹⁹¹ This is important because for

COMM’N, <https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2-2.pdf> [<https://perma.cc/G9TR-SDK4>] (last visited Aug. 17, 2018).

186. Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016, 30,016 (June 10, 2015).

187. OFF. OF MINORITY & WOMEN INCLUSION, U.S. SEC. & EXCH. COMM’N, DIVERSITY ASSESSMENT REPORT FOR ENTITIES REGULATED BY THE SEC 1 (Jan. 25, 2018), <https://www.sec.gov/files/OMWI-DAR-FORM.pdf> [<https://perma.cc/5RQW-KAPL>]; *SEC Invites Regulated Entities to Voluntarily Submit Self-Assessment of Diversity Policies and Practices*, U.S. SEC. & EXCH. COMM’N (Jan. 25, 2018), <https://www.sec.gov/news/press-release/2018-7> [<https://perma.cc/G5DB-H94L>]. Some of the voluntary disclosures the SEC seeks are whether the firm offers training and education on diversity and inclusion and whether the firm promotes diverse candidates when selecting board nominees. *Id.*

188. *SEC Invites Regulated Entities to Voluntarily Submit Self-Assessment of Diversity Policies and Practices*, *supra* note 187.

189. DHIR, *supra* note 34, at 231.

190. See Lissa L. Broome et al., *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 761, 764 (2011) (describing a set of interviews about board diversity in which corporate insiders universally described the importance of diversity, but were unable to elaborate on contributions of female or minority directors or even acknowledge the impact of gender, race, and ethnicity).

191. See Michaels, *supra* note 36.

disclosure rules to be effective, they must have “simple, salient, and comparative information.”¹⁹²

Next, these modifications can help reduce bias indirectly. When the law prohibits or permits behavior, it indirectly “creates incentives (or avoids disincentives) for regulated actors to adopt a debiasing approach.”¹⁹³ Thus, a rule requiring disclosure of whether directors and officers participate in unconscious bias trainings can encourage companies to implement trainings and other bias-reducing actions.¹⁹⁴ Moreover, rather than continuing to treat diversity as an empty narrative, companies are encouraged to consider how the director nomination process is not gender neutral.¹⁹⁵

Another benefit of these changes is accountability. When actors must explain their choices—such as how corporations consider gender diversity and whether they offer unconscious bias trainings—they may be less likely to rely on stereotypes.¹⁹⁶ Evidence shows that actors who know they will be held accountable will weaken cognitive biases prior to making decisions.¹⁹⁷

Furthermore, this type of disclosure is a nod to research findings that a counterproductive bias-reduction strategy is stereotype suppression, or trying to be gender blind.¹⁹⁸ Research shows that stereotype suppression may work to control explicit stereotyping, but it has negative effects on implicit stereotyping.¹⁹⁹ By recognizing that we are not a gender-blind society,²⁰⁰ these disclosures could bring more awareness of bias barriers that persist.

Critics will point out problems with disclosure as a means to address implicit bias on boards. One issue is lack of clarity. Relatedly, the effectiveness of transparency depends on an interested public to demand change, and for

192. BOHNET, *supra* note 127, at 278, 283.

193. Jolls & Sunstein, *supra* note 75, at 985.

194. *See id.* at 986–87.

195. *See* Broome et al., *supra* note 190, at 777–78; Wade, *supra* note 137, at 30, 33.

196. *See* BOHNET, *supra* note 127, at 280 (citing Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 *PSYCHOL. BULL.* 255, 259 (1999)).

197. *See id.* at 281. Related to accountability is the “expressive function” of this kind of disclosure law, which can shape norms to break down implicit stereotypes. Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2024–25 (1996); *see* DHIR, *supra* note 34, at 219–28.

198. Carnes et al., *supra* note 95, at 223.

199. Galinsky & Moskowitz, *supra* note 99, at 721 (describing results of a study in which stereotype suppression had a negative impact on implicit stereotyping whereas taking the perspective of the target individual has potential benefits in reducing stereotyping).

200. POMERANTZ & RABY, *supra* note 52, at 15 (“Although post-feminism erases the possibility of sexism by insisting that girls are living in a gender-neutral world, sexism still abounds in all areas of social life and at all levels of power.”); *see* Ramirez, *supra* note 124, at 1583.

leaders to respond to such demands.²⁰¹ However, these modifications—defining diversity, providing demographic information of directors and officers, and disclosing whether implicit bias trainings exist—help clarify diversity information and prompt investors and the public to understand the implications of the disclosure.

Another problem may be that certain disclosures could be seen as inconsistent with the purpose of securities laws. When disclosure is used to “shame issuers away from otherwise unregulated conduct[,]” it departs from the goal of investor protection.²⁰² It would provide nonmaterial information to investors who may be indifferent to diversity.²⁰³ However, many investors, particularly funds that promote women in leadership, do care about gender diversity.²⁰⁴ It is also not unusual for disclosure laws to seek desired conduct.²⁰⁵

C. Diversity Task Forces and Voluntary Targets

A greater emphasis on training and modified disclosures will help ensure a gender-neutral nomination process and work to reduce implicit bias on boards. In addition, voluntary, business-led efforts should aim to (1) address the role of implicit bias on board diversity through task forces, and (2) increase women directors to reflect critical mass research. Companies should seek to implement targets and task forces because they will help ensure corporate governance is free of bias. These measures will also promote transparency and accountability, which can help shape a culture that will overcome biases.

1. Diversity Task Forces

Companies should engage in voluntary efforts to tackle implicit bias. Specifically, firm task forces and similar initiatives should address how implicit

201. BROWN, *supra* note 51, at 13–14 (suggesting the limitations of transparency when companies simply share demographic data in order bring change in the numbers).

202. DHIR, *supra* note 34, at 86.

203. *Id.*

204. *See, e.g., Women in Leadership Fund*, GLENMEDE INV. MGMT LP (2016), <https://www.glenmede.com/files/women-in-leadership-gwilx-factsheet-2q2016.pdf> [<https://perma.cc/8C28-PGP7>] (investing in companies with women in senior leadership roles, including women on the board); PAX ELLEVATE, <http://paxworld.com/pax-ellevate/> [<https://perma.cc/9U8V-443S>] (last visited Oct. 19, 2017) (investing in companies with high ratings of advancing women in leadership).

205. *See, e.g., Pay Ratio Disclosure*, 80 Fed. Reg. 50,104, 50,105 (Aug. 18, 2015) (to be codified at 17 C.F.R. pts. 229, 240, 249). The rule requiring issuers to disclose the ratio of median compensation of all employees to the compensation of the CEO was designed to allow shareholders to hold companies accountable for executive compensation and to examine the relationship between pay and performance.

bias is a barrier to women in leadership. The benefit of a task force is social accountability and the ability to engage perspectives of company leaders who “begin to think of themselves as diversity champions.”²⁰⁶ Dobbin and Kalev note the effectiveness of social accountability within diversity task forces because of the mutual monitoring that occurs.²⁰⁷ Companies with diversity task forces have seen a 9% to 30% increase in representation of women in management.²⁰⁸

As such, firms should create task forces encouraging directors and officers to investigate implicit bias and related diversity concerns in the company. These efforts may range from board nomination to mentorship and sponsorship of women. Along with creating programs that prepare women in senior management to “become board-ready,” task forces should encourage senior executives to mentor and sponsor qualified women for board seats.²⁰⁹ Engaging executives this way recognizes the interconnectedness of advancing women in leadership. Not only can CEOs influence board appointments, but evidence shows that when women serve on boards, women are also more likely to advance in managerial roles.²¹⁰ Task forces should also meet periodically to implement company-specific tools to address the role of bias. These tools may include objective assessments and criteria to select board candidates and data analytics to pinpoint barriers.

Ideally, diversity task forces will include men, women, and other minorities. This has the benefit of fostering personal connections amongst members of different groups, which research indicates can reduce bias. Diversity task forces may also promote exposure to out-group members, perspective-taking, and counter-stereotypic imaging—all strategies that have shown the ability to moderate bias.

206. Dobbin & Kalev, *supra* note 135, at 57.

207. *Id.* at 60.

208. *Id.*

209. GAO REPORT, *supra* note 117, at 20; *see also, e.g., Catalyst Women on Board*, CATALYST, <http://www.catalyst.org/catalystwomenonboard> [<https://perma.cc/P43S-3Q88>] (last visited Dec. 13, 2017).

210. Sheryl Skaggs et al., *Shaking Things Up or Business as Usual? The Influence of Female Corporate Executives and Board of Directors on Women’s Managerial Representation*, 41 J. SOC. SCI. RES. 936, 937 (2012); Stefanie K. Johnson & Kimberly Davis, *CEOs Explain How They Gender-Balanced Their Boards*, HARV. BUS. REV. (Oct. 6, 2017, updated Oct. 16, 2017) <https://hbr.org/2017/10/ceos-explain-how-they-gender-balanced-their-boards> [<https://perma.cc/TK9Q-BVQC>].

2. Voluntary Targets

Companies should also implement targets to increase the number of women directors to reach a critical mass. Voluntary targets are an important element of tackling biased structures because the presence of more women directors can help moderate implicit bias. Adopting targets to increase gender diversity can address tokenism and implicit bias in the boardroom by way of having a critical mass of women directors. More women on the board may also increase exposure to counter-stereotypical exemplars, encourage perspective-taking, and promote contact with out-group members—all recognized bias-reducing strategies.²¹¹

Making board diversity targets public and working together will increase accountability. The United Kingdom found success with voluntary targets in 2011 when the government worked with business leaders to adopt recommendations to increase women on boards.²¹² After achieving the initial goal of increasing women on FTSE 350 boards to 25%, the new target became increasing representation to 33%.²¹³ Similar voluntary targets for U.S. companies could also be successful. Some large companies including Intel, Google, and Apple have taken the lead by implementing diversity goals and disclosing workforce numbers in terms of race, ethnicity, and gender.²¹⁴

Moreover, targets can be impactful if they reinforce a message of engagement. Therefore, it is important to engage the perspectives of relevant stakeholders including managers, directors, shareholders, search firms, government leaders, and other experts.²¹⁵ Indeed, a report from the Business Roundtable, an association of CEOs of leading U.S. companies, suggests an increased willingness to form coalitions that encourage board diversity policies.²¹⁶ Natural partners also include the nonprofit organizations working

211. See *supra* Section III.B.1; see also DHIR, *supra* note 34, at 288.

212. GAO REPORT, *supra* note 117, at 7.

213. WOMEN ON BOARDS DAVIES REVIEW, IMPROVING THE GENDER BALANCE ON BRITISH BOARDS 7 (2015); GAO REPORT, *supra* note 117, at 7; see also Zoe Wood & Tom Bawden, *Inquiry Calls for More Women in Boardroom*, THE GUARDIAN (Feb. 24, 2011), <https://www.theguardian.com/business/2011/feb/24/davies-inquiry-women-boardroom-targets-quotas> [<https://perma.cc/23DG-CZGY>].

214. BARRIERS AND BIAS, *supra* note 74, at 31; Manjoo, *supra* note 150.

215. See GAO REPORT, *supra* note 117, at 7.

216. See BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 2016, at 11 (2016) <https://s3.amazonaws.com/brt.org/Principles-of-Corporate-Governance-2016.pdf> [<https://perma.cc/D39A-85UK>].

to increase the percentage of women on boards, including Catalyst, 2020: Women on Boards, and the 30% Club.²¹⁷

Through these collaborative, voluntary targets, gender equality can start to become a reality in corporate cultures.

V. CONCLUSION

Board diversity advocates and the business community alike should not ignore the role of implicit gender bias in the selection of board nominees and in the boardroom. Companies should take advantage of continuing research on bias-reduction strategies and other structural tools to overcome implicit bias in recruiting board nominees and in boardroom dynamics. Improved trainings for directors and officers, modified disclosures, and meaningful voluntary action by companies are each part of the solution. Once companies recognize the importance of overcoming implicit bias in the selection process and in the boardroom, they can begin to overcome the visible and invisible obstacles that qualified women encounter.

217. *About Us*, 2020 WOMEN ON BOARDS, <https://www.2020wob.com/about> [<https://perma.cc/SE53-S5DP>] (last visited Dec. 12, 2017); *About*, 30% CLUB, <https://us.30percentclub.org/about/> [<https://perma.cc/94XM-QPEV>] (last visited Dec. 12, 2017).