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A Half Century Post Title VII: Still Seeking Pathways for Women to Organizational Leadership

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**A Half Century Post Title VII:
Still Seeking Pathways for Women to Organizational Leadership⁺**

By

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Perhaps the most important of the many 50th anniversaries marked in 2014 is the passage of Title VII of the Civil Rights Act of 1964 (Title VII).¹ Title VII greatly broadened the ability of individuals to gain and keep employment by barring discrimination based on race, color, religion, sex, or national origin.² Although much progress has been made, there is still much to be done. This is especially true in terms of gender discrimination. The anniversary is a good time to take stock, see what has been accomplished, and consider next steps, particularly with regard to overcoming discrimination against the advancement of working women with children.

Part I of this manuscript briefly reviews the effectiveness of Title VII and examines judicial interpretations of the statute as well as additional legislation and regulations adopted to further its implementation. Part II follows with an analysis of our empirical study addressing whether and for which gender cultural similarity with leaders in their organization is related to obtaining and benefiting from mentors and networks. Specifically we examine whether cultural similarity with leaders deflects the negative stereotypes associated with women being married or having dependents. Proposals for reform follow in Part III.

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¹ 42 U.S.C. § 2000(e) (1964) (West 2014). This anniversary was preceded 10 years earlier by the 50th anniversary of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), which overruled the separate but equal doctrine and enabled equal access to education. The two main pillars for a decent life in the U.S. were seen to be an education and a job. *Brown* enabled the former and ten years later, Title VII was seen as enabling the latter. Other 50th anniversaries in 2014 include the beginning of the free speech movement at UC Berkeley, and the Beatles appearance on the Ed Sullivan Show.

² EQUAL EMP'T OPPORTUNITY COMM'N, FEDERAL LAWS PROHIBITING JOB DISCRIMINATION QUESTIONS AND ANSWERS, (Nov. 21, 2009), <http://www.eeoc.gov/facts/qanda.html>.

I. Title VII: Effectiveness

Title VII's protection for women from employment discrimination had a significant impact on opportunities and results for women.³ In 1963, women comprised 38 percent of the workforce.⁴ Married women comprised less than a third of the workforce in 1960.⁵ Even fewer women with children were employed.⁶ Perhaps more importantly, women were effectively excluded from most well-paid, more powerful, and often more interesting occupations prior to 1964.⁷ Figures from the last few years show a radically changed landscape. For example, in 2012, 58 percent of the workforce was comprised of women, a 53 percent increase from 1963.⁸ Furthermore, the labor force of working mothers has grown by 30 percent, from 54.4 percent in 1962 to 70.5 percent in 2012.⁹ There is, however, a significant and stubborn area where women still face significant barriers – top leadership positions. This is most starkly shown in regard to women with children.

A. Women in the Workforce: The Data

Although there are obvious successes, gender discrimination¹⁰ and the glass ceiling are still firmly in place. This can be seen in areas such as the number of discrimination suits being brought, the lack of women in top leadership positions, and pay disparities. For example, in 2013, 46 percent of women said they had faced gender discrimination in the workplace.¹¹ Furthermore, things are not getting better; the figures are little-changed from a survey in 1997 and only slightly improved from 2000.¹² In 2012, a record number of Title VII sex discrimination cases were filed.¹³ Of course, some industries are worse than others. Women do worse in male-dominated, higher-paid professions. The technology industry has recently come under attack for its “boorish” behavior toward women,¹⁴ the lack of women,¹⁵ and the lack of

³ Of course, cultural and social changes such as the Women's Movement also had an impact. See e.g., Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 146-50 (1997).

⁴ U.S. DEP'T OF LABOR, 50 YEARS LATER: WOMEN, WORK & THE WORK AHEAD, 2012, <http://www.dol.gov/wb/pcswinfographic.pdf>.

⁵ U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *Equal Pay: A Thirty-five Year Perspective*, 53 tbl. 1 (1988); see also Schipani, et al., *Women and the New Corporate Governance Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504, 505 (2006).

⁶ Approximately 25 percent of mothers of preschool age children had opted out of the workforce in 2009. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 1961 TO 2009 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENTS, <http://www.census.gov/prod/2010pubs/p60-238.pdf>.

⁷ The main occupations were nursing, teaching, and secretary. *Id.*

⁸ U.S. DEP'T OF LABOR, *supra* note 5.

⁹ *Id.*

¹⁰ The EEOC defines sex discrimination as treating someone unfavorably based on the person's sex, but can include treating someone unfavorably based on his or her connection with an organization or group that is generally associated with people of a certain sex. Additionally, sex discrimination also includes gender identity discrimination, usually against the transgendered. EQUAL EMP'T OPPORTUNITY COMM'N, *Sex-Based Discrimination*, <http://www.eeoc.gov/laws/types/sex.cfm> (last visited February 14, 2015).

¹¹ The poll was based on 1,000 nationwide phone interviews (300 of which were by cell phone). Colleen McCain Nelson, *Poll: Most Women See Bias in the Workplace*, WALL ST. J., Apr. 12, 2013, at A4.

¹² *Id.*

¹³ EQUAL EMP'T OPPORTUNITY COMM'N, *Sex-Based Charges, FY 1997-FY 2013, Enforcement and Litigation Statistics*, <http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm> (last visited Jan. 17, 2015).

¹⁴ Shira Ovide, *Boorish Behavior by Techies? There's No App for That*, WALL ST. J., Sept. 10, 2013, at B7.

funding for women.¹⁶ Similar complaints are made about the financial sector where less than 20 percent of executives and directors are female, and no women lead the 20 largest securities firms and banks.¹⁷ An examination of the legal profession also shows significant disparities. Although women make up 45.4 percent of associates in the nation's major law firms,¹⁸ they make up only 17 percent of equity partners at the 200 largest law firms.¹⁹ Female partners also can command less for their work.²⁰ Only 14 percent of senior executives at Fortune 500 companies are women, and this percentage has remained unchanged for a decade.²¹ Political leadership shows similar disparities: fewer than 100 women are in Congress,²² and under 30 percent of all legislators are female.²³

This lack of female leadership is not a problem of supply. By 2014, 88 percent of women had completed high school or more,²⁴ and by 2013, 37 percent had completed four years of college.²⁵ Indeed, more women than men have received a graduate education.²⁶ Eleven percent of women age 25-34 had two or more years of graduate school compared to eight percent of men.²⁷

¹⁵ This issue was recently brought into sharp focus when the CEO of Microsoft, speaking at a meeting celebrating and advocating for women in computing, stated that women should just trust in the system and do not need to ask for raises; good karma will take care of them. This incident occurred despite the fact that there had been recent publicity about pay gaps in the industry. *E.g.*, Nick Wingfield, *Microsoft Chief Sets Off a Furor On Women's Pay*, N.Y. Times, Oct. 10, 2014, at B1, 7; Janet I. Yu, *More Women Hired at Microsoft*, SEATTLE TIMES, Oct. 4, 2014, at A8; *Where Are the Women? --- Behind Gender Imbalance at Startups*, WALL ST. J., Oct. 10, 2013, at B6 (noting that Twitter lacked any women on its board, no executives were female except a lawyer, and virtually all its investors were men.)

¹⁶ Of the private companies that received venture capital funding during 1997-2011, only 1.3 percent had a female founder and 6.5 percent had a female CEO. Ovide, *supra* note 14.

¹⁷ Terry Morehead Dworkin, Virginia Maurer & Cindy Schipani, *Career Mentoring for Women: New Horizons/Expanded Methods*, 55 BUS. HORIZONS 363, 364 (2012).

¹⁸ AMERICAN BAR ASSOCIATION, A CURRENT GLANCE AT WOMEN IN THE LAW 2011 1 (2011), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_2011.authcheckdam.pdf.

¹⁹ Jennifer Smith, *More Women Lead Law Firms*, WALL ST. J., Oct. 6, 2014, at B4 (noting that two women had just been appointed to head two major law firms).

²⁰ Jennifer Smith, *Legal Fees and Gender Gap --- Despite Gains, Women Still Lag Behind Men in Billing Rates, Management Roles*, WALL ST. J., May 5, 2014, at B4.

²¹ Phyllis Korkki, *Number of Women Breaking Through Glass Ceiling Stalls*, SEATTLE TIMES, Oct. 15, 2011 (noting that 30 percent of general and operational managers were women in 2011, and 50.5 percent of advertising and promotional managers were women). U.S. DEP'T OF LABOR, *Latest Annual Data*, <http://www.dol.gov/wb/stats/recentfacts.htm#age> (last visited Jan. 17, 2015).

²² U.S. DEP'T OF LABOR, *supra* note 21; Terry Morehead Dworkin, Aarti Ramaswami & Cindy A. Schipani, *The Role of Networks, Mentors and the Law in Overcoming Barriers to Organizational Leadership for Women with Children*, 20 MICH. J. GENDER & L. 83, 84 (2013).

²³ Nat'l Conference of State Legislators, *Women In State Legislators for 2014*, (Apr. 1, 2014), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2014.aspx>.

²⁴ U.S. CENSUS BUREAU, *Educational Attainment, Table A-2*, <http://www.census.gov/hhes/socdemo/education/data/cps/historical/index.html> (last visited Feb. 6, 2015).

²⁵ NAT'L CENTER FOR EDU. STATISTICS, FAST FACTS: EDUCATIONAL ATTAINMENT (2014), *available at* <http://nces.ed.gov/fastfacts/display.asp?id=27>.

²⁶ U.S. DEP'T OF COMMERCE, *Women in America, Indicators of Social and Economic Well-being*, Mar. 2011, http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf.

²⁷ *Id.*

Pay disparities tell a similar story. Women with bachelor's degrees made \$931 weekly to the men's median of \$1,246.²⁸ Those with Master's degrees were paid \$1,122 to men's \$1,545 weekly median salary.²⁹ Those with professional degrees received \$1,411 to men's \$1,896.³⁰ Overall, in 2013 women's median weekly salary was \$706 to men's \$860.³¹ The earnings ratio of women to men in the U.S. is 80.9 percent.³² Furthermore, the percentage of wage and salary workers with earnings at or below the prevailing federal minimum wage is almost double for women as compared to men.³³ Women with children have even greater disparity. The "motherhood wage penalty" is as much as five percent per child, and motherhood is a significant risk factor for poverty.³⁴ Since women are now the primary or co-primary wage earners in almost two-thirds of families, such disparities have a broad impact on children as well.³⁵ The disparity persists even though women accounted for 51 percent of all those employed in management, professional, or related occupations.³⁶ In 2011, 24.2 percent of CEOs were women but a large number of them were in small, self-started businesses.³⁷

The cited statistics help show that the employment playing field is still not level. This is true despite the expansion and enhancement of Title VII over the fifty years since its passage, in furtherance of parity.

²⁸ U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 1, 59-60 (2013), <http://www.bls.gov/cps/wlf-databook-2012.pdf> (showing weekly median salary data based on 2012 annual averages).

²⁹ *Id.*

³⁰ *Id.* (noting that women with Doctoral degrees had a median weekly salary of \$1,413 compared to their male counterparts' \$1,778).

³¹ U.S. DEP'T OF LABOR, *supra* note 21, at Table 1.

³² U.S. BUREAU OF LABOR STATISTICS, *supra* note 28 at 58 (showing weekly median salary data based on 2012 annual averages).

³³ U.S. DEP'T OF LABOR, *supra* note 21, at Table 3.

³⁴ See Julie Manning Magid, *Cloaking: Public Policy and Pregnancy* 2 (October 2014) (unpublished manuscript) (on file with authors) (citing Professor Stephen Barnard).

³⁵ *Id.*

³⁶ These statistics are from 2011. The disparities are worse when race is included. Asian and white women are more likely to work in higher paying management, professional, or related occupations than Black or Hispanic women. Magid, *supra* note 34.

³⁷ See Magid, *supra* note 34. Even when women owned businesses, they had a more difficult time getting financing and their sales were lower than those of male-owned businesses. Their businesses were also generally smaller. U.S. DEP'T OF COMMERCE, ECON. AND STATISTICS ADMIN WOMEN-OWNED BUSINESSES IN THE 21ST CENTURY 16-20, (2010), available at <http://www.esa.doc.gov/Reports/women-owned-businesses-21st-century>. A number of studies have suggested that women-owners of small businesses are denied loans at a higher rate and receive a higher interest rate on loans they receive. See, e.g., Elizabeth Asiedu, James A. Freeman, & Akwasi Nti-Addae, *Access to Credit by Small Businesses: How Relevant Are Race, Ethnicity, and Gender?* 102 AM. ECON. REV. 3, 532, 533 (2012) (reporting that in 2002, white, female small-business owners had a denial rate of 16 percent compared to white males' 8.8 percent; and white females' average interest rate was 6.091 percent compared to 5.677 percent for white males).

B. Expansion of the Coverage of Title VII

1. *Protecting Racial Minorities*

Title VII has been interpreted and reinterpreted to expand its coverage, contributing significantly to improvements in female employment.³⁸ The first expansions involved race discrimination cases, with cases centering on women following several years later. Perhaps the most significant interpretation of Title VII was the reasoning of the Supreme Court in the landmark case of *Griggs v. Duke Power Company*,³⁹ which recognized the theory of disparate impact. When passed, most thought that Title VII only prohibited intentional discrimination. In *Griggs*, the Court greatly expanded the reach of Title VII with adoption of the theory of disparate impact. In doing so, the Court acknowledged that Title VII was not achieving its intended purpose of leveling the playing field to give all people a fair chance at attaining a decent job. The Court noted that in Title VII, Congress required the removal of “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate . . . on the basis of impermissible classifications.”⁴⁰ Further, the Court stated that “absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in head winds’” on protected groups.⁴¹

Under this theory, showing that a facially-neutral rule or policy produced a relevant numerical disparity for a protected group shifted the burden of proof to the employer to prove that the selection device producing the disparity was both job-related and necessary.⁴² Shifting burdens of proof have been an important part of Title VII and the presumptions they allow have worked in favor of protected groups claiming discrimination.⁴³ For example, height and weight requirements that were routinely used pre-*Griggs* to select for positions such as firefighters, police officers, and physical therapists, and which kept most women (and some minorities) out of those jobs, could not be used unless the employer could show they were job-related and necessary; most could not.⁴⁴

The EEOC’s Uniform Guidelines on Employee Selection Criteria, establish a method to identify whether there is adverse impact necessary for a disparate impact ruling.⁴⁵ Under this

³⁸ For example, it was amended in 1972 to include federal employees by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972). In 1978, the Pregnancy Discrimination Act expanded its coverage.

Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e (West 2014).

³⁹ 401 U.S. 424 (1971).

⁴⁰ *Id.* at 431.

⁴¹ *Id.* at 432.

⁴² Over time, the courts have become more sophisticated about statistical analysis, and showing the required numerical disparity has become more difficult. *See, e.g.,* *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 997 (1988); *Conn. v. Teal*, 457 U.S. 440 (1982).

⁴³ *See* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁴⁴ *See, e.g.,* *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *EEOC v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006). In *Dial*, the employer’s use of a strength test was found to be in violation of Title VII because only 15percent of women were hired after its implementation compared to the 49 percent prior to its use. This represented nearly ten standard deviations, a number much greater than the two or three standard deviations found to be statistically significant in prior cases. The EEOC rejected the employer’s defense that the test was designed to reduce injuries. It found that the test was considerably more difficult than the job required.

⁴⁵ EQUAL EMP’T OPPORTUNITY COMM’N, *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. §§ 1607.4(d).-16C, <http://www.uniformguidelines.com/uniformguidelines.html> (last visited January 29, 2015).

method, adverse impact exists if members of a protected class are selected at a rate less than 80 percent of that of another group.⁴⁶ This rule has been criticized by the courts, which more often find an adverse impact in situations where the difference between the number of members of the protected class selected and the number that would be anticipated in a random selection is more than two or three standard deviations.⁴⁷ The defendant can then rebut the prima facie case by showing that the scored test is consistent with business necessity and job specific by showing that it is “validated.”⁴⁸ Even when the employer has proven that the selection procedure is job-related and consistent with business necessity, plaintiff may demonstrate that there is a less discriminatory alternative available.⁴⁹

Another important step with regard to disparate impact was taken in the case of *Watson v. Fort Worth Bank & Trust*.⁵⁰ In *Watson*, a bank teller who was a black woman was passed over many times for a promotion. The employer showed that in each instance subjective, discretionary criteria were used to select someone else. In prior cases, only objective criteria that applied to all but that had a disproportionate adverse impact were the basis for a challenge.⁵¹ In this case, the Supreme Court held that even subjective criteria that had a disproportionate impact could prove disparate impact. In doing so, the Court acknowledged that without so holding, the *Griggs*/disparate impact theory could be avoided by using both subjective and objective selection criteria.⁵² Thus, allowing proof of discriminatory effect through subjective means, the burden of proof shifted back to the employer to justify the legitimacy of its subjective criteria.⁵³

Congress reaffirmed the importance of disparate impact when it passed the Civil Rights Act of 1991. Eighteen years after *Griggs*, a more politically conservative Supreme Court, in *Wards Cove Packing Co. v. Antonio*, shifted the burden of proof back to the employee to show that the employer’s job selection means were not job related, thereby significantly undermining a major part of Title VII.⁵⁴ Congress reacted by passing the Civil Rights Act of 1991 which codified disparate impact and its burden of proof, restoring it to its pre-*Wards Cove* status, and enabling discrimination cases in other ways.⁵⁵

⁴⁶ *Id.* at § 4(D).

⁴⁷ BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW*, 90-1 (Paul W. Cane, Jr. et al., eds., 3d ed. 1996). When analyzing unscored objective criteria, the Uniform Guidelines have generally found educational requirements that have a disparate impact unlawful. The higher the professional requirements, the lower the burden on the employer to show job-relatedness. *See, e.g., Griggs v. Anderson*, 796 F.2d 1009, 123 (8th Cir. 1986) (holding that a college degree in psychology is a valid requirement for a counseling position); *Aguilera v. Cook Cnty Police & Corr. Merit Bd.*, 760 F.2d 844, 848 (7th Cir. 1985), *cert. denied*, 474 U.S. 907 (1985) (requiring a high school diploma for police officers and corrections officers is valid).

⁴⁸ 29 C.F.R. § 1607.5(B). *See Watson v. Ft. Worth Bank & Trust*, 487 U.S. 997 (1988); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

⁴⁹ EQUAL EMP’T OPPORTUNITY COMM’N, *Employment Tests and Selection Procedures* (Sept. 23, 2010), http://www.eeoc.gov/policy/docs/factemployment_procedures.html (last visited Jan. 17, 2015).

⁵⁰ *Watson*, 487 U.S. 997 (1988).

⁵¹ *Id.* at 988.

⁵² “We are persuaded that our decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices.” *Id.* at 989.

⁵³ It is not sufficient, however, to just prove numerical disparity. *See* 42 U.S.C.A § 2000e-2 (West 2014).

⁵⁴ *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642 (1989).

⁵⁵ *See generally*, Civil Rights Act of 1991, Pub. L. No. 102-166, Nov. 21, 1991, 105 Stat. 1071-1100 (codified as amended in scattered sections of 42 U.S.C.); 42 U.S.C.A. § 1981 (West 2014). The allowance of damages for intentional discrimination was another important part of the revisions.

The most radical interpretation of Title VII took place with regard to affirmative action, where the Court cited the “spirit” of the 1964 Civil Rights Act rather than its language prohibiting discrimination.⁵⁶ Nine years after the Court’s affirmative action decision regarding blacks, the Court, in *United Steelworkers of America AFL-CIO v. Weber*, recognized that women were also entitled to the benefits of affirmative action.⁵⁷ In this case, a county transportation department followed a voluntarily-adopted affirmative action plan and promoted a woman over a man who had scored slightly higher on the exam taken for promotion. The plan, adopted to promote minorities and women into jobs in which they were underrepresented, considered being female a plus factor. This was approved in situations where there was a manifest imbalance. The Court noted that no jobs were set aside for women and no men were automatically excluded.⁵⁸

The general affirmative action interpretation has gradually been narrowed over time – primarily through the requirement of ever better statistical evidence in combination with a heightened showing of necessity when the case involves government selection through preference for a protected category.⁵⁹ Additionally, several states have passed legislation prohibiting affirmative action in the public sector.⁶⁰ In the latest Supreme Court case involving affirmative action, *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary (BAMN)*,⁶¹ the Court effectively upheld a Michigan constitutional amendment prohibiting affirmative action in employment, education, and contracting, by finding that there was no authority in the U.S. Constitution allowing judges to set aside such amendments. Despite the narrowing of its use, affirmative action, particularly in the private employment sector, is still allowed.

⁵⁶ *United Steelworkers AFL-CIO v. Weber*, 443 U.S. 193 (1979) (“It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had ‘been excluded from the American Dream for so long,’ constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”) (quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey)). The Court upheld a voluntarily-adopted affirmative action plan in private employment that was challenged under Title VII. *Weber* was decided the year after *Regents of the Univ. of Cal. v. Baake*, 438 U.S. 265 (1978), in which the Court upheld affirmative action in selection for admission to a public medical school through an analysis of the Equal Protection clause.

⁵⁷ *Johnson v. Transp. Agency, Santa Clara Cnty. Cal.*, 480 U.S. 616 (1987).

⁵⁸ *Id.*; *Wards Cove Packing Co., Inc., v. Antonio*, 490 U.S. 642 (1989).

⁵⁹ *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 132 U.S. 1536 (2012); *Grutter v. Bollinger*, 359 U.S. 306 (2003); *Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996); *Dworkin et al., supra* note 22, at 88-95.

⁶⁰ Seven states have adopted formal bans on affirmative action in the public sector: Arizona (2010 Ar. Const. art. 36); California (1996 Cal. Const. art. I, § 31); Florida (1999 Executive Order 99-281); Michigan (2006 Mich. Const. art. I, § 26); Nebraska (2008 Neb. Const. art. I, § 30); New Hampshire (2011 statute-HB 623); Oklahoma (2012 Okl. Const. art. II, § 36A) Washington (1988 RCW 49.60.400). Failed measure: Colorado (2008 failed initiative constitutional amendment). Drew Desilver, *Supreme Court Says States Can Ban Affirmative Action; 8 Already Have, Fact Tank*, PEW RESEARCH CENTER (Apr. 22, 2014), available at <http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/>.

⁶¹ 134 S. Ct. 1623 (2014). In a lengthy dissent, Justice Sotomayor argued that the Court’s precedents do not permit political restructurings that create separate processes for racial minorities and everyone else.

2. Expanding Protection for Women

Because sex as a protected category was added at the last minute in an attempt to kill the legislation, there is virtually no legislative history, and the courts and the EEOC, the administrative body charged with enforcement of Title VII, have been freer to decide its scope. In general, the protections have expanded over time. A significant interpretation of Title VII expanding its coverage on an issue important to women was recognition that sexual harassment suits could be encompassed within its reach.⁶² Before that recognition, many argued that harassment was not gender discrimination within the purview of Title VII because women could harass men as well as men harassing women.⁶³ Eventually, the Court recognized two types of sexual harassment, *quid pro quo* and harassing environment, again expanding protection.⁶⁴ The theoretical basis for *quid pro quo* harassment recognizes the power differential between men and women in both the workplace and society, and that men in supervisory positions sometimes take advantage of that power to extract sexual favors in exchange for a job benefit.⁶⁵ Different levels of proof, however, are required for burden shifting because the former was considered worse than the latter.⁶⁶

Another expansion came in the case of *Price Waterhouse v. Hopkins*.⁶⁷ Hopkins was denied partnership in the accounting firm even though she was highly rated for her accounting skills and her rainmaking abilities.⁶⁸ In an effort to help her become a partner in the next round of considerations, she was advised to adopt stereotypical female attributes such as dressing and speaking more femininely. When she sued for sex discrimination, the firm argued she was not made partner because of personality problems including being too abrasive to staff.⁶⁹ The fractured majority held that Hopkins could sue in her “mixed motive” case which included legitimate reasons to deny partnership (negative personality traits) and discriminatory reasons (gender-based stereotypes). Hopkins met her burden of proof by showing the latter was a

⁶² The first case to recognize sexual harassment under Title VII was *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). *See also Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

⁶³ Terry Moorehead Dworkin, et al., *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125, 125-6 (1988). Since women could collect for assault and battery for the most severe form of harassment, others argued it should not be included within Title VII. That almost all sexual harassment was by men harassing women was not considered dispositive.

⁶⁴ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

⁶⁵ Companies are held strictly liable for this type of harassment. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984).

⁶⁶ Discrimination based on a harassing environment, which can be done by coworkers and third parties as well as supervisors, generally requires a repeated pattern. It is based on the power of the employer to control the work environment and failing to control it so that a harassing environment exists. The Court looked to agency law (and the EEOC) to impose liability. For harassing environment cases, the Supreme Court created a safe harbor for employers by allowing them to avoid liability by putting in place procedures to educate about and prohibit such actions, and establish meaningful procedures to report and investigate claims, and punish wrongdoers. *Vinson*, 477 U.S. at 72-73.

⁶⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁶⁸ *Id.* at 233-4.

⁶⁹ *Id.* at 234-35.

“motivating” factor in the decision.⁷⁰ In the Civil Rights Act of 1991, Congress included the motivating factor in the statute.⁷¹

Many of the additional gender-related decisions and Title VII supplemental legislation have centered on childbearing.⁷² Women with children have suffered more discrimination and pay inequity than women without children. As noted in the next part, these problems have not been dealt with adequately.

C. Childbearing

Since the 1960s, the labor force participation of mothers has grown by 30 percent from 54.4 percent to 70.5 percent.⁷³ In 1974, the Supreme Court in *General Electric v. Gilbert*, held that while Title VII prohibited discrimination based on sex, it did not include pregnancy discrimination.⁷⁴ The Court determined that an insurance policy that excluded pregnancy disability was not discriminatory because it distinguished between pregnant persons and non-pregnant persons and the latter group included both men and women.⁷⁵ Congress reacted to this by amending Title VII in 1978 through passage of the Pregnancy Discrimination Act (PDA),⁷⁶ thus acknowledging that Title VII was not adequately protecting women from discrimination on the basis of pregnancy, motherhood, and perceptions related thereto.⁷⁷ The PDA mandates that an employer cannot discriminate against his or her employee on the basis of pregnancy,

⁷⁰ *Id.* at 250. There was some disagreement in the plurality decision about who had the burden of persuasion but the majority held that the employer could escape liability by showing that it would have made the same decision without the illegal considerations. For a fuller discussion see Jamie Darin Prenkert, *Fifty Years of Jockeying: The Congressional-Judicial Conversation About Title VII and Its Impacts*, 18-24 (2014) (unpublished manuscript) (on file with authors).

⁷¹ 42 U.S.C.A. § 2000e-2(m) (West 2014) (“an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”) Additionally, even if the defendant can show it would have made the same decision, it is still liable but plaintiff’s relief is limited. 42 U.S.C.A. § 2000e-5(g) (2)(B)(i)-(ii) (West 2014).

⁷² The Family and Medical Leave Act, which requires employers to provide employees with job-protected, unpaid leave for qualified family and medical reasons, is one example. It covers pregnancy, personal or family illness, adoption or foster care placement of a child. 29 U.S.C.A. §§ 2601-54 (West 2014); see DEP’T OF LABOR, WAGE AND HOUR DIVISION, FAMILY MEDICAL LEAVE ACT, <http://www.dol.gov/whd/fmla> (last visited Jan. 17, 2015). The 2009 Lilly Ledbetter Fair Pay Act is an exception. 42 U.S.C. § 2000e-5(e)(3)(A). The Act allows the 180-day statute of limitations for filing an equal pay lawsuit based on gender discrimination to be reset with each new paycheck that is affected by the discriminatory action. The Act was a response to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

⁷³ WOMEN’S BUREAU U.S. DEP’T OF LABOR, 50 YEARS LATER: WOMEN, WORK & THE WORK AHEAD, <http://www.dol.gov/wb/pcswinfographic.pdf> (last visited Jan. 17, 2015).

⁷⁴ *Gen. Elec. v. Gilbert*, 429 U.S. 125 (1976).

⁷⁵ *Id.* at 136. This is similar to the reasoning some courts used to deny that sexual harassment should be included within Title VII.

⁷⁶ 42 U.S.C.A. § 2000(e)(k) (West 2014); EQUAL EMP’T OPPORTUNITY COMM’N, *Pregnancy Discrimination*, <http://www.eeoc.gov/laws/types/pregnancy.cfm>. The PDA picks up on a vigorous dissent by Justice Brennan in *Gilbert*, 429 U.S. 125 who said that the majority, in holding that pregnancy was not covered by Title VII, had lost sight of the intention of Title VII. See Julie Manning Magid, *Pregnant With Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 820-21 (2001).

⁷⁷ See Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L. J. 567 (2010).

childbirth, or related medical issues.⁷⁸ Any pregnancy related medical conditions must be treated in the same way as any temporary illness or condition.⁷⁹

Unfortunately, despite this amendment, courts have routinely interpreted the PDA in a restrictive manner.⁸⁰ Some treated pregnancy as a disability, and one that is chosen because women can control becoming pregnant. Since it is chosen, these courts provide minimal protection. Others held that the PDA only prohibits discriminatory animus against pregnant women.⁸¹ Thus, sex-neutral policies that disproportionately affect pregnant women may not be remedied. Also, because the PDA does not completely prohibit termination of pregnant employees, if the employer believed that the cost of the women's maternity leave to the business was more than he or she believed the employee was "worth," then termination may not constitute unlawful discrimination.⁸² Many of these restrictive interpretations may be made moot by the EEOC's new guidelines.

On July 14, 2014, the EEOC released the Enforcement Guidance on Pregnancy Discrimination and Related Issues ("Guidance").⁸³ The Guidance focuses on the PDA and the Americans with Disabilities Act ("ADA"). The Guidance is the first time since 1983 that the EEOC has stated an official position interpreting the PDA,⁸⁴ and it takes a number of controversial positions.

The Guidance favors a broad approach to interpretation of the PDA. For example, it concludes that the PDA prohibits discrimination against not only presently pregnant women, but also those with past pregnancies or intending to become pregnant.⁸⁵ Furthermore, discrimination based on stereotypes and assumptions about a pregnant woman's capabilities is unlawful, even when the employer believes it is acting in the employee's or the child's best interests. One example of this is excluding a pregnant woman from handling toxic chemicals. This incorporates the decision in *UAW v. Johnson Controls*, where the court barred the employer from using a policy which barred any female employee who had the ability to become pregnant from working in jobs where they could be exposed to substances that could be harmful to a fetus.⁸⁶ These jobs were some of the highest paying and therefore desirable to the plaintiffs, none of whom was pregnant or planned on getting pregnant. The PDA was an important factor in the

⁷⁸ 42 U.S.C.A. § 2000(e)(k) (West 2014).

⁷⁹ *Id.*

⁸⁰ Dworkin et al., *supra* note 22, at 96.

⁸¹ *Id.*

⁸² *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994).

⁸³ EQUAL EMP'T OPPORTUNITY COMM'N, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

⁸⁴ There have been numerous conflicting interpretations of the PDA in case law. Compare *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008) (finding that discrimination against a female employee because she was seeking fertility treatment is actionable) with *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (holding that lactation discrimination is not covered because lactation is not related to pregnancy).

⁸⁵ Susan L. Nardone & Michael J. Riccobono, *EEOC "Delivers" Guidance on Pregnancy Discrimination*, THE METROPOLITAN CORPORATE COUNSEL, Sept. 2014, at 34, <http://www.metrocorpcounsel.com/pdf/2014/September/34.pdf>.

⁸⁶ 499 U.S. 187 (1991).

Court not allowing a classification based on potential for pregnancy, and contrasts with its pre-PDA decision in *Gilbert*.⁸⁷

In a major change, the Guidance takes a broad interpretation of the phrase “related medical condition,” which now officially includes lactation.⁸⁸ If an employer allows sick leave or change of schedules based on non-incapacitating medical conditions, the same options should be available for lactation.

The most controversial position in the Guidance is that women affected by pregnancy, childbirth, or related medical conditions should be treated in the same manner as those who have similar abilities and are not affected. Those protected by the PDA should be entitled to “workplace adjustments similar to accommodations” provided by the employer for disabled employees.⁸⁹ In fact, the source of the limitation, whether pregnancy or disability, is immaterial. What matters is whether the employees have a similar ability or inability to work. This interpretation was strongly criticized by an EEOC Commissioner because she believes that it “allows pregnant employees to bypass the requirements of a qualified individual with a disability under the ADA, thus elevating pregnant employees to a kind of super-status above that of individuals with disabilities.”⁹⁰

Another key issue discussed by the Guidance is whether an employer must provide a pregnant employee with a light-duty assignment to accommodate her pregnancy-related limitation or incapacity,⁹¹ a central issue in *Young v. United Parcel Service*.⁹² The plaintiff in *Young* requested light-duty assignments to accommodate heavy lifting restrictions, but UPS’s policy limited light-duty to employees who (1) have been injured on the job; (2) had lost their U.S. Department of Transportation certification; or (3) were disabled under the ADA. *Young* did not qualify for any of these categories and her request was denied. However, she received an extended leave of absence. The District Court for the District of Maryland granted summary judgment to UPS.⁹³ The Fourth Circuit Court of Appeals affirmed by finding that UPS’s light-duty policy was “pregnancy-neutral” as required by the PDA.⁹⁴ The Supreme Court’s decision is expected to address the “pregnancy-blind” employer policies and the appropriate ways for pregnant workers to establish a pregnancy discrimination claim under the PDA.⁹⁵

The Guidance addresses both issues. First, an employee “may still establish a violation of the PDA by showing that she was denied light-duty or other accommodations that were granted

⁸⁷ Cf. *Johnson Controls*, 499 U.S. at 199, with *Gen. Elec. v. Gilbert*, 429 U.S. 125 (1976). *Johnson Controls*, has been strongly criticized by two commissioners as well as others. See Nardone & Riccobono, *supra* note 85.

⁸⁸ Nardone & Riccobono, *supra* note 85.

⁸⁹ *Id.*

⁹⁰ See EQUAL EMP’T OPPORTUNITY COMM’N, Public Statement of EEOC Commissioner Constance S. Barker, Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (Jul. 14, 2014), [http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp5/\\$File/barkerdissent.pdf](http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp5/$File/barkerdissent.pdf); EQUAL EMP’T OPPORTUNITY COMM’N, Public Statement of the Honorable Victoria A. Lipnic, Commissioner on Enforcement Guidance on Pregnancy and Related Issues (Jul. 14, 2014), [http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/\\$File/lipnic.pdf](http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/$File/lipnic.pdf).

⁹¹ Nardone & Riccobono, *supra* note 85.

⁹² *Young v. UPS*, No. 08–2586, 2011 WL 665321 (D. Md. Feb. 14, 2011); Nardone & Riccobono, *supra* note 85.

⁹³ *Id.*

⁹⁴ *Young*, 707 F.3d 437.

⁹⁵ *Id.*

to other employees who are similar in their ability or inability to work.”⁹⁶ The Guidance clearly states that employer policies that make light-duty work available only to employees who suffer an on-the-job injury violate the PDA. The EEOC argues that these policies treat pregnant workers differently simply because of the source of her limitation.⁹⁷ Second, the Guidance states that in disparate treatment cases, a pregnant employee may compare herself to employees with disabilities or on-the-job injuries to establish a *prima facie* case of pregnancy discrimination.⁹⁸

The Guidance also interprets the ADA. Unsurprisingly, the EEOC acknowledges that pregnancy in itself does not constitute an impairment under the ADA.⁹⁹ However, the EEOC finds that a broad range of temporary impairments associated with pregnancy could qualify as disabilities. The Guidance includes a long list of accommodations that may be necessary when the pregnancy-related impairments impose substantially limiting work-related restrictions.

In order to address many of the questions left for the employers post-Guidance, the EEOC has created a list of best practices that could help employers avoid liability under the PDA and ADA.¹⁰⁰ Central in these practices is the need for employers to develop, disseminate, and enforce a strong policy, which includes a process for addressing accommodation requests by pregnant women.¹⁰¹ An important note is that under the Guidance, parental leave must be offered to similarly situated men and women under the same terms.¹⁰²

The Guidance has been released at a complicated time. The Supreme Court’s impending decision in *Young* could contradict the Guidance in many ways. Additionally, Congress is considering the passage of the Pregnant Workers Fairness Act (“PWFA”), which could amend the PDA to expressly require employers to grant reasonable accommodations to pregnant workers.¹⁰³

Discrimination on the basis of pregnancy occurs at all levels of an organization.¹⁰⁴ An illustration of how rare it is to have a pregnant CEO is seen in the selection of Marissa Mayer as the CEO of Yahoo in 2012. Ms. Mayer announced she was pregnant the same day that Yahoo announced her appointment. Her selection made her the twentieth female CEO of a Fortune 500 company and also the first pregnant CEO of a Fortune 500 Company.¹⁰⁵ While her appointment was newsworthy for a variety of reasons, including her qualifications and her visions for the struggling company, it was her pregnancy that garnered more discussion than those. Her appointment also raised the issue of the “glass cliff,” where women are appointed to leadership

⁹⁶ *Enforcement Guidance*, *supra* note 83.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at Part II Americans with Disabilities Act.

¹⁰⁰ *Id.* at Part IV Best Practices.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Pregnant Workers Fairness Act, S. 942, 113th Cong. (2013); Pregnant Workers Fairness Act, H.R. 1975, 113th Cong. (2013).

¹⁰⁴ *See, e.g.*, *Bass v. Chem. Banking Corp.*, No. 94 CIV. 8833 SHS, 1996 WL 374151 (S.D.N.Y. July 2, 1996).

¹⁰⁵ Annie-Rose Strasser, *Marissa Mayer Becomes First Ever Pregnant CEO of Fortune 500 Company*, THINK PROGRESS (July 17, 2012, 11:45 AM), <http://thinkprogress.org/health/2012/07/17/529141/mayer-pregnant-ceo/?mobile=nc>; Press Release, Yahoo!, Yahoo! Appoints Marissa Mayer Chief Executive Officer (July 16, 2012), <http://pressroom.yahoo.net/prycorp/236553.aspx>; Patricia Sellers, *New Yahoo CEO Mayer is Pregnant*, FORTUNE, July 16, 2012.

positions in organizations “a disproportionate amount of the time” when the corporation is facing a dire situation.¹⁰⁶

Successful women in the labor market are less likely to be married and have children than others.¹⁰⁷ This is in stark contrast to men. For example, one study found that 33 percent of high achieving women and 49 percent of ultra-achieving women between 41 and 55 were childless.¹⁰⁸ Another study conducted in 2001, found that only half of women on Wall Street had children compared to 74 percent of men.¹⁰⁹ The more hours that women work, the more women experience dissatisfaction about the time pressures of life, while managing the demands of employment and family life.¹¹⁰ However, a man’s sense of satisfaction is not influenced by the hours that men spend at work. Additionally, women who are extremely highly educated are less likely to participate in the workforce after having children.¹¹¹

A study which looked at female graduates at top universities concluded that once those women have children, they are more likely to quit their jobs than those who graduated from less selective schools.¹¹² Sixty percent of women who graduated from top schools work full time, compared to sixty-eight percent of those who graduated from less prestigious universities.¹¹³ Married women without children are 20 percentage points more likely to work full time than those with children, while the difference between graduates of lesser schools is 13.5 points.¹¹⁴ Even more surprising, only 35 percent of women who have earned MBAs after studying at a top school are working full time, compared to 66 percent of graduates of lesser institutions.¹¹⁵ This may be because they are pushed out by inflexible workplaces or they may be willingly opting out to care for their children.¹¹⁶ Since graduates of elite schools have more flexibility in terms of workplace options and higher wages, the inflexible workplace hypothesis cannot explain the differences between graduates of elite and non-elite schools.¹¹⁷

¹⁰⁶ Erin Mckean, *Week in Words: A Field Guide to Unusual Words in This Week's Wall Street Journal*, WALL ST. J., July 21, 2012, at C4.

¹⁰⁷ Sharon R. Margalioth, *Women, Careers, Babies: An Issue of Time or Timing?* 13 UCLA WOMEN’S L. J. 293, 303-04 (2005).

¹⁰⁸ *Id.* at 304.

¹⁰⁹ *Id.* at 304-305. Also, most women did not report being childless by conscious choice, but something that occurred for various reasons. *Id.* at 306.

¹¹⁰ See generally ALICE H. EAGLY & LINDA L. CARLI, *THROUGH THE LABYRINTH THE TRUTH ABOUT HOW WOMEN BECOME LEADERS* 55 (2007).

¹¹¹ See Amy Wolf, *Women with Elite Education Opting Out of Full-time Careers*, RESEARCH NEWS AT VANDERBILT (Apr. 8, 2013 8:00 AM), <http://news.vanderbilt.edu/2013/04/women-elite-education-work-less/>.

¹¹² Joni Hersch, *Opting Out Among Women with Elite Education* 37 (Vand. U. Law Sch. Law and Econ. Working Paper, Paper No. 13-05, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221482. (concluding, “labor market activity is on average lower among elite graduates than among those from less selective institution”).

¹¹³ *Id.* at 45, Table 2.

¹¹⁴ *Id.* at 48 Table 4.

¹¹⁵ *Id.* at 29.

¹¹⁶ *Id.* at 33.

¹¹⁷ *Id.* “[I]ncreasing workplace flexibility alone may have only a limited impact on reducing the gap between graduates of elite and non-elite schools.” *Id.* Obama recently proposed an initiative calling for an \$80 billion expansion to a federal program that gives childcare subsidies to low and middle-income families. This could enable more women to remain in the workplace. He also proposed to raise the childcare tax credit. Julie Hirschfield Davis, *Obama Proposes Expansion of Program Providing Subsidies for Child Care*, N.Y. TIMES, Jan. 23, 2015, at A17.

Common biases toward women in the workplace include assumptions that women with small children will be less productive or dependable than their counterparts;¹¹⁸ that mothers will not, or should not, work long hours;¹¹⁹ and that mothers are not committed to their jobs.¹²⁰ Women who take leave or use flexible schedules may be viewed as less committed to their workplace as well.¹²¹ Discrimination faced by working mothers can be very subtle. Benard, Paik, and Correll document that women with children are often perceived as more warm, but less competent and less worthy of institutional rewards in experimental studies.¹²² Part of the bias against women as leaders, stems from the fact that characteristics associated with leadership are also associated with masculinity.¹²³ This mismatched association creates competition between the two sets of expectations. Other experimental studies suggest that mothers are held to higher performance standards.¹²⁴ Some research shows that bias may be stronger in work settings.¹²⁵

Men also can face family responsibilities discrimination.¹²⁶ Men may find that employers discourage them from using time off to take care of children.¹²⁷ Alternatively, employers may retaliate against men when they return from leave or deny them leave with the idea that their spouses should take leave instead. The men may also be perceived as less committed to their job and career. Stereotypes about women's roles in the home are reinforced by parallel stereotypes of men's roles. These restrictive interpretations "inculcate the cultural stereotypes and invidious treatment of women who have been, are, or may be affected by pregnancy or childbirth in their lifetime."¹²⁸ Many have attributed the pay disparities and lack of female leadership not to bias against women, *per se*, but to the fact that women have children and thus are not as committed to their jobs, take more time out to care for the children, and are not as focused.¹²⁹

¹¹⁸ *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55-56 (1st Cir. 2000) (holding that comments that the plaintiff might not be able to balance work and family responsibilities after she had a second child was sufficient for the jury to find that she was fired due to gender); *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378, 381-82 (1st Cir. 1998) (upholding the jury's inference that the supervisor's comment "[her] body trying to tell her something" demonstrated in part that the plaintiff was fired based on gender stereotypes rather than performance issues); *Enforcement Guidance*, *supra* note 83, at Part I.A.1.b.

¹¹⁹ *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120-21 (2nd Cir. 2004) (holding that the view that woman cannot be a good mother and have a job that requires long hours reflects gender stereotypes); *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502, 503 (Va. 1997) (reversing lower court and suggesting that employer terminated new mother on the theory that her place was at home with her child).

¹²⁰ *Back*, 365 F.3d at 120; *Enforcement Guidance*, *supra* note 83, at Part I(B)(1)(b). This perception is unfounded, "a meta-analysis of twenty-six studies revealed no difference between men and women in feeling committed to their organizations." EAGLY & CARLI *supra* note 110, at 61.

Enforcement Guidance, *supra* note 83, at Part I.B.1.b.

¹²² Stephen Benard et. al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1371-72 (2008); see Amy J.C. Cuddy, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 709-11 (2004).

¹²³ EAGLY & CARLI, *supra* note 110, at 96.

¹²⁴ Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004).

¹²⁵ See Catherine Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 30-39 (2005).

¹²⁶ Catherine Albiston, et al., *Ten Lessons for Practitioners about Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1300-01 (2008).

¹²⁷ Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077-78 (1994); Albiston, *supra* note 125.

¹²⁸ Magid, *supra* note 76, at 821-22.

¹²⁹ See Schipani et al., *supra* note 5, at 511.

Factors other than familial that limit access to top positions come from cultural, social and organizational obstacles.¹³⁰ For example, when leadership positions become available, those doing the selecting, who are almost always male, tend to select those who are most like them.¹³¹ Also, male leaders at the top quite often have spouses who do not hold a job outside the home but stay home with the children, thus reinforcing another norm.¹³² In fact, one study found that compared to men in modern marriages, employed husbands in traditional marriages tend to view the presence of women in the workplace unfavorably, perceive those organizations with high levels of female employees as running less smoothly, find organizations with female leaders less attractive, and more frequently deny qualified female employees opportunities for promotion.¹³³ The “like me” and “like my spouse” are cultural norms that can influence leadership selections. Another factor is that women have diminished access to experiences that build social capital within the organization.¹³⁴ We have conducted a multi-year study in an effort to obtain a greater perspective on this issue. In the study reported here, we examine the extent to which being more like one’s boss is important for women with children. Additionally, we look at the effect of mentoring and networking in helping those with children get past the barriers to leadership positions.

II. The Pathways Study

In this Part, we review previous studies to formulate hypotheses regarding how sharing cultural norms may influence experiences in the workplace. We then utilize survey data to analyze whether sharing cultural background with top people in an organization influences career outcomes for men and women and whether those outcomes depend on whether these men and women are married or single. We further address the extent to which sharing cultural background with top people in the organization influences career outcomes for men and women and whether these outcomes depend on whether these men and women have dependents.

A. Backdrop: Previous Studies

This section reviews previous studies involving the similarity of the cultural background of recruits and employees to leaders of organizations and its relevance to employee hiring or advancement. For example, Kathleen L. McGinn and Katherine L. Milkman examined gender demographics in large law firms, specifically looking at the interplay between persistent

¹³⁰ See Dworkin, et al., *supra* note 22, at 95.

¹³¹ *Id.* at 97-98; see also, Jerry Large, *We Tend to Discriminate by Favoring the Familiar*, SEATTLE TIMES, May 22, 2014, at B1 (citing studies showing that discrimination without malice is by far the most common kind through in-group favoritism which harms others when practiced by a dominant group).

¹³² Melissa Korn, *Careers: At Work*, WALL ST. J., Apr. 10, 2013, at B8 (34.8 percent of women with children who attended selective undergraduate schools were fully employed compared with 66.1 percent of those who attended less selective schools; since elite companies tend to hire from elite schools and women from elite schools do not remain employed as long, the talent pipeline is more limited).

¹³³ Sreedhari D. Desai et al., *Marriage Structure and Resistance to the Gender Revolution in the Workplace 5* (U. of N.C. Keenan-Flagler Bus. Sch., Working Paper No. 2013-19, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018259.

¹³⁴ Susan Vinnicombe & Val Singh, *Locks and Keys to the Boardroom*, 18 WOMEN IN MGMT. REV. 325, 328 (2003). Social capital is the result of actual and potential resources embedded in and available through a network of social relationships. Dworkin, et al., *supra* note 22, at 103-04.

inequalities in gender at the top of the firms despite a more proportional gender makeup in the entry-level ranks at the firms.¹³⁵ Law firms are “up or out” in terms of promotion policies, meaning that entry-level employees are required to prove their value to the firm in a specified time period early on in their careers.¹³⁶ Moreover, with this “up or out” policy, it is senior professionals who decide whether junior professionals move up or move out.¹³⁷ This results in intense pressure on the associates to “fit in.”¹³⁸ McGinn and Milkman studied promotions and departures within these up-or-out firms and found that a higher proportion of same-sex superiors within a workgroup decreased a woman’s likelihood of departure and increased the likelihood of a promotion.¹³⁹ They also found, however, that higher proportions of same-sex peers within one’s workgroup increased the likelihood of departure and decreased the likelihood of promotion.¹⁴⁰ This finding was a bit of a departure from previous research, which showed that higher proportions of same-sex peers within a workgroup contributed to social cohesion.¹⁴¹ Instead, McGinn and Milkman found that putting demographically similar peers in the same workgroup led to structural marginalization, creating competition within the group.¹⁴² The same effects were found for men and women, suggesting that one perceives one’s chances of success hampered when one is within the presence of numerous individuals who are in the same demographic group.¹⁴³

Allen N. Berger and his coauthors examined how homophily and social ties affect career outcomes in banking, looking at outsider appointments versus insider appointments to executive boards.¹⁴⁴ The authors analyzed the effect of homophily and social ties, including age, gender, education, and social connections on the appointment of outsiders over insiders.¹⁴⁵ They studied the German banking industry from 1993-2008, using data on nearly 11,000 executive appointments.¹⁴⁶ The authors found age to be an important factor – small differences in age between the appointed and the members of the executive board was a considerable factor in whether the appointed was an outsider.¹⁴⁷ That is, if the appointed is in the same generation as the board members, there is an increased likelihood that the appointed is an outsider.¹⁴⁸ For gender, the authors found that women appointees were more likely to be outsiders when the executive board already had female representation.¹⁴⁹ Social connections also played a role – if

¹³⁵ Kathleen L. McGinn & Katherine L. Milkman, *Looking Up and Looking Out: Career Mobility Effects of Demographic Similarity Among Professionals*, 24 *ORG. SCIENCE* 1041 (2013).

¹³⁶ *Id.* at 1042.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1055.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1056.

¹⁴² *Id.* at 1057.

¹⁴³ *Id.* at 1057.

¹⁴⁴ Allen N. Berger, et al., *Does it Pay to Have Friends? Social Ties and Executive Appointments in Banking*, 37 *J. BANKING & FIN.*, 2087 (2013).

¹⁴⁵ *Id.* at 2088.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2094

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

the appointee was well-embedded in the social systems of the executives, there was a higher chance that the appointee was an outsider.¹⁵⁰

Another study considered hiring in academia, hypothesizing that recruiters in academia prefer candidates with demographic backgrounds that are similar to their own.¹⁵¹ Prior research suggested that due to absence of clear evaluation criteria in academia, decision-makers often base their assessments on “alternative criteria” – as a result, candidates with similar backgrounds, attitudes, and personalities to the recruiter are often rated more favorably than other candidates.¹⁵² Heinke Roebken found, using recruitment data on sixty departments of business administration in Germany, that the more exchange partners in common, the more likely that universities were to exchange personnel directly with each other.¹⁵³ Moreover, the more departments published in similar journals, the more likely they were to interact.¹⁵⁴ Geographic distance between universities also had an effect on recruitment, with universities located close to each other more likely to recruit from one another.¹⁵⁵ Additionally, Roebken found that departments preferred candidates from the same or higher status group – thus, when it is difficult to evaluate the candidate directly, academic departments may instead look at the social position of the sending institution.¹⁵⁶

Paul K. Skilton studied factors that influence employers’ decision to create breakthrough opportunities for individuals working on elite Hollywood projects.¹⁵⁷ Because a breakthrough is considered employment in a new career for which the employee has no experience, the employer cannot use employee experience as a gauge for the employee’s ability in the new area.¹⁵⁸ Thus, even when an individual has experience in non-elite projects, this is not sufficient to qualify him or her for the breakthrough job on an elite project.¹⁵⁹ Instead, employers might rely on familiarity or similarity when making a decision, such as gender, family or work affiliations, or prior acquaintances.¹⁶⁰ “Similarity” is defined as a correspondence between persons on the basis of characteristics such as race, sex, or age – he considers these unearned, inherited elements.¹⁶¹ Past affiliations and family and work ties are a component of similarity.¹⁶² In contrast, “familiarity” involves specific knowledge of a person’s abilities and attitudes – a product of actual social contact.¹⁶³

¹⁵⁰ *Id.*

¹⁵¹ Heinke Roebken, *Similarity Attracts: An Analysis of Recruitment Decisions in Academia*, 38 EDUCATIONAL MGMT. ADMIN. & LEADERSHIP 472 (2010).

¹⁵² *Id.* at 473.

¹⁵³ *Id.* at 482-83.

¹⁵⁴ *Id.* at 483.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Paul K. Skilton, *Similarity, Familiarity and Access to Elite Work in Hollywood: Employer and Employee Characteristics in Breakthrough Employment*, 61 HUMAN RELATIONS 1743 (Dec. 2008).

¹⁵⁸ *Id.* at 1744.

¹⁵⁹ *Id.* at 1745.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1748.

¹⁶² *Id.* at 1749-50.

¹⁶³ *Id.* at 1751.

Skilton looks at breakthroughs to direct an elite motion picture, using archival data on employment in Hollywood motion picture production.¹⁶⁴ The author found that similarity and familiarity play a larger role than experience in individuals who achieve breakthroughs.¹⁶⁵ He found that two similarity factors played a role in achieving a breakthrough. He further found gender to be a factor, and that producer groups with a higher proportion of women are more likely to hire a woman director.¹⁶⁶ However, he also found that breakthroughs go to the sexes in the proportion represented by the prospects – that is, although more men achieve breakthroughs, 89% of the prospects were men in the first place.¹⁶⁷ Thus, there is a small number of women in producing and directing roles overall, meaning men may have a cumulative advantage in career progressions.¹⁶⁸ He also found that affiliation quality was an important factor in achieving breakthroughs.¹⁶⁹ Family based favoritism did not facilitate breakthroughs.¹⁷⁰ Finally, the author found that non-elite directing experience played little role in achieving a breakthrough.¹⁷¹

Christoph Ellersgaard, Anton Larsen, and Martin Munk studied the importance of families, educational system, and economic organizations on pathways to the top in organizations.¹⁷² The authors note the similarity of the social origin of the top managerial elite, with 4/5 of executives coming from the top fifth of their society.¹⁷³ While their social origin is homogenous, their pathways to the top are heterogeneous. As a result, there is a homogenous business elite with regard to age, sex, and ethnicity.¹⁷⁴

Furthermore, women in the highest positions may face higher performance expectations.¹⁷⁵ A recent Utah State University study suggests that companies that hire their first female or minority CEO, might not actually be setting the company on a more diverse track.¹⁷⁶ The study found that boards are more likely to promote women or minority candidates to top leadership when the company is in crisis.¹⁷⁷ When these companies then decline, the boards are more likely to replace the diverse executives with white males.¹⁷⁸ Previous studies have identified this as the “glass cliff,” where boards are more likely to appoint minorities and women to companies that are in difficult times.¹⁷⁹

¹⁶⁴ *Id.* at 1753-54.

¹⁶⁵ *Id.* at 1767.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1768.

¹⁷¹ *Id.* at 1769.

¹⁷² Christoph H. Ellersgaard et.al, *A Very Economic Elite: The Case of the Danish Top CEOs*, 47 *SOCIOLOGY* 1051 (2012).

¹⁷³ *Id.* at 1052.

¹⁷⁴ *Id.* at 1052.

¹⁷⁵ D.G. McCullough, *Women CEO's: Why Companies in Crisis Hire Minorities-and Then Fire Them*, *THE GUARDIAN*, Aug. 8, 2014, <http://www.theguardian.com/sustainable-business/2014/aug/05/fortune-500-companies-crisis-woman-ceo-yahoo-xerox-jc-penny-economy>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* The detailed findings of this study were published in May 2013. Alison Cook & Christy Glass, *Glass Cliffs and Organizational Saviors- Barriers to Minority Leadership in Work Organizations?*, 60 *SOCIAL PROBLEMS* 2, 168 (2013).

B. Hypotheses

Against this backdrop of prior studies, drawing on social identity and similarity-attraction theories, we build arguments for eight hypotheses regarding the significance of sharing cultural background with organizational leaders, for both men and women, whether married or single, for career satisfaction and career success. Further, because access to mentors and networks have been proven to be an important component to successfully climbing the corporate ladder,¹⁸⁰ we also examine whether sharing a cultural background with those at the top in the organization conferred any advantages to one gender over the other in the quality of mentoring and networking relationships. Previous research has not examined how gender and family status (marital and dependents) interact with sharing cultural background with top people on work related outcomes. We used both objective and subjective career success measures (position and career satisfaction). We could not use salary because a large portion of the sample did not provide such information. Recent research suggests that demographic characteristics such as gender and marital status can have differential associations with men's and women's career development and growth.¹⁸¹ Specifically, using signaling theory,¹⁸² these researchers argue that gender and family status signal negative attributes and stereotypes in senior decision makers' minds that ultimately influence their workplace decisions regarding women, especially women who are in committed relationships or have dependents.¹⁸³ Because organizational decision makers have incomplete information about employees, they rely on such signals to furnish information (albeit incorrect) about competence, fit, and commitment to the organization.¹⁸⁴ Indeed, in the absence of full information, as noted earlier, decision makers are likely to rely on familiarity, similarity, and social indicators of employee ability and motivation, regardless of whether such signals and indicators are defensible or job-related and necessary. Superiors also use gender and family status to predict how productive or worthy of developmental investment a subordinate will be, that is, their potential social exchange.¹⁸⁵ To that end, marital and dependent status are less likely to aid women's careers or their developmental opportunities, in comparison to single women or their male counter parts with or without dependents.

In this context, we posit that sharing cultural background with top managers in the organization will likely reduce the negative discriminatory effects of family status especially for women. Shared social and cultural identities facilitate interpersonal interactions.¹⁸⁶ According to social identity theory, individuals categorize themselves and others into different categories (demographic, social, cultural, for example) and attach differing value to different social categories maintaining their self-esteem by valuing the categories they identify with personally

¹⁸⁰ See *infra* Part III.C discussion and accompanying notes.

¹⁸¹ Aarti Ramaswami, et al., *Mentoring Across Cultures: The Role of Gender and Marital Status in Taiwan and the U.S.*, 67 J. BUS. RES. 2542 (2014).

¹⁸² Michael Spence, *Job Market Signaling*, 87 QUARTERLY J. ECON. 355 (1973).

¹⁸³ Ramaswami, et al., *supra* note 181, at 2547-49.

¹⁸⁴ Jenny M. Hoobler, et al., *Bosses' Perceptions of Family-Work Conflict and Women's Promotability: Glass Ceiling Effects*, 52 ACAD. OF MGMT 939, 951-54 (2009).

¹⁸⁵ Judy D. Olian, et al., *Mentor Reactions to Protégés: An Experiment With Managers*, 43 J. VOCATIONAL BEH. 266 (1993).

¹⁸⁶ Georgia.T. Chao, & Henry Moon, *The Cultural Mosaic: A Metatheory for Understanding the Complexity of Culture*, 90 J. APPLIED PSYCHOL. 1128 (2005).

higher.¹⁸⁷ The similarity-attraction theory suggests that individuals who are similar or are perceived to belong to similar demographic, social, and cultural categories will be interpersonally attracted, leading to mutual liking and positive perceptions of each other.¹⁸⁸ Similarity in socio-cultural aspects suggests having the similar socialization in values, beliefs, and assumptions, historical experiences and “cultural capital” promote communication, trust and reciprocity.¹⁸⁹ Following the above arguments, we expect that sharing cultural background with top people in the organization will be particularly useful for women who are married or have dependents, as such similarity may replace the negative signals from women’s family status with positive signals.

Our hypotheses are as follows:

Hypothesis 1: Gender, marital status and sharing cultural background with top people in the organization will interact on career satisfaction. For married women, the relationship between sharing cultural background and career satisfaction will be stronger than for their single counterparts. Sharing cultural background should equally benefit married and single men.

Hypothesis 2: Gender, dependent status and sharing cultural background with top people in the organization will interact on career satisfaction. For women with dependents, the relationship between sharing cultural background and career satisfaction will be stronger than for women without dependents. Sharing cultural background should equally benefit men regardless of dependent status.

Hypothesis 3: Gender, marital status and sharing cultural background with top people in the organization will interact on organizational position. For married women, the relationship between sharing cultural background and organizational position will be stronger than for their single counterparts. Sharing cultural background should equally benefit married and single men.

Hypothesis 4: Gender, dependent status and sharing cultural background with top people in the organization will interact on organizational position. For women with dependents, the relationship between sharing cultural background and organizational position will be stronger than for women without dependents. Sharing cultural background should equally benefit men regardless of dependent status.

Hypothesis 5: Gender, marital status and sharing cultural background with top people in the organization will interact on benefitting from a network. For married women, the relationship between sharing cultural background and benefitting from a network will be stronger than for their single counterparts. Sharing cultural background should equally benefit married and single men.

¹⁸⁷ *Id.*

¹⁸⁸ DONN ERWIN BYRNE, *THE ATTRACTION PARADIGM* (1971).

¹⁸⁹ See, e.g., Pierre Bourdieu, *Cultural Reproduction and Social Reproduction in KNOWLEDGE, EDUCATION, AND CULTURAL CHANGE* 71 (Richard Brown, ed. 1973); PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice, trans. 1984); Jerome Karabel, & Katherine McClelland, *Occupational Advantage and the Impact of College Rank on Labor Market Outcomes*, 57 *SOCIOLOGICAL INQUIRY* 323 (1987).

Hypothesis 6: Gender, dependent status and sharing cultural background with top people in the organization will interact on benefitting from a network. For women with dependents, the relationship between sharing cultural background and benefitting from a network will be stronger than for women without dependents. Sharing cultural background should equally benefit men regardless of dependent status.

Hypothesis 7: Gender, dependent status, and sharing cultural background with top people in the organization will interact on having a mentor. For women with dependents, the relationship between sharing cultural background and having a mentor will be stronger than for their single counterparts. Sharing cultural background should equally benefit married and single men.

Hypothesis 8: Gender, marital status and sharing cultural background with top people in the organization will interact on having a mentor. For married women, the relationship between sharing cultural background and having a mentor will be stronger than for women without dependents. Sharing cultural background should equally benefit men regardless of dependent status.

C. Method

Data used in this study are part of a larger project on career pathways for women to obtain organizational leadership.¹⁹⁰ The survey was administered beginning in August, 2007 and continued into 2008 to graduates of leading business schools. Surveys were sent to 11,291 male and 3,198 female Master of Business Administration (MBA) graduates, 173 female and 274 male Master of Accounting graduates, and 1,393 female and 2,875 male Bachelor of Business Administration (BBA) graduates of the Ross School of Business at the University of Michigan, and 1,643 MBA, Master of Accounting, BBA graduates of the Warrington College of Business at the University of Florida. Those earning Master in Accounting and BBA degrees were sent surveys so long as at least three and ten years had passed since graduation, respectively, to allow for sufficient experience to potentially rise in their organizations. Through the above methods, we received in total 887 usable surveys. 69% of the sample was male, 69% were in a committed relationship, and 71% reported having dependents. Descriptive statistics of the analysis sample is included in Table 1.

D. Measures

The independent, dependent, and control variables analyzed in our study are described below.

1. Independent Variables

The independent variables identified for this study are:

Gender. Males were coded as 1 and females as 0.

¹⁹⁰ Professors Virginia Maurer, Angel Kwolek-Folland, and Mary Hinesly, together with the authors, collaborated on this project.

Committed relationship. Those who were married, in a civil union or in a long-term committed relationship were coded as 1 and others (never married, divorced, widowed) were coded as 0.

Dependents. Respondents who indicated they had dependents were coded as 1 and others as 0.

Sharing cultural background with top people in organization. Respondents answered the question, “Over the course of my career, I have shared a great deal of cultural background with the people at the top levels of my organizations” on a scale of 1 to 5 where 1 is = “strongly disagree,” and 5 is = “strongly agree.”

2. Dependent Variables

The dependent variables examined in this study are:

Career satisfaction. Respondents rated the item, “I am satisfied with the level I have reached in my career,” on a five-point scale ranging from 1 = “strongly disagree” to 5 = “strongly agree.”

Organizational position. Respondents indicated their reporting level to the top person in their organization on the following scale: 1) Three or four levels below, 2) Two levels below, 3) Direct report or one level below, and 4) I am the top person.

Mentor Yes No. Respondents indicated whether or not they had mentors. Those with mentors were coded as 1 and those without mentors were coded as 0.

Benefit from network. Respondents rated a single statement, “I have benefited from being part of a network,” on a five-point scale ranging from 1 = “strongly disagree” to 5 = “strongly agree.”

3. Control Variables

Following prior research¹⁹¹ we controlled for five demographic, human capital, organizational and industry-related variables that could influence the outcomes of interest. These are:

Age. Respondents reported their age based on the following scale: 1) 20-29 years old, 2) 30-39 years old, 3) 40-49 years, 4) 50-59 years old, 5) 60-69 years old, and 6) 70+ years old.

¹⁹¹ See e.g., Gary N. Powell & Lisa A. Mainiero, *Cross-Currents in the River of Time: Conceptualizing the Complexities of Women’s Careers*, 18 J. MGMT. 215, 227-229 (1992); Aarti Ramaswami, et al, *The Interactive Effects of Gender and Mentoring on Career Attainment: Making the Case For Female Lawyers*, 37 J. CAREER DEV. 692 (2010); Aarti Ramaswami, et al., *Gender, Mentoring, and Career Success: The Importance of Organizational Context*, 63 PERSONNEL PSYCHOL. 385 (2010).

Education level. Respondents indicated their educational attainment on the following scale: 1) Associates Degree (2-year college degree), 2) Bachelors Degree (4-year college degree), 3) Master's Degree, 4) Doctoral Degree, and 5) Professional Degree.

Firm size. Respondents indicated their firm size on the following scale: 1) Fewer than 50, 2) 50-499, 3) 500-999, 4) 1,000-9,999, and 5) 10,000+.

Respondent industry. We controlled for industry using a dummy coding sequence where those with positions in *service industries* and *manufacturing industries* were contrasted with those in other industries.

E. Analysis and Results

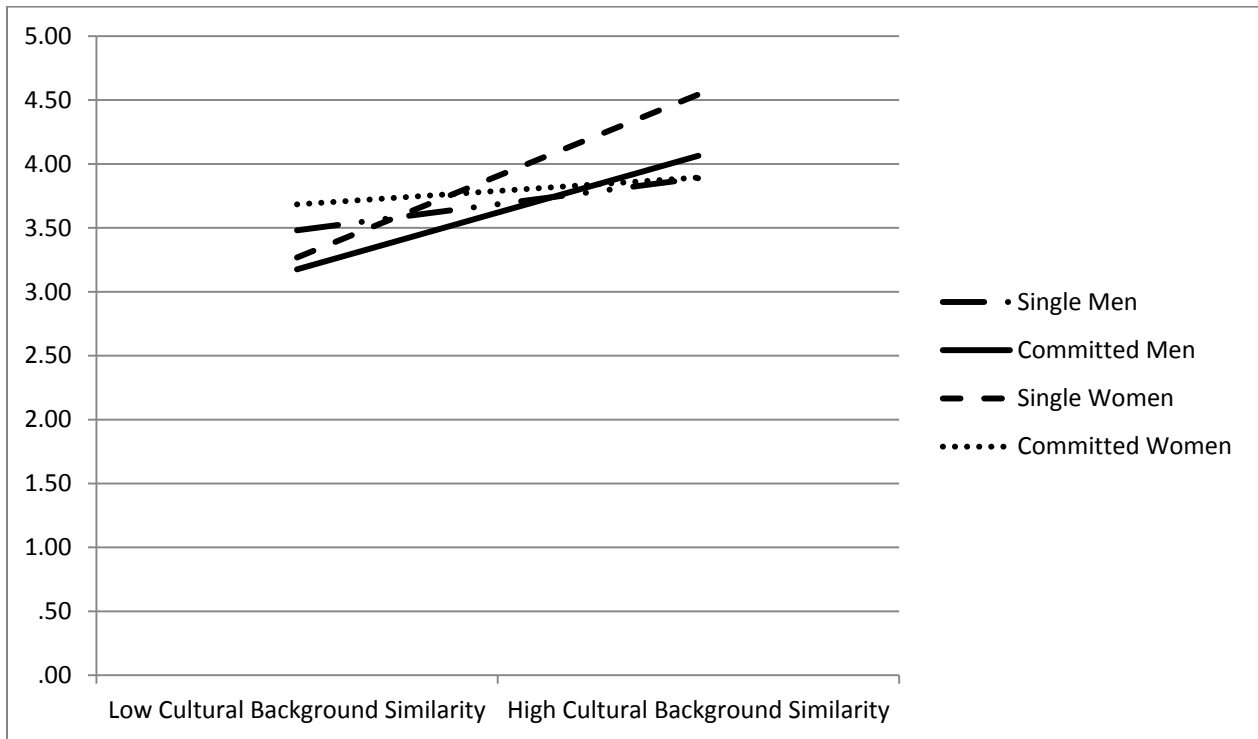
Descriptive statistics including means, standard deviations, and correlations are reported in Table 1. Among the independent variables, all correlations were below .30, except that between manufacturing and service industry ($r = -.43$), theoretically posing no cause for concern. Variation inflation factor values indicated no problems with multicollinearity. Hypotheses were tested using ordinary least squares (OLS) multiple regression and logistic regression, where the control and independent variables were entered first, followed by the two-way interaction terms, and finally the three-way interaction term in separate steps.

The three-way interaction of *gender x committed relationship x share cultural background* was only significant for career satisfaction ($\beta = .75, p < .05$) and organizational position ($\beta = .58, p < .05$). The three-way interaction of *gender x dependents x share cultural background* was only significant for mentor yes no ($\beta = -1.03, p < .01$) and benefit from network ($\beta = -.86, p < .01$).

To better understand the interactions, we plotted graphs of the significant three-way interactions for each dependent variable using unstandardized regression coefficients.

Career Satisfaction

Figure 1



This graph suggests that, single women with high cultural similarity with top people in the organization report higher career satisfaction than married/committed women, who also have high cultural similarity with top people, contrary to hypothesis 1. So, even if women have high cultural background similarity with organizational leaders, the benefits are still higher for single than for married women.

Position level
Figure 2

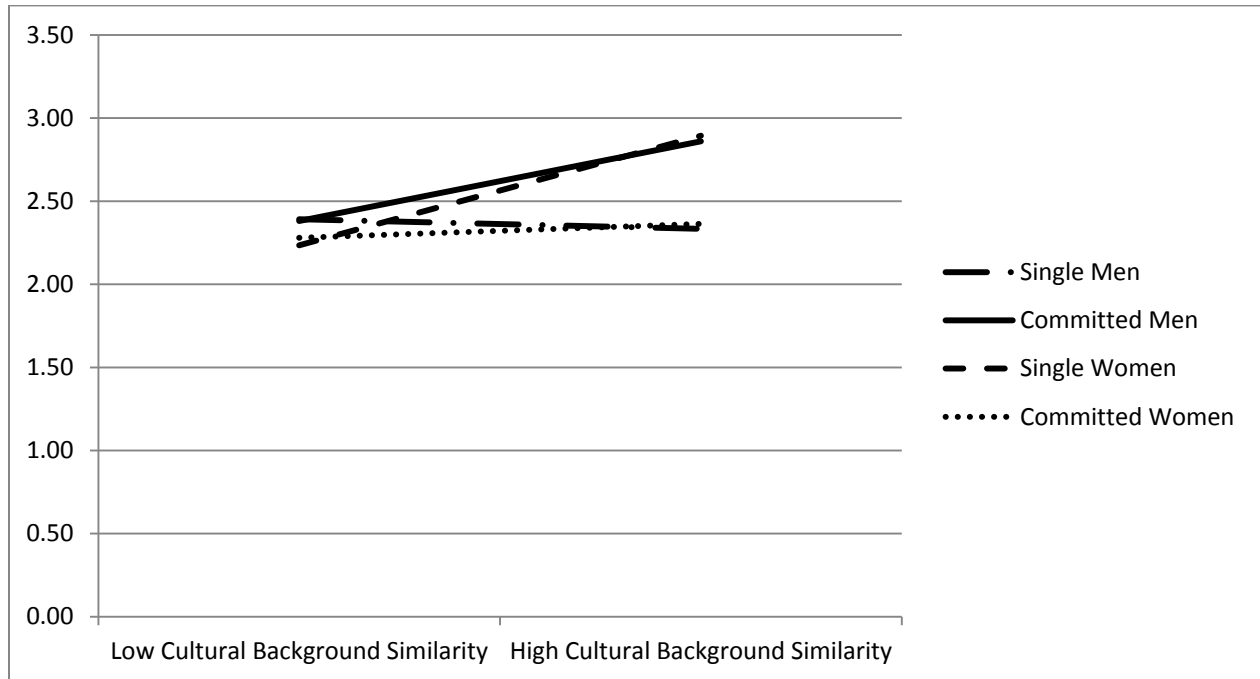
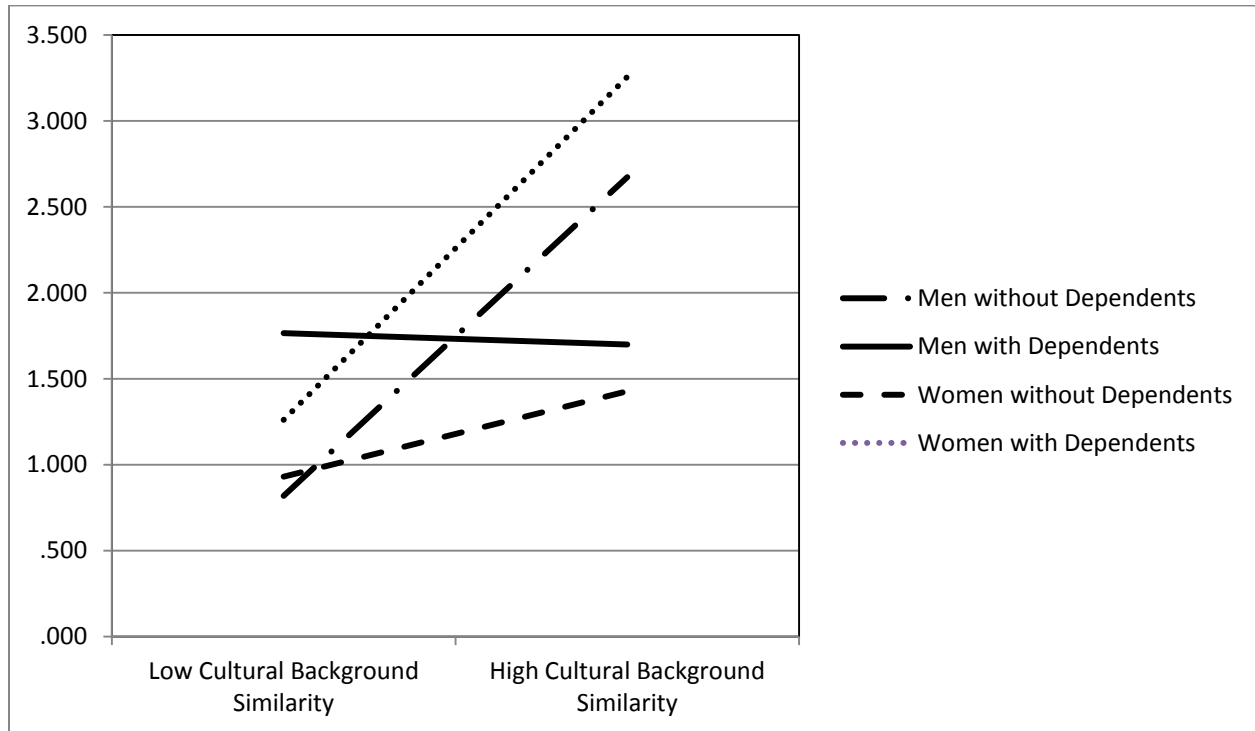


Figure 2 suggests that men and women – single or married - who have low cultural background similarity do not differ much in the organizational position they hold. Note that the lines all converge on the left side of the graph. Indeed, there is no difference between single and women in committed relationships or between single and men in committed relationships. However, having cultural similarity with top people in the organization appears to benefit single women more than it does married women, contrary to hypothesis 3. This suggests that with respect to sharing cultural similarity with top people, being married is a disadvantage for women, but not for men.

Mentor Yes/No
Figure 3



The graph depicted in Figure 3 suggests that for women with dependents, having high cultural background similarity with top people in the organization influences their likelihood of having a mentor, supporting hypothesis 6. For men with dependents, sharing cultural similarity with top people does not seem to affect their likelihood of having a mentor. So women with dependents fare better if they share cultural background with top people in terms of obtaining developmental resources such as mentoring. To the contrary, for men with dependents, sharing cultural background with the organizational leadership neither provides an advantage nor a disadvantage with respect to their likelihood of having a mentor.

Benefit from Network
Figure 4

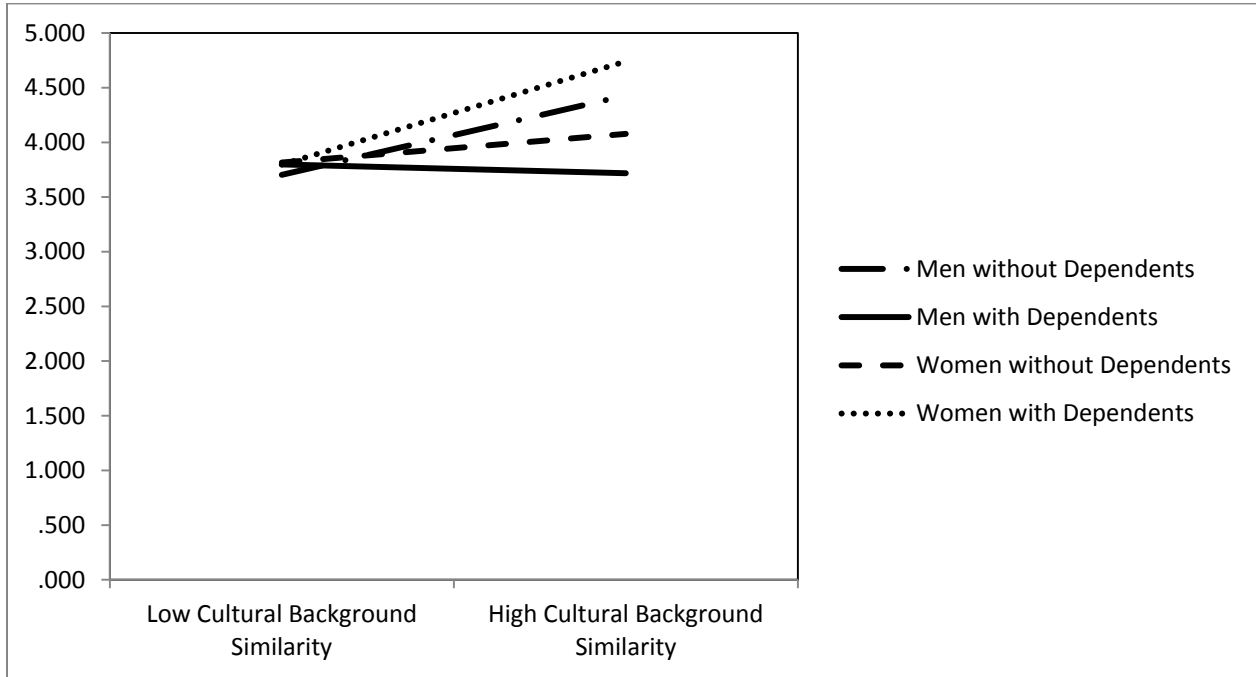


Figure 4 plots the relationship between network benefits and cultural background similarity with the top people in the organization, comparing male and female experiences. This data suggests that neither gender nor having dependents makes a difference with regard to network benefits for those with a low cultural background similarity with top people. However, women with dependents gain from having cultural similarity with top people. Women with dependents who also have high cultural background similarity with top people report benefiting most from networks compared to other groups, supporting hypothesis 8. Yet, as shown in Figure 4, the data suggest that for men with dependents, cultural background similarity with top people does not seem to impact the benefits they report receiving from networks. So, again, sharing cultural similarity with top people in the organization influences the outcomes of women with dependents.

Finally, hypotheses 2, 4, 5 and 7 were not supported, as their respective three-way interactions were not significant.

F. Discussion

The role of family status in men’s and women’s career development and progress continues to receive research attention.¹⁹² This study examined the relationships between family status (marital and dependent), sharing cultural background with top people in the organization and career, mentoring, and networking outcomes. Importantly, this study extends the

¹⁹² Hoobler et al., *supra* note 184.

Ramaswami, Huang, and Dreher¹⁹³ cross-cultural study on *gender x marital status* interaction on mentoring attainment by also examining the *gender x dependent status* interaction on mentoring attainment (and other dependent variables) as well as observing whether these interactions differ for four career, mentoring, and networking outcomes, as a function of the respondents' similarity of cultural background with top people in their organizations. Ramaswami and her colleagues found that, in contrast to women in Taiwan, in the U.S., married women have a lower likelihood of attaining mentors compared to single women, but for men, being married was still advantageous in having mentors.

Following their study, here we tested for whether sharing cultural background with top people in the organization would help women who are married or who have dependents to report higher outcomes (career success, mentoring, and network benefits) than their single counterparts. Only some of our hypotheses were supported. Indeed, the *gender x marital status x sharing cultural background* interaction was significant only for career success variables such as career satisfaction and organizational position but we found that single women benefited more than committed women for both outcomes. Indeed our results suggest that sharing cultural capital with top people in the organization, and the associated understanding that arises from such similarity may not be enough to trump the negative associations of marital status on women's career satisfaction and organizational position. As hypothesized, *the gender x dependent yes/no x sharing cultural background* interaction was significant but only for mentor yes/no and benefits from network and not for the career success variables. In terms of other significant main and interaction effects, marital status had no significant main effects on the dependent variables. Gender and dependent status were positively related to organizational position, and gender to mentor yes/no. Sharing cultural background was positively related to all dependent variables. The only significant two-way interaction was that of *gender x sharing cultural background* on organizational position, suggesting that men who shared cultural background with top people were more likely to be in higher organizational positions than women. The results of our study suggest that family status continues to pose barriers for women's careers in the U.S. In line with Professor Ramaswami, and her coauthors' findings,¹⁹⁴ these results once again show that in the U.S. or Western context, women who have high career attainment also tend to be single and/or without children.¹⁹⁵

As is true with most studies, this study is not without limitations. Our analysis combined both formal and informal mentoring, but only a small percentage of our respondents had formal mentors. This study also does not distinguish between current and past mentoring, nor have we differentiated among various types of professional networks or types of dependents (children versus parents). We used self-report cross-sectional data preventing us from making conclusions regarding causality. In addition, we did not have data from respondents' significant others in their respective organizations (supervisors, superiors, teammates, etc.) regarding their attributions of men and women in who are in committed relationships, have dependents, or share cultural backgrounds with top people in the organizations.

¹⁹³ Ramaswami et al., *supra* note 181.

¹⁹⁴ *Id.*

¹⁹⁵ STEWART D. FRIEDMAN, & JEFFREY H. GREENHAUS, WORK AND FAMILY—ALLIES OR ENEMIES?: WHAT HAPPENS WHEN BUSINESS PROFESSIONALS CONFRONT LIFE CHOICES (2000).

Certainly, the influence of family status on men and women’s careers is complex and warrants continued study. Our study underscores the fact that diversity variables in isolation may not be able to paint the complete picture. Considering the intersection of multiple diversity as well as organizational or contextual variables may shed light on how gender and family status influence career, mentoring, and networking outcomes for men and women.

III. Proposed Solutions

No matter what the cause, it is clear that women are still effectively shut out of most leadership positions. In this Part, we propose a combination of new judicial interpretations, regulatory disclosure requirements, and firm-level actions in an attempt to rectify the problem. First, we propose that Title VII which, in its current form has not been effective with regard to breaking the glass ceiling, be reinterpreted to address the issue of leadership. We cannot take the European approach, which is to use quotas, due to the Supreme Court’s rulings with respect to affirmative action.¹⁹⁶ However, we propose that when deciding cases of employment discrimination for top leadership positions, the courts impose a rebuttable presumption of discrimination with respect to opportunities for advancement when there are no women or only token women in top leadership positions or on the board of directors. Second, as advocated in our previous work, we propose that the Securities and Exchange Commission (SEC) require that details already reported about diversity include reports on the numbers of women occupying positions of leadership and board positions. Finally, based on our studies and the literature, we advocate that firms provide mentoring programs and opportunities for networking to help break the glass ceiling. These proposals are discussed below.

A. Rebuttable Presumption

1. Proposed U.S. Approach

The U.S. effectively bars a quota system based on the language of *Baake*, the case that allowed affirmative action in the public sector in 1978.¹⁹⁷ As noted, the Supreme Court is limiting the availability of affirmative action in some instances, and *Baake*’s quota ban is still good law. This does not mean, though, that we cannot learn from the European Union (EU) experience.

Title VII is an elastic statute, as the above discussion shows. Disparate impact was adopted to eliminate “*built-in head winds*”¹⁹⁸ and “*unnecessary barriers*”¹⁹⁹ when progress was stalled. The decision to expand the reach of disparate impact by allowing evidence of subjective decision-making was likewise designed to further the goal of getting rid of built-in headwinds. The *Weber* decision was based on the spirit of Title VII to level the playing field and open opportunities to protected groups.²⁰⁰ Coverage of sexual harassment was read into the statute

¹⁹⁶ See *infra* Part III.A.1 discussion and accompanying notes.

¹⁹⁷ *Regents of Univ. of Cal. v. Baake*, 438 U.S. 265 (1978).

¹⁹⁸ *Griggs v. Duke Power Co.* 401 U.S. 424, 432 (1971).

¹⁹⁹ *Id.* at 431.

²⁰⁰ *United Steelworkers AFL-CIO v. Weber*, 443 U.S. 193 (1979).

when that was recognized as a problem.²⁰¹ Also important was the shifting of the burden of proof to the defendant after a relatively easily met burden of proof on plaintiff's part.²⁰² Fifty years after 1964, there is still a glaring failure regarding women and minorities achieving attainment of leadership positions, and it is time to expand or stretch Title VII once again.

This goal can be facilitated by establishing a rebuttable presumption that discrimination is at play if there are no women, or only token women, in top leadership positions or on the board of a company. In the past this would not have succeeded because in any one instance, the number of top leadership positions in a company opening up at a particular time would not have been large enough to be statistically relevant.²⁰³ But if board and top leadership positions are examined as a whole, the number would be large enough as long as there are 15-25 positions that fit within this category. This would then shift the burden of proof to the defendant to prove it did not discriminate. This is admittedly a step beyond the disparate impact scheme of burden shifting that occurs once a relevant disparity is shown. However, since subjective selection methods are encompassed by the theory, and top positions are filled by subjective selection, it would be consistent with precedent in this regard.

Admittedly, small numbers of opportunities can be problematic but not insurmountable. In *Watson*, where the Court recognized that subjective or discretionary selection procedures that lead to disparate impact can be actionable, Watson was denied a promotion on four occasions.²⁰⁴ She was still able to show that the unfettered discretion of the selectors resulted in discrimination. Choosing board members and leaders is generally not a transparent process to which those not selected would have access. Shifting the burden greatly increases the possibility of a successful challenge; at a minimum, it should facilitate getting to a jury.

A rebuttable presumption is not a quota, and it would not be as effective as quotas have been elsewhere in the world.²⁰⁵ But it may be enough to finally put a crack in the glass ceiling and help women achieve top management positions in sufficient numbers to be meaningful. In *Watson* the plurality was concerned that the adoption of the disparate impact theory might cause employers to adopt quotas because of the difficulty of validating subjective criteria used to select a candidate.²⁰⁶ This view, though, did not prevent the adoption of the theory then, and should not now bar a device that could help overcome the barriers that lead to the "markedly disproportionate"²⁰⁷ number of women – over 90 percent - being kept out of these top leadership positions. A recent study shows that women and minorities are punished when they appoint a

²⁰¹ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Bundy v. Jackson*, 641 F.2d 934, (D.C. Cir. 1981); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

²⁰² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²⁰³ In order to prove disparate impact, one must have a sample size that is statistically significant. "Small sample sizes are often rejected as having little probative value, because results from small sample sizes that show ... disparity can also be credited to or explained by simple random chance." Melinda K. Burton, *Using Statistics to Prove Disparate Treatment Discrimination*, 17 *YOUNG LAWYER* 7 (2013). Usually, one compares an average measure of economic performance or welfare for the protected class with an average measure of the same economic variable for the unprotected class.

²⁰⁴ *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 997, 982 (1988).

²⁰⁵ See *infra* Part III.A.2 and accompanying notes.

²⁰⁶ Prekert, *supra* note 70, at 12.

²⁰⁷ *Griggs v. Duke Power Co.* 401 U.S. 424, 429 (1971).

women or minority to a leadership position.²⁰⁸ Thus, having a token woman or minority in a leadership position would not be effective in solving the problem. The problem will continue until a sufficient number of women are in leadership positions that it is no longer harmful.

Shifting the burden to the organization to show business necessity of its subjective (and usually nontransparent) selection process is consistent with a long line of cases that speak to Title VII's "broad remedial purposes" as well as the Civil Rights Act of 1991.²⁰⁹ It would be difficult to argue business necessity in light of the fact that when women are included on boards and in top positions, the organizations do better financially and employees tend to be more satisfied because they have more voice within the organization.²¹⁰

Ideally, Congress would implement the presumption in the statute. However, in the current political climate, this is highly unlikely. This does not prevent the EEOC from adopting a Guideline to this effect which would be highly persuasive to courts. The EEOC has often taken the lead on discrimination issues and should do so here. The courts usually look to the EEOC when interpreting Title VII. We advocate that both the EEOC and the courts adopt this rule. Alternatively, if they are not willing to do this, as a minimum, the EEOC and the courts should follow the long line of cases establishing burden shifting in favor of the protected group.

Such an approach is somewhat similar to the EU proposal and the Finland approach in terms of having to explain why no women were appointed. While many countries have adopted quotas as a fast-track way to more parity, quotas were a step too far for the EU (and, of course, the U.S.). Our proposal would put the U.S. more in line with most developed countries which are already showing that including women in leadership is crucial and just.

2. *The European Approach*

European countries have attacked the problem of low female representation directly by establishing quotas for women, primarily in terms of board membership.²¹¹ Norway was the first

²⁰⁸ The researchers performed an experiment in which they asked 395 students to watch trained actors playing human resources professionals pitching to hire specific candidates. The experiment results showed that students watching the presentations reacted negatively when women and minority actors were promoting diverse candidates. They suggested that these reactions may arise from negative stereotypes. David R. Hekman & Maw-Der Foo, *Does Valuing Diversity Result in Worse Performance Ratings for Minority and Female Leaders?* (Aug. 1-5, 2014) (presented at the Annual Meeting of the Academy of Management). See also, Jillian Berman, *Women and Minorities are Punished for Promoting Women and Minorities at Work: Study*, THE HUFFINGTON POST, (July 28, 2014, 11:02 AM), available at http://www.huffingtonpost.com/2014/07/25/diversity-study_n_5620839.html.

²⁰⁹ Although the Supreme Court, beginning in a fractured opinion in *Watson*, made a series of decisions shifting the burden of proof in disparate impact cases, these were nullified by the passage of the Civil Rights Act of 1991. 42 U.S.C.A. § 2000e-2(k)(2000) (West 2014); Pub. L. No. 102-166, § 3(1), 105 Stat. 1071 (1991). See Prekert, *supra* note 70, at 9-16.

²¹⁰ A recent study of 366 public companies by McKinsey & Co. again found better financial results with greater diversity in the top ranks. U.S. companies showed financial gains when women constituted 22 percent of the senior executive team. *Careers: At Work, Financial Gains Linked To Diverse Leadership*, WALL ST. J., Jan. 21, 2015, at B7.

²¹¹ For recent statistics on female representation on boards of directors of European companies see EUROPEAN COMMISSION, *New Women on Boards Figures Show Continued Progress*, (Jan. 20, 2015), http://ec.europa.eu/justice/newsroom/gender-equality/news/150120_en.htm.

to adopt a board quota in 2008, and its female representation now approaches 40 percent.²¹² Other European countries followed suit and today Belgium, France, Iceland, Italy, The Netherlands, Spain, and Sweden have “pink quotas.”²¹³ The United Kingdom encourages female representation through its corporate governance code²¹⁴ and Finland requires companies with no women on their boards to tell investors why.²¹⁵ The push, however, is not uniform throughout the E.U. Board representation in Portugal, for example, is only one percent, and the average in European companies is about ten percent.²¹⁶

More recently, France enacted a law²¹⁷ requiring French public companies making at least 50 million euros with more than 500 employees to have 40 percent female board directors by 2017.²¹⁸ A recently published paper analyzes the effectiveness of the French approach and compares it to that of the EU.²¹⁹ The paper suggests that the French approach has wider reach because it applies to both executives and nonexecutive directors.²²⁰ As of November 2014, Germany requires the boards of directors of its largest corporations to include 30 percent women nonexecutive directors by 2016.²²¹ Firms that do not meet the 30 percent requirement are required to leave those seats unoccupied.²²² The agreement affects more than 100 German firms.²²³ Lastly, the Netherlands enacted a law in 2013 that advises large companies to aim for at least 30 percent women representation in their executive and supervisory boards.²²⁴

The E.U. attempted to set an E.U.-wide quota of 40 percent in 2012,²²⁵ but it failed primarily due to objections of some E.U. commissioners to its mandatory nature and questions of its legality.²²⁶ Instead, it is attempting to “smash the glass ceiling” by establishing goals for large

²¹² Joann S. Lublin & Theo Francis, *U.S. Board of Directors Lag Behind in Naming Women*, WALL ST. J., (Feb. 4, 2014, 11:07PM), <http://online.wsj.com/news/articles/SB10001424052702304851104579361313785708236>.

²¹³ Joann S. Lublin, *‘Pink Quotas’ Alter Europe’s Boards*, WALL ST. J., (Sept. 11, 2012, 8:46PM), <http://www.wsj.com/articles/SB10000872396390443696604577645470530827882>.

²¹⁴ See Claire Braund, *UK Boardrooms Still Need More Women*, THE GUARDIAN, (Sept. 25, 2012, 11:29AM), <http://www.theguardian.com/society/2012/sep/25/uk-boardrooms-need-more-women>. Australia has a similar rule.

²¹⁵ Lublin & Francis, *supra* note 212. Finland has been pushing since 2010 to increase female representation on boards. Women’s board representation is now up to 27 percent.

²¹⁶ See Dworkin et al, *supra* note 22, at 86.

²¹⁷ Loi n° 14-873 du 4 août 2014, J.O. du 15 février 2015, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832>.

²¹⁸ Matt Orsagh, *Women on Corporate Boards: Global Trends for Promoting Diversity*, CFA INSTITUTE, Sept. 24, 2014, <http://blogs.cfainstitute.org/marketintegrity/2014/09/24/women-on-corporate-boards-global-trends-for-promoting-diversity/> (last visited Feb. 5, 2015).

²¹⁹ *Id.* (citing Annick Masselot & Anthony Maymont, *Balanced Representation between Men and Women in Business Law: The French ‘Quota’ System to the Test of EU Legislation*, 3 CENTRE FOR EUR. L. LEGAL STUDIES ONLINE PAPER SERIES 1 (2014)).

²²⁰ *Id.*

²²¹ *Germany Agrees Law on Quotas for Women on Company Boards*, BBC, (Nov. 26, 2014, 1:10PM), <http://www.bbc.com/news/business-30208400>.

²²² *Id.*

²²³ *Id.*

²²⁴ Orsagh, *supra* note 218.

²²⁵ Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-executive Directors of Companies Listed on Stock Exchange and Related Measures, COM/2012/0614, (Nov. 14, 2012).

²²⁶ Aoife White, *EU Companies Face 40% Quota Rule Favoring Women on Boards*, BLOOMBERG.COM, (Nov. 14, 2012, 1:33PM), <http://www.bloomberg.com/news/2012-11-14/eu-companies-face-40-quota-rule-favoring-women-on-boards-2-.html>.

corporations.²²⁷ Corporations that do not meet the target would be required to be transparent in their hiring process by, for example, disclosing the reasons for choosing board members to unsuccessful candidates, and to favor women over equally qualified men.²²⁸

In November 2013, the European Parliament voted 459 to 148 in support of the European Commission's proposed law requiring 40 percent of nonexecutive directors to be women by 2020.²²⁹ This would require a 16.6 percent increase from the 2013 statistics.²³⁰ Small and medium-sized companies are beyond the scope of the directive and member states cannot exempt companies where women make up less than ten percent of the workforce.²³¹ The proposed directive would have to be adopted in the Council by the European Parliament and the EU member states before it can come into effect.²³² The directive is currently pending.²³³

The push for women in board positions, particularly in the Nordic countries, is contributing to leadership in other areas such as politics.²³⁴ In Sweden, women now outnumber men in government and it is considered the most gender-egalitarian country.²³⁵ Even there, though, women make up only 25 percent of corporate boards, earn 14 percent less than men, and still take 75 percent of parental leave.²³⁶ Worried that progress had stalled, women established the Feminist Initiative,²³⁷ a party that became the first to win a seat in the European Parliament on a feminist platform.²³⁸ In September 2014, it also won a seat in the Swedish parliament.²³⁹

In the EU, some see an increase in female board representation as a competitive advantage.²⁴⁰ Some international companies such as Sodexo SA, Fiat, and Logica PLC, in an effort to meet their quotas, have actively recruited U.S. women viewing it as an opportunity to gain U.S. business.²⁴¹ Despite being the most desirable candidates, only twelve percent of outside directors on the 500 largest companies' boards are female CFOs.²⁴²

²²⁷ *Id.* (quoting EU Justice Commissioner Viviane Reding). The goal is to have 2/5 women on boards by 2020. The goal would only apply to companies with 250 or more employees or global sales of over 50 million euros.

²²⁸ *Id.*

²²⁹ Press Release, European Commission, Cracking Europe's Glass Ceiling: European Parliament backs Commission's Women on Boards proposal (Nov. 20, 2013), http://europa.eu/rapid/press-release_IP-13-1118_en.htm.

²³⁰ Press Release, European Commission, Women on Boards: Share of Women up to 16.6% as European Parliament Committees back Commission Proposal, (Oct. 14, 2013). http://europa.eu/rapid/press-release_IP-13-943_en.htm); Orsagh, *supra* note 218.

²³¹ Orsagh, *supra* note 218.

²³² *Id.*

²³³ *Id.* citing *Legislative Board Diversity-Pending*, CATALYST, http://www.catalyst.org/legislative-board-diversity-pending#footnote3_7eecr98.

²³⁴ Anna Molin, *Feminist Party Gains in Europe's Model State for Equality*, WALL ST. J., Sept. 13, 2014, at A9.

²³⁵ *Id.* (citing the INSTITUTE FOR GENDER EQUALITY).

²³⁶ *Id.*

²³⁷ A quarter of its members are men. One of its biggest donors is Benny Anderson of ABBA fame. *Id.*

²³⁸ *Id.*

²³⁹ News Services, *News Swedish Winners*, SEATTLE TIMES, Sept. 15, 2014, at A2.

²⁴⁰ Teri L. Thompson, *From Pink Quotas to Pink Ghettos: Opportunities Abound*, FORBES, (Oct. 10, 2012). In 2011, Catalyst found a 26 percent difference in return on invested capital between top-quartile companies with 19-44 percent female board representation and those at the bottom with zero women directors.

²⁴¹ Lublin, *supra* note 213.

²⁴² See Maxwell Murphy, *CFO Journal: Boards Snap Up Female CFOs*, WALL ST. J., July 16, 2013, at B6. (Citing the European Union's proposal). The article also notes that in the U.S., since the passage of Sarbanes-Oxley, CFOs

B. Regulatory Reporting Approach

A second approach, previously advocated by the authors is for the SEC to amplify the disclosure requirement regarding diversity. Companies are already required to disclose whether and if so, how diversity was considered when selecting candidates for the board of directors.²⁴³ We propose that companies be required to further disclose whether gender is included in any diversity considerations. A disclosure requirement would put the issue at the forefront for consideration and may encourage companies to put diversity policies, which include gender, in place. This requirement would help signal that results could be improved with sufficient diversity as well as potential legal problems if there is none.

C. Role of Mentors and Networks

Our findings would be particularly useful to organizations and human resource managers interested in retaining female talent. Mentoring can be described as an “intense reciprocal interpersonal exchange between a senior experienced individual (the mentor) and a less experienced individual (the protégé), characterized by the type of guidance, counsel, and support provided by the mentor for the protégé’s career and personal development.”²⁴⁴ Having a mentor has implications for employees’ career advancement, and the positive association of mentoring with career outcomes for protégés makes it “a key employee development and talent management practice. . . .”²⁴⁵ Through mentoring, protégés are able to more effectively enhance their skills and more easily adapt to new work and/or non-work settings.²⁴⁶

Another helpful tool for better protégé development is networking. Networking is an alternative, yet complementary, mechanism to mentoring that provides career and moral support, advice, and personal and interpersonal resources that aid in employees’ career progression.²⁴⁷ It

are sought after for stronger financial controls, and this has benefitted women in terms of outside board membership. Today, more than 60 percent of all auditors and accountants are women.

²⁴³ Corporate Governance, 17 C.F.R. §229.407(c)(2)(vi)(2012).

²⁴⁴ Aarti Ramaswami, *A Cross-Cultural Examination of the Relationship Between Mentor-Protégé Similarity and Mentor Behavior in India and the U.S.*, 2 (May 2009) (unpublished Ph.D dissertation, Indiana University) (on file with authors). See, Raymond A. Noe, *An Investigation of the Determinants of Successful Assigned Mentoring Relationships*, 41 PERSONNEL PSYCHOL. 457, 458 (1988).

²⁴⁵ Ramaswami, *supra* note 244; Tammy D. Allen, et al., *Career Benefits Associated with Mentoring for Protégés: A Meta-Analysis*, 89 J. APP. PSYCHOL. 127 (2004) (reporting that the aggregated results of mentoring studies published between 1985 and 2004 confirm that there are measurable benefits associated with mentoring); Lillian T. Eby et al., *Does Mentoring Matter? A Multidisciplinary Meta-analysis Comparing Mentored and Non-mentored Individuals*, 72 J. VOCATIONAL BEHAV. 254, 254 (2008) (reporting that the aggregated results of mentoring research show that mentoring has a small, favorable effect on the behavior, attitudes, health, relationships, motivation, and careers of protégés); Thomas W.H. Ng, et al., *Predictors of Objective and Subjective Career Success: A Meta-Analysis*, 58 PERSONNEL PSYCHOL. 367, 367, 371 (2005) [hereinafter Ng, et al.] (considering organizational sponsorship, including the extent to which employees receive sponsorship from senior employees and supervisors, as a potential determinant of objective and subjective career success, and finding that organizational sponsorship is relatively strongly related to subjective career success).

²⁴⁶ Ramaswami, *supra* note 244.

²⁴⁷ See Suzanne M. Crampton & Jitendra M. Mishra, *Women in Management*, 28 PUB. PERSONNEL MGMT. 87 (1999); Monica L. Forret & Thomas W. Dougherty, *Networking Behaviors and Career Outcomes: Differences for Men and Women?*, 25 J. ORG. BEHAVIOR 3, 419, 420 (2004) (defining “networking behaviors” as “individuals’

is the “process of gaining advice and moral support or using contacts for information in order to become more effective in the work world.”²⁴⁸ Networking can be particularly helpful for those who did not have access to mentors early in their careers.²⁴⁹ Networking and mentoring provide similar and complementary career benefits.²⁵⁰

As discussed earlier and despite evidence to the contrary, women (regardless of marital or parental status) continue to suffer bias and negative perceptions regarding their competence and commitment to the job or career.²⁵¹ Yet, women, and men and women who are in committed relationships or with dependents, represent important sources of diversity at work.²⁵² Networking and mentoring are useful and effective mechanisms through which gender inequality in career attainment may be reduced.²⁵³ The “importance of mentors for employee career progress and

attempts to develop and maintain relationships with others who have the potential to assist them in their work or career.”)

²⁴⁸ Crampton & Mishra, *supra* note 247, at 94.

²⁴⁹ Catherine Tracey & Honor Nicholl, *Mentoring and Networking*, 12 NURSING MGMT. 28, 31 (2006) (finding that networking is especially important for some women who have not had the benefit of mentors early in their careers); William Whitely, et al., *Relationship of Career Mentoring and Socioeconomic Origin to Managers’ and Professionals’ Early Career Progress*, 34 ACAD. MGMT. J. 331, 341 (1991) (suggesting that mentoring is related to early career progress of managers and professionals). See Ronald J. Burke & Carol A. McKeen, *Training and Development Activities and Career Success of Managerial and Professional Women*, 13 J. MGMT. DEV., 53 (1994) (finding that among a sample of women mostly in the early stage of their careers, mentoring was perceived to be useful but was infrequently undertaken relative to other training and development activities).

²⁵⁰ See Forret & Dougherty, *supra* note 247, at 431 (finding that many networking behaviors are positively correlated with number of promotions obtained, total compensation, and perceived career success); Tracey & Nicholl, *supra* note 249, at 31 (arguing that mentoring and networking are alternative means to achieve the same career-related ends, and that mentoring is more appropriate to individuals in the early stage of their careers).

²⁵¹ Alexander H. Jordan, & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC APPLIED SOC. PSYCH. 474 (2012); Belle Rose Ragins, & Eric Sundstrom, *Gender and Power in Organizations: A Longitudinal Perspective*, 105 PSYCHOLOGICAL BULLETIN 51 (1989).

²⁵² EQUAL EMP’T OPPORTUNITY COMM’N, FEDERAL LAWS PROHIBITING JOB DISCRIMINATION QUESTIONS AND ANSWERS, *supra* note 2 (noting that Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 protect workers against gender discrimination and that state and municipal laws protect workers against discrimination and harassment based on status as a parent); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INT. 31, 42 (2005) (“[T]o the extent that groups are more diverse in their perspectives and approaches to problem solving, they should outperform groups with less diversity.”)

²⁵³ Forret & Dougherty, *supra* note 247, at 433 (“While engaging in networking behavior might be viewed as a promising career management strategy for women, our results show that networking behaviors are not as advantageous for women as for men.”); Margaret Linehan & Hugh Scullion, *Repatriation of European Female Corporate Executives: an Empirical Study*, 17 WOMEN IN MGMT. REV. 80 (2002) (establishing that female international managers experience more difficulties than their male counterparts in repatriation after an international assignment, and suggesting that home-based mentors and access to networks while abroad are important factors in contributing to the successful repatriation of international managers.); Aarti Ramaswami, et al., *Gender, Mentoring, and Career Success: The Importance of Organizational Context*, 63 PERSONNEL PSYCHOL. 385, 399 (2010) (“[T]he return to a mentoring relationship . . . appears greatest for women employed in male-gendered industries. . . . [W]ithin industries characterized by general levels of female underrepresentation or by aggressive, engineering-intensive, competitive, ‘up-or-out’ corporate cultures, the importance of a senior-male mentor seems high for female managers and professionals.”); Aarti Ramaswami, et al., *The Interactive Effects of Gender and Mentoring on Career Attainment: Making the Case for Female Lawyers*, 37 J. CAREER DEV. 692, 707 (2010) (reporting that “lawyers with senior male mentors had higher compensation, career progress satisfaction, and organizational position compared to lawyers with other mentors or without mentors” and reporting an interaction that suggests that “female lawyers with senior male mentors had higher career attainment than male lawyers with senior male mentors . . .”).

organizational outcomes”²⁵⁴ necessitates an examination of the role that mentoring plays in a career enhancing strategy such as networking.

In a prior study, we concluded that employers should provide mentoring for women to help open networking pathways for women to success in business.²⁵⁵ Relatedly, a 2011 study of college-educated men and women, over half of whom were in large companies, cited inadequate career development as the primary reason women have not reached the top rungs of the corporate ladder.²⁵⁶ Female managers interviewed in one study suggested “that men, as the dominant group, may want to maintain their dominance by excluding women from the informal interactions of mentoring and networking.”²⁵⁷ Some studies suggest that the impact of mentorship and networking may be greatest for women in male-dominated professions and industries.²⁵⁸ Women within these industries often have a particular need for sponsorship and legitimacy that mentorship and networking can provide.²⁵⁹ Furthermore, mentors may buffer an individual from overt and covert forms of discrimination; even discrimination they may not consciously realize exists.²⁶⁰

Utilizing the survey data described above, we found that mentoring results in higher returns for women with dependents, in terms of women benefiting from a network. We further found that organizational and social support is particularly needed for women with dependents to overcome challenges to networking. We thus advocate that firms invest more in the area of diversity training and sensitivity to the unique contingencies faced by women with dependents by establishing mentoring programs.

Conclusion

As documented above, although Title VII and the accompanying legislation and judicial rulings have made significant headway in improving the work environment for women, pathways for women to positions of leadership in organizations are still generally elusive. Our studies suggest that there are additional challenges for women with dependents.

As a society, we should want to maximize the contributions of all citizens, both at leadership levels and lower levels of organizations. Likewise, if we are to continue as a society,

²⁵⁴ Ramaswami, *supra* note 244. See also Allen, et al., *supra* note 245, at 132 (finding overall positive effects on career success for mentoring); Eby, et al., *supra* note 245, at 254 (showing, based on a meta-analysis of existing studies, that mentoring favorably affects the behavior, attitudes, health, relationships, motivation and careers of protégés); Ng, et al., *supra* note 245, at 387 (finding that organizational sponsorship of employees, including by senior employees and supervisors, is positively related to salary, promotions and career satisfaction).

²⁵⁵ See Dworkin et al., *supra* note 22, at 115.

²⁵⁶ Joann S. Lublin, *Coaching Urged for Women: Inadequate Career Development Holds Back Female Executives*, *McKinsey Says*, WALL ST. J., Apr. 4, 2011, at B8.

²⁵⁷ Margaret Linehan & Hugh Scullion, *The Development of Female Global Managers: The Role of Mentoring and Networking*, 83 J. BUS. ETHICS 29, 29 (2008).

²⁵⁸ Aarti Ramaswami, et al., *Gender, Mentoring, and Career Success: The Importance of Organizational Context*, 63 PERSONNEL PSYCHOL. 385, 386-87 (2010).

²⁵⁹ Cindy A. Schipani, et al., *Pathways for Women to Obtain Positions of Organization Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL’Y, 89, 115 (2009).

²⁶⁰ See generally Ellen A. Fagenson, *The Mentor Advantage: Perceived Career/Job Experience for Protégés Versus Non-Protégés*, 10 J. ORG. BEHAV. 309 (1989).

we should want to encourage citizens to have children. As the above study shows, women who have children are doubly disadvantaged in terms of reaching the path to higher leadership positions. Since leadership opportunity is effectively denied to a large number of our female citizens, it is time to again stretch the elastic Title VII and take steps to help remedy this type of discrimination.

In this paper, we offer three proposals to begin to achieve more cultural diversity and thus, identity. First, recognizing that unlike in the Nordic countries, quotas would not survive judicial scrutiny in the U.S. law, we advocate that in cases alleging gender discrimination, courts consider the paucity of women in leadership positions as a rebuttable presumption that discrimination has occurred. This analysis is a logical extension to the disparate impact analysis firmly established in judicial precedents. Second, we see a role for regulatory authorities. To the extent firms manage what is measured, the SEC could define diversity in the reporting requirements of public companies that are already mandated, to include gender diversity. Finally, we advocate that firms take mentoring seriously - especially given the significance of cultural similarity - it is important that leaders look beyond mentoring those who share cultural similarity and provide mentoring and networking opportunities to others as well.

We recognize that the problems are complex and elude simple solutions. We hope that our study and recommendations may prompt further research and discussion to help break the logjam in the pathway for women who seek upward mobility.

Table 2. OLS and Logistic Regression Results

Variable	Career Satisfaction N=711			Organizational Position N=708			Mentor Yes/No N=711			Benefit from Network N=705		
	β	<i>t</i>	<i>p</i>	β	<i>t</i>	<i>p</i>	B	<i>T</i>	<i>p</i>	B	<i>t</i>	<i>p</i>
Step 1. Main effects												
Service	.01	.35		.00	.02		.31	1.89		-.04	-.93	
Manufacturing	-.01	1.58		.04	-1.21		.01	.00		-.07	-1.70	
Education level	-.01	2.18	*	.04	-1.45		.22	.73		-.02	-.45	
Age	.19	5.15	*	.17	5.45	*	-.15	2.56		-.08	-1.95	*
Firm size	-.01	1.80		.53	-17.63	*	.08	1.29		-.04	-.98	
Committed relationship yes/no	.00	.00		.02	.56		-.40	1.62		-.06	-1.42	
Dependents yes/no	.00	1.55		.07	2.02	*	.38	1.90		-.03	-.58	
Respondent Gender	-.01	1.03		.06	2.09	*	-.62	6.35	*	-.04	-.93	
Share cultural background	.19	5.25	*	.09	3.23	*	.41	21.11	*	.14	3.77	**
<i>R square. Chi square</i>	.13			.43			.3278			.04		
Step 2. Two-way interactions												
Gender x Committed	-.01	-.97		.11	1.32		-.92	1.93		.10	.88	
Gender x Dependents	.00	.83		-.03	-.35		-.13	.05		-.19	-1.78	
Gender x Share cultural background	-.01	-.68		.22	2.12	*	.05	.05		.07	.50	
Committed relationship x	-.01	-.86		.00	-.01		.22	.65		-.02	-.12	

Share cultural background	3								
Dependent x Share cultural background	.06	.41	-	-.54	-	.55		-.05	-.32
<i>R square. Chi square</i>	.14		.43		36.41			.04	

Step 3. Three-way interactions

Gender x Committed relationship x Share cultural background	.75	2.14 *		.58	2.06 *	.29	.27		.47	1.28
Gender x Dependents x Share cultural background	-.36	-	1.13	.27	1.03	-	3.8 *	3 *	-.86	-2.53 **
<i>R square. Chi square</i>	.14			.44		40.62			.05	

* $p < .05$

** $p < .01$