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Inattentional Blindness: Psychological Barriers Between Legal Mandates and Progress Toward Workplace Gender Equality

Rachel J. Anderson*

* Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law; J.D. 2005, University of California, Berkeley School of Law; M.A. 2002, Stanford University International Policy Studies; Zwischenprüfung 1998, Humboldt-Universität zu Berlin. Research for this article was supported by Dean Dean Daniel Hamilton. I would also like to thank Andrew Martineau at the Wiener-Rodgers Law Library for his excellent research support. I am also appreciative of the feedback I received from participants at presentations applying this theory to various issues, including at the UNLV Cultural Competency Academy in April 2014 and September 19, 2014, UNLV Student Affairs Conference on November 14, 2014, Santa Clara Journal of International Law Symposium on February 6-7, 2015, American Association of Law Schools Workshop on Next Generation Issues on Sex, Gender and the Law in Orlando, Florida, June 24-26, 2015, and the Immigration Power 2016, August 10-12, 2015 at Culinary 226 in Las Vegas, Nevada, UNLV Women's Council Presentation on October 27, 2016.

Introduction

Inattentive blindness allows the perpetuation of workplace gender inequality. Gender inequality is contributing to the international workforce crisis causing widespread economic and other harm around the world. Currently, there is an under explained, sluggish, and in some cases imperceptible pace of change toward gender equality in the workplace despite formal legal mandates and policies. Employers, employees, and policy makers are faced with a frustrating lack of progress and an inability to ensure the success of measures to address this problem. Understanding inattentive blindness will allow employers, employees, and policy makers to achieve greater success in improving opportunities for women in the workplace and, thus, begin to turn the tide on the current workforce crisis.

The workforce crisis affects individuals, children, families, companies, nations, and international development. A large percentage of the global labor force is cumulatively losing trillions of dollars in potential income each year.¹ Companies operating domestically and internationally are losing money due to lower productivity that is caused, in part, by low levels of employee engagement and a perceived talent shortage. National economies are weakened by lower incomes and increasing debt. International development is being held back by weak national economies.

Two intertwined factors play a significant role in the workforce crisis and its persistence: gender-based workplace inequalities and gaps in perceptions of workplace inequalities and bias. Gender-based workplace inequalities contribute to and exacerbate weak recruitment and retention, lower engagement and productivity, insufficient training and mentoring, and perceived and real talent shortages. Despite formal measures to address workplace gender inequality, the pace of change remains stunningly slow. One explanatory factor for the lack of change is purposeful resistance. However, conscious defiance of laws and policies designed to promote women's workplace equality does not adequately explain the many contexts in which well-intentioned and designed efforts result only in acutely limited success.

Current measures alone have not been able to adequately accelerate the pace of progress toward workplace gender equality. At the current pace of progress we will not achieve full gender equality in the workplace for another seventy to eighty

1. See McKinsey Global Institute, *The Power of Parity: How Advancing Women's Equality Can Add \$12 Trillion to Global Growth*, 1 (Sept. 2015) ("[I]n a full-potential scenario in which women play an identical role in labor markets to men's, as much as \$28 trillion, or 26 percent, could be added to global annual GDP in 2025."), available at http://www.mckinsey.com/insights/growth/how_advancing_womens_equality_can_add_12_trillion_to_global_growth, see also Joyce P. Jacobsen, *Gender Inequality* (2011), at <http://www.copenhagenconsensus.com/sites/default/files/gender.pdf>.

years.² The total time required to achieve gender equality will be over 120 years in some countries, including the projected seventy to eighty years remaining combined with the time that has already gone by since the passage of targeted laws and legal instruments.³ More than one hundred years – longer than most people’s lifetimes – is an excruciatingly long time for approximately forty-nine percent of the world’s population to wait for fundamental rights that are guaranteed under existing laws. While it may be unreasonable to expect rights are fully implemented immediately upon being guaranteed by law, it is reasonable to expect that rights be broadly enjoyed after fifty-plus years of legal protection.

Gaps in perceptions of workplace bias and its effects contribute to inconsistent and intermittent efforts toward gender equality and even inertia or squandering of time-intensive and cost-intensive achievements. Significant gaps exist among the perception of gendered workplace inequalities by various demographic groups. In a recent survey of over 240,000 men and women, a significant majority of the women stated that they experienced “some form of exclusion” in the workforce while an even larger percentage of the men stated that they were not excluding women.⁴ This gap in perception has implications for the effectiveness of formal and informal measures to reduce gender inequalities.⁵

Gender inequality and employment discrimination are perennial problems that have been studied for decades and there is a well-developed body of literature addressing these issues, among others in feminist legal theory, employment and discrimination law, civil rights law, and international human rights law. The slow pace of progress toward workplace gender equality has been the focus of scholars, recent statements by international leaders, and reports by international and

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2. Guy Ryder, Director-General, Int’l Labour Org., Statement on the Occasion of International Women’s Day (Mar. 8, 2015), *available at* http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_348734/lang-en/index.htm (last visited Mar. 8, 2015); Oliver Cann, Director-Media Relations, World Economic Forum, 2095: The Year of Gender Equality in the Workplace, *Maybe* (2014) (“Overall gains in gender equality worldwide since 2006 are offset by reversals in a small number of countries”), *available at* <http://www.weforum.org/news/2095-year-gender-equality-workplace-maybe> (last visited Mar. 8, 2015) [hereinafter Cann, 2095: *The Year of Gender Equality*].
 3. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2007); Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, *available at* <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>
 4. See Barbara Annis & John Gray, *Are Women Being Excluded?*, HUFF POST BUSINESS (Feb. 3, 2014), *available at* http://www.huffingtonpost.com/barbara-annis/are-women-being-excluded_b_4377547.html (last visited Mar. 8, 2015) [hereinafter Annis & Gray, *Are Women Being Excluded?*].
 5. Julie Birkinshaw, Ulf Holm, Peter Thilenius, & Niklas Arvidsson, *Consequences of Perception Gaps in the Headquarters-Subsidiary Relationship*, 9 INT’L BUS. REV. 321, 328 (2000) (arguing that “perception gaps between HQ and subsidiary regarding subsidiary’s role, and the magnitude of that gap has implication for the effective management of the MNC”), *available at* http://faculty.london.edu/jbirkinshaw/assets/documents/55Birkinshaw_2000_International-Business-Review.pdf.

national bodies.⁶ Numerous challenges to and priorities for achieving full and sustainable workplace gender equality in the current context have been identified.⁷ The challenges identified include active resistance, persisting discriminatory social norms and gender stereotypes, violent conflicts, economic instability and crises, inadequate allocation of resources, underrepresentation of women in decision-making and leadership, lack of strong accountability mechanisms, and limited data to track progress.⁸ The priorities established to overcome these challenges include transforming discriminatory social norms, gender stereotypes, and the economy, increasing investments, ensuring full and equal participation in all-levels of decision-making, and strengthening accountability.⁹

This Article adds to that body of literature by using a law and psychology approach to identify ways to strengthen the administration of justice in the corporate workplace.¹⁰ Essentially, a better understanding of human behavior provides insights that are useful in crafting effective laws and improving the implementation of existing laws. The analysis of perception gaps due to inattentive blindness uncovers an under-theorized factor contributing to an enduring problem. Part I sets out the workforce crisis at the individual, company,

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6. Ryder, *supra* note 2; MATTHEW MORTON, JENI KLUGMAN, LUCIA HANMER & DOROTHE SINGER, GENDER AT WORK: A COMPANION TO THE WORLD DEVELOPMENT REPORT ON JOBS 6 (2014), available at <http://documents.worldbank.org/curated/en/2014/02/19790446/gender-work-companion-world-development-report-jobs> [hereinafter MORTON ET AL., GENDER AT WORK]; Katherine Miles & Carmen Niethammer, *Embedding Gender in Sustainability Reporting: A Practitioner's Guide* 4, GLOBAL REPORTING INITIATIVE (2009), available at <https://www.globalreporting.org/resource/library/Embedding-Gender-In-Sustainability-Reporting.pdf> ("Research on companies' reporting on gender equality found that companies rarely report much gender disaggregated data despite the inclusion of gender-related indicators in the GRI framework, and global recognition of the importance of gender equality" (citing Kate Grosser & Jeremy Moon, *Developments in Company Reporting on Workplace Gender Equality: A Corporate Social Responsibility Perspective*, 32 ACCOUNTING FORUM 179 (2008)); United Nations Office of the Special Advisor on Gender Issues and Advancement of Women, *Gender Mainstreaming: Strategy for Promoting Gender Equality* 1 (2001), available at <http://www.un.org/womenwatch/osagi/pdf/factsheet1.pdf> ("Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities - policy development, research, advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.").
 7. See, e.g., U.N. WOMEN, THE BEIJING DECLARATION AND PLATFORM FOR ACTION TURNS 20 49-57 (2015), available at http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/sg%20report_synthesis-en_web.pdf [hereinafter U.N. WOMEN, THE BEIJING DECLARATION].
 8. *Id.* at 50-54.
 9. *Id.* at 54-57.
 10. *Careers in Psychology and Law*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apadivisions.org/division-41/education/students/careers.aspx> (last visited Aug. 29, 2015) ("The field of psychology and law involves the application of scientific and professional aspects of psychology to questions and issues relating to law and the legal system."); W. EDWARD CRAIGSHED & CHARLES B. NEMEROFF, THE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY AND BEHAVIORAL SCIENCE 591 (2001) ("Psychology of the law concerns applying behavioral research strategies to legal phenomena in order to increase the administration of justice in our society.").

national, and international levels and the role of gender inequality in this crisis and the pace of change. Part II discusses perception gaps among demographic groups as to the presence and pervasiveness of workplace gender inequalities. Part III describes and uses inattention blindness theory to explain these gaps. Part IV proposes some measures to infuse new energy into the pace of progress toward workplace gender equality and reduce the workplace crisis. The Article concludes with a call to action.

I. The Workplace Crisis & the Role of Gender Inequality

A. Workplace Crisis

There is a growing global workplace crisis. Employers complain of a talent shortage, difficulty recruiting a diverse group of employees, low employee engagement and productivity, and inability to retain skilled employees. Employees complain about the lack of engagement and interest of employers in creating an inclusive work culture and environment, inadequate opportunities for advancement, and employers' insufficient allocation of resources for workforce training development.

Many employers are taking steps to address the workforce crisis.¹¹ Those steps include offering more training opportunities to existing staff (23%), expanding their recruiting practices, including targeted recruitment of women (25%), and redesigning or providing alternative working arrangements (23%).¹² However, many questions remain unanswered, including how to identify and select from among appropriate options, develop new strategies, and optimize efforts.¹³ Measures are needed that can increase the pace of progress toward gender equality, reduce the talent shortage facing employers, and promote job security and equal rights for employees.¹⁴

11. Forty-seven percent (47%) of the over 37,000 employers participating in the 2014 survey are already taking steps to address talent shortages. MANPOWERGROUP, THE TALENT SHORTAGE CONTINUES: HOW THE EVER CHANGING ROLE OF HR CAN BRIDGE THE GAP 8-9 (2014), *available at* <http://www.manpowergroup.us/campaigns/talent-shortage-2014/assets/pdf> [hereinafter MANPOWERGROUP, TALENT SHORTAGE].

12. *Id.*

13. *Id.* Forty-seven percent (47%) of the over 37,000 employers participating in the 2014 survey are already taking steps to address talent shortages.

14. See MANPOWERGROUP, TALENT SHORTAGE, *supra* note 1, at 15. See also TOWERS WATSON, GLOBAL WORKFORCE STUDY: ENGAGEMENT AT RISK: DRIVING STRONG PERFORMANCE IN A VOLATILE GLOBAL ENVIRONMENT 2 (2012), <https://www.towerswatson.com/DownloadMedia.aspx?media={D1E4CAF3-55FB-45B9-9A14-B384BF7E9A66> [hereinafter TOWERS WATSON] ("Security is taking precedence over almost everything . . . Attracting employees is now largely about security. Salary and job security top the list of what people want when considering a job, followed by opportunities to learn new skills and build a career, which are also routes to increased salary and long-term

1. *Talent Shortage*

At the same time policy makers are calling for concerted action to reduce workplace gender inequalities, employers have identified a talent shortage and are engaged in reforming their practices to address the shortage.¹⁵ A 2014 survey of over 37,000 employers in forty-two countries and territories found that thirty-six percent (36%) reported that they are facing a shortage of talent. Thirty-six percent (36%) is the highest percentage of employers reporting a talent shortage in seven years.¹⁶

The intensity of the talent shortage varies from country to country. The percentage of individual employers in each country reporting that they are having difficulty filling jobs ranges from two percent (2%) in Ireland to eighty-one (81%) in Japan.¹⁷ In the United States, forty percent (40%) of employers reported a talent shortage.¹⁸

There are six main negative effects of talent shortages, as identified by employers in the 2014 survey.¹⁹ The top 1, 2, 4, and 5 effects are reductions in companies' ability to serve clients (41%), competitiveness and productivity (40%), innovation and creativity (24%), and employee engagement and moral (24%).²⁰ The top 3 and 6 effects are increases in employee turnover (27%) and compensation costs (22%).²¹ In the same survey, a majority of employers indicated that their ability to provide good customer service would be negatively affected by the talent shortage.²² Among those employers who stated that their ability to serve clients would be decreased by the talent shortage, fifty-six percent (56%) of both global and U.S. employers said that there would be a medium to high effect.²³

2. *Recruitment*

A 2012 study of more than 32,000 full-time workers around the world identified two issues that inhibiting employers from recruiting women and ethnic minorities as job candidates.²⁴ The two issues identified are inadequate allocation of resources

security.”).

15. MANPOWERGROUP, TALENT SHORTAGE, *supra* note 11, at 4, 8-9, & 15.

16. *Id.* at 2-3.

17. *Id.* at 4.

18. *Id.*

19. *Id.* at 7.

20. *Id.*

21. *Id.*

22. *Level of Impact Talent Shortage Has on Employers' Ability to Meet Client Needs*, MANPOWERGROUP, http://www.manpowergroup.us/campaigns/talent-shortage-2014/assets/img/ts_chart7.jpg (last visited Nov. 27, 2015) [hereinafter *Level of Impact*, MANPOWERGROUP].

23. *Id.*

24. *See* TOWERS WATSON, *supra* note 14, at 4.

and managers' lack of interest in and engagement toward creating an appropriate work culture and environment.²⁵ Difficulties recruiting make it more challenging for employers to meet clients' needs. Inadequate allocation of resources for hiring can result in expensive but failed hiring processes and overburdening of existing employees, which can lead to frequent turnover. Weak recruiting can also prevent job seekers from finding suitable employment. These issues also affect engagement and productivity.²⁶

3. Engagement & Productivity

Inadequate allocation of resources and managers' lack of engagement and interest in creating an appropriate work culture and environment identified under recruitment also affect engagement and productivity.²⁷ The 2012 study found that, of the 32,000 full-time workers surveyed around the world, just under two-thirds (65%) are not highly engaged.²⁸ Slightly more than fifty percent (50%) of the employees surveyed stated that they do not believe that the leaders in their organization have "a sincere interest in employee well-being."²⁹ Low levels of employee engagement increase companies' risks of measurably decreased productivity, higher rates of absenteeism, increased rates of employee turnover, and lower quality customer service.³⁰ These effects of low engagement can decrease productivity in the short term and negatively affect overall business outcomes in the long term.³¹

4. Training & Mentoring

Training and mentoring are key ways employees develop the skills and expertise needed for professional advancement.³² According to the 2012 international study of more than 32,000 full-time workers, "opportunities to learn new skills and build a career" ranked high on the list of things employees' desire in their workplace.³³

25. *See id.*

26. *See id.*

27. *See id.*

28. *Id.* at 2. The 2012 study uses four categories to assess the sustainability of employee's engagement: highly engaged, unsupported, detached, and disengaged. *Id.* at 4. For a more in-depth discussion of the categories of employee engagement, *see id.*

29. *Id.* at 3.

30. *Id.* at 5.

31. *Id.*

32. *See* Anne Grönlund, *On-the-Job Training—A Mechanism for Segregation? Examining the Relationship between Gender, Occupation, and On-the-Job Training Investments*, 28 EUR. SOC. REV. 408, 418 (2012).

33. *See* TOWERS WATSON, *supra* note 14, at 2.

Employees are more likely to stay in positions that offer more training.³⁴ Correspondingly, a lack of training and mentoring contributes to employee dissatisfaction and higher workplace turnover.

5. *Retention*

The two issues identified under recruitment, specifically inadequate resource allocation and managers' lack of interest in and engagement toward creating an appropriate work culture and environment also negatively affect retention.³⁵ Some employers make assumptions about women's attachment to the labor force based on assumptions about their familial and child rearing obligations.³⁶ Such employers are likely to invest less in female employees in terms of wages and may also segregate women into positions that require less investment in terms of training.³⁷ This, in turn, can become a self-fulfilling prophecy as women in whom less is invested are likely to feel less attached to their place of employment. This corresponds to the results of the 2012 study of more than 32,000 full-time workers around the world that found that the overall quality of the work experience is a significant factor in retention.³⁸ Further, when women have equal wages, occupation, and other job characteristics, they are equally likely to stay with their place of employment.³⁹

B. *Gender Inequality in the Workplace*

Gender inequality in the workplace is one of the causes and exacerbating factors of the global workforce crisis. Gender inequality contributes directly to lost wages for a large percentage of the world's working population and the inability of companies to recruit and retain much-needed talent. Gender inequality also contributes indirectly to weak national economies and lagging international development.

Despite a plethora of legal interventions and documented achievements in the United States and around the world, workplace inequality persists along lines of gender, race, ethnicity, color, descent, and other legally protected categories.⁴⁰ This

34. See John M. Barron et al., *Gender Differences in Training, Capital, and Wages*, 28 J. HUM. RESOURCES 343, 351 (1993).

35. See TOWERS WATSON, *supra* note 14.

36. See Grönlund, *supra* note 32.

37. See Barron et al., *supra* note 34, at 344.

38. See TOWERS WATSON, *supra* note 14, at 3.

39. See Barron et al., *supra* note 34, at 345.

40. See NATIONAL EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 7 (2013), available at https://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_report_june_10_2013.pdf [INCLUDE CITATIONS TO VARIOUS LAWS ETC. E.G. Equal Pay Act of 1963, Civil Rights Act of 1964, various

Article uses the goal of gender equality as an issue case study and the United States as a national case study. Similar analyses could be done for other equality goals and countries.

Despite significant achievements, measures to promote gender equality in the workforce have not yet achieved their goal.⁴¹ Wage disparities, occupational segregation, and gender segregation are persistent problems.⁴² Significantly fewer women participate in the labor force than men and are often paid much less than men.⁴³ Women are disproportionately employed in jobs that are low paying, provide fewer benefits, and offer fewer opportunities for training and professional development.⁴⁴ In addition, women hold only a small percentage of the positions in corporate leadership.⁴⁵

Access to a pool of strong talent is a key factor for the success of individual companies and national economies.⁴⁶ Gender inequalities in workforce and occupational participation, earnings and income, and advancement have indirect effects in addition to the direct effects discussed above. Gender inequalities in the workplace have negative effects on several key areas: recruitment, engagement and productivity, training and mentoring, and retention. Allowing gender inequalities to persist and not investing in creating and maintaining a hospitable work environment for a large segment of the workforce contributes to a talent shortage that can have a negative effect on companies' abilities to meet client needs and achieve their overall business goals.

Gender equality in the workforce is a combination of several factors: "labor force participation, employment, [workplace] characteristics, earnings, and job quality."⁴⁷

executive orders including ones from Johnson and Obama]. Under the International Convention on the Elimination of All Forms Racial Discrimination [hereinafter "CERD"], race, colour, descent, or national or ethnic origin are all protected categories. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195, *available at* <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf>.

41. Ryder, *supra* note 2 ("In the areas of national gender equality policies, and legislation against discrimination based on sex, much has been accomplished. Nevertheless, progress on the ground remains elusive."); MORTON ET AL., GENDER AT WORK, *supra* note 6, at 6 ("[W]omen's labor force participation has stagnated around 55 percent, and actually fell by two percent- age points since 1990.").
42. Ryder, *supra* note 2.
43. *Id.*
44. *Id.*
45. *Id.*
46. Cann, 2095: The Year of Gender Equality, *supra* note 2, at 3 (quoting Klaus Schwab, Founder and Executive Chairman of the World Economic Forum, "Achieving gender equality is obviously necessary for economic reasons. Only those economies who have full access to all their talent will remain competitive and will prosper.").
47. THE WORLD BANK GROUP, GENDER AT WORK: A COMPANION TO THE WORLD DEVELOPMENT REPORT ON JOBS 1-2 (2013), *available at* http://www.worldbank.org/content/dam/Worldbank/document/Gender/GenderAtWork_web.pdf [hereinafter WORLD BANK GROUP, GENDER AT WORK].

There are a variety of ways to measure gender inequality in the workplace. For example the Gender Gap Index is a measurement tool used since 2006 by the World Economic Forum to measure the magnitude of gender inequalities on an annual basis and to compare those inequalities over time.⁴⁸

The workforce gap is captured in the Economic Participation and Opportunity sub-index, which is one of the four indices that make up the Gender Gap Index.⁴⁹ This Index separates the gender gap in the workforce into three subcategories: the participation gap, the remuneration gap, and the advancement gap.⁵⁰ The Index ranks the gaps between women and men in 142 countries on economic output indicators for participation and opportunity, specifically salaries, participation, and leadership.⁵¹ The Index uses a percentage to express how much of the gender gap between women and men has been closed.⁵² The Gender Gap Index uses five indicators that are converted to female/male ratios to measure gender inequality in economic participation and opportunity: (1) labor force participation, (2) wage equality for similar work, (3) estimated earned income, (4) legislators, senior officials, and managers, and (5) professional and technical workers.⁵³

The data for these indicators is obtained from the International Labor Organization's (ILO) Key Indicators of the Labor Market and ILO Stat online database and the World Economic Forum's Executive Opinion Survey, as well as calculations based on the United Nations Development Programme methodology.⁵⁴ This mixture of hard quantitative data (workforce participation statistics, earned income, leadership statistics, and occupational participation statistics) and more subjective qualitative data (opinion survey) contributes to the robustness of the Gender Gap Index as a measurement tool.

In setting out gender gap aspects of the global workforce crisis, this Article relies on quantitative data and qualitative surveys from several reputable sources. These include the World Economic Forum's *The Global Gender Gap Report* (2014), the World Bank Group's *Gender at Work* (2013), the U.S. National Equal Pay Task Force's *Fifty Years After the Equal Pay Act* (2013), various recent Pew Research Center opinion surveys, including *On Pay Gap* (2013), and Manpower Group's *The*

48. Klaus Schwab, *Preface to* WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT (2014), available at http://www3.weforum.org/docs/GGGR14/GGGR_CompleteReport_2014.pdf; Ricardo Hausmann, Laura D. Tyson, Yasmina Bekhouche & Saadia Zahidi, *The Global Gender Gap Index 2014*, in WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT (2014) [hereinafter Hausmann et al., *The Global Gender Gap Index*].

49. Hausmann et al., *The Global Gender Gap Index*, *supra* note 48, at 5.

50. *Id.*

51. Cann, 2095: The Year of Gender Equality, *supra* note 2, at 3-4.

52. *Id.* at 3.

53. Hausmann et al., *The Global Gender Gap Index*, *supra* note 48, at 4-5.

54. *Id.* at 4.

Talent Shortage Continues (2014).⁵⁵ Whichever measurement tool one uses, they all document aspects of the existence and persistence of gender inequality in the workplace in terms of participation, wages and income, occupations, advancement, and other metrics.

Gender inequalities in the workforce manifest in many ways, including in labor force participation, earnings, job quality, access to training opportunities, and opportunities for advancement. Gender inequalities in the workplace can be documented and measured in a variety of ways. Robust assessments of can be made using a mixture of hard quantitative data (*e.g.*, workforce participation statistics, earned income, leadership statistics, and occupational participation statistics) and more subjective qualitative data (*e.g.*, opinion surveys).

1. Workforce Participation

Around the world, the goal of gender equality in workforce participation has not yet been achieved. Globally and on a country-by-country basis, there continue to be significantly fewer women than men participating in the labor force with a few exceptions. No country has achieved parity.⁵⁶ In 2014, four countries had reverse gender gaps, meaning the number of women in the labor force exceeds the number of men: Malawi, Mozambique, Rwanda, and Burundi.⁵⁷ Of the 138 countries that have not achieved gender parity in workforce participation, only twenty-eight have managed to reduce the gender gap down to 10% or less and seventeen still have a gender gap of 50% or more.⁵⁸

In the United States, workforce participation by women in the United States has improved but gender gaps remain. In 2007-2009, women in the United States earned the same as men as personal care and service workers. However, women in the same period earned less than men in many other occupations: forty-six percent (46%) less as farmers and ranchers, thirty-six percent (36%) less as physicians and surgeons, twenty-nine percent (29%) less as accountants and auditors, ten percent

55. WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT (2014), http://www3.weforum.org/docs/GGGR14/GGGR_CompleteReport_2014.pdf [hereinafter WORLD ECONOMIC FORUM, GLOBAL GENDER GAP]; MORTON ET AL., GENDER AT WORK, *supra* note 6; WORLD BANK GROUP, GENDER AT WORK, *supra* note 47; NATIONAL EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT (2013), https://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_report_june_10_2013.pdf [hereinafter NATIONAL EQUAL PAY TASK FORCE]; PEWRESEARCHCENTER, ON PAY GAP, MILLENNIAL WOMEN NEAR PARITY – FOR NOW: DESPITE GAINS, MANY SEE ROADBLOCKS AHEAD (2013), http://www.pewsocialtrends.org/files/2013/12/gender-and-work_final.pdf [hereinafter PEWRESEARCHCENTER, ON PAY GAP]. This report is based on a survey of 2,002 adults, including 810 Millennials. *Id.* ManPowerGroup, *Talent Shortage*, *supra* note 15, at 2-3.

56. WORLD ECONOMIC FORUM, GLOBAL GENDER GAP, *supra* note 55, at 63-64.

57. *Id.* at 64.

58. *Id.*

(10%) less as registered nurses, and seven percent (7%) less as computer programmers.⁵⁹

2. Occupational Participation

Around the world, the goal of gender equality in occupational access and representation has not yet been achieved. In particular, women continue to face additional hurdles to enter the highly paid occupations.⁶⁰ Despite the inclusion of occupational gender segregation as a recognized form of discrimination recognized in the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111),⁶¹ occupational gender segregation persists.⁶² In developing countries, only five percent (5%) of women work in business-oriented sectors compared to eighteen percent (18%) of men.⁶³ Women are disproportionately over-represented in health, social work, education, and the retail sales and services sector.⁶⁴ Men are disproportionately over-represented in crafts, trades, manufacturing, communications, construction, transport[,] plant and machine operations, and managerial and legislative operations.⁶⁵ Occupational participation by women in the United States has improved but gender gaps remain.⁶⁶

3. Earnings & Income

Women tend to be paid less than men.⁶⁷ Around the world, employers continue to pay women substantially less than men on average and no country has achieved the goal of equal pay for equal work for women and men.⁶⁸ On average, women are paid ten percent (10%) to thirty percent (30%) less than men.⁶⁹ In addition, some of

59. U.S. Census Bureau, *Women in the Labor Force* (2010), available at http://www.census.gov/newsroom/pdf/women_workforce_slides.pdf.

60. NATIONAL EQUAL PAY TASK FORCE, *supra* note 55, at 7.

61. Convention Concerning Discrimination in Respect of Employment and Occupation, Jun. 25, 1958, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312256.

62. The Gender Gap Index also measures occupational segregation in the workforce through the inclusion of a ratio for professional and technical workers, specific professions not disaggregated in the Index, so they are not included here. See WORLD ECONOMIC FORUM, GLOBAL GENDER GAP, *supra* note 55, at 67.

63. WORLD BANK GROUP, GENDER AT WORK, *supra* note 47, at 2.

64. *Id.* at 2, 21 (citing GRANT THORNTON, WOMEN IN SENIOR MANAGEMENT: SETTING THE STAGE FOR GROWTH 2 (2013)).

65. *Id.* at 21 (citing INTERNATIONAL LABOUR ORGANIZATION, GLOBAL EMPLOYMENT TRENDS FOR WOMEN 25-26 (Dec. 2012)).

66. Mark Mather & Beth Jarosz, Population Reference Bureau, *The Demography of Inequality in the United States*, 69 POPULATION BULLETIN 10 (2014).

67. WORLD BANK GROUP, GENDER AT WORK, *supra* note 47, at 2.

68. WORLD ECONOMIC FORUM, GLOBAL GENDER GAP, *supra* note 55, at 63, 65.

69. WORLD BANK GROUP, GENDER AT WORK, *supra* note 47, at 2 (citing International Labor

the greatest gender wage gaps are among managers.⁷⁰ Controlling for various factors, *e.g.*, labor market experience and job characteristics, does not substantially explain the wage gap as studies have shown.⁷¹

In terms of wages, the five countries in 2014 with the smallest gap between men's and women's perceived wages indicated employers are paying women on average 17%-19% less than men.⁷² Those countries are Burundi, Mongolia, Qatar, Thailand, and Malaysia.⁷³ In the 137 remaining countries analyzed by the World Economic Forum, employers in 103 countries including the United States continue to pay women on average at least 30% less than men for similar work.⁷⁴ A significant factor in the pay gap between men and women is the lack of advancement opportunities for women.⁷⁵

In terms of estimated earned income, no country has achieved parity.⁷⁶ However, four countries have reduced the gap to less than ten percent (10%).⁷⁷ Those countries are Australia, Tanzania, Kenya, and Denmark, whereby Denmark has a reverse ratio with women earning slightly more than men.⁷⁸ In the 138 remaining countries analyzed by the World Economic Forum, employers in 121 countries – including the United States – continue to pay women on average at least thirty percent (30%) less than men.⁷⁹ Employers in forty-six (46) countries pay women at least fifty percent (50%) less than men.⁸⁰ In the remaining four countries – Pakistan, Jordan, Iran, and Algeria – employers pay women eighty-two to eighty three percent (82%-83%) less than men.⁸¹

Over the past thirty years, the gap between women's and men's earnings in the United States has decreased.⁸² In 1980, the difference between women's (\$11.94) and men's (\$18.57) median hourly wages for full-time and part-time workers age sixteen and up was thirty-six percent (36%).⁸³ The gender gap between women's and men's full-time annual earnings has also been reduced from forty-one percent (41%) in

Organization, *Global Wage Report 2008-09: Minimum Wages and Collective Bargaining, Towards Policy Coherence* (2008).

70. NATIONAL EQUAL PAY TASK FORCE, *supra* note 55, at 7.

71. *Id.* at 6.

72. WORLD ECONOMIC FORUM, GLOBAL GENDER GAP, *supra* note 55, at 65.

73. *Id.*

74. *Id.*

75. Gary Siniscalco et. al., *The Pay Gap, the Glass Ceiling, and Pay Bias: Moving Forward Fifty Years After the Equal Pay Act*, 29 A.B.A.J. LAB. & EMP. L. 395-96 (2014).

76. WORLD ECONOMIC FORUM, GLOBAL GENDER GAP, *supra* note 55, at 66.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 4.

83. *Id.*

1963 to twenty-three percent (23%) in 2011.⁸⁴ In 2012, the difference between women's (\$14.90) and men's (\$17.97) median hourly wages for full- and part-time workers age sixteen and up was sixteen percent (16%), and the difference between Millennial women and men was seven percent (7%).⁸⁵

4. *Training & Advancement*

A study based on a representative sample of Swedish employees found a significant gap between men and women in the same occupations as well as those in gender segregated occupations.⁸⁶ The study found that employers who make assumptions about women's familial plans and obligations may penalize female employees, especially younger women.⁸⁷ In addition, low participation or a lack of women in certain occupations or management positions effectively reduces the availability of mentoring opportunities for women and ethnic minorities.⁸⁸ This lack of training and mentoring harms women's opportunities for advancement.⁸⁹

Companies do not promote women to senior management positions at the same rate as men, resulting in women holding fewer higher positions in companies.⁹⁰ Around the world, women hold only twenty-four percent (24%) of senior management positions.⁹¹ In addition, women are very underrepresented on corporate boards and as Chief Operating Officers.⁹² In 135 countries, women hold top management positions in 2,340 (18%) out of 13,000 firms.⁹³ Among the 13,000 firms surveyed in 135 countries, 1,300 (10%) have female management and men

84. See NATIONAL EQUAL PAY TASK FORCE, *supra* note 55, at 6.

85. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 4. The report indicates that the twenty-five percent (25%) increase in women's median hourly wage is due primarily to increases in women's education, labor force participation, and presence in more higher-paying occupations. *Id.* at 4-5. The report also indicates that the decreasing wage gap can be attributed in part to a four percent (4%) decrease in men's median wages from 1980 to 2012. *Id.* at 4.

86. See Grönlund, *supra* note 32, at 408.

87. *Id.* at 418.

88. Transit Research Board of the National Academies, *Building a Sustainable Workforce in the Public Transportation Industry—A Systems Approach*, 162 TRANSIT COOPERATIVE RESEARCH PROGRAM I-5-6 (2013), http://www.tcrponline.org/PDFDocuments/tcrp_rpt_162.pdf.

89. See Grönlund, *supra* note 32 (The training-deficit manifestations of companies' gender segregation and discrimination practices continue to harm women's prospects for competitive career advancement through skill upgrading).

90. The Gender Gap Index also measures advancement in the workforce through the inclusion of managers in its leadership statistics, but statistics on managers are not disaggregated in the Index so they are not included here. See WORLD ECONOMIC FORUM, GLOBAL GENDER GAP, *supra* note 55, at 67. See also Siniscalco et al., *supra* note 75, at 396-97.

91. WORLD BANK GROUP, GENDER AT WORK, *supra* note 47, at 2.

92. *Id.* at 22.

93. *Id.* See also *Women in S&P 500 Companies*, CATALYST (Oct. 13, 2015), <http://www.catalyst.org/knowledge/women-sp-500-companies>.

manage ninety percent (90%).⁹⁴ Women hold eleven percent (11%) of the board positions at 4,322 companies in thirty-four industrialized and emerging markets, and men hold eighty-nine percent (89%).⁹⁵ The percentage of women who advance to managerial positions in the United States has increased from approximately fifteen percent (15%) in 1960 to approximately forty percent (40%) in 2009.⁹⁶ However, as this data indicates, this improvement has not yet closed the gender gap.

5. Experiences of Gender Discrimination

Fourteen percent (14%) of adults in the United States say they have personally experienced gender discrimination in the workforce; eighteen percent (18%) of women and ten percent (10%) of men.⁹⁷ Twenty percent (20%) of blacks, thirteen percent (13%) of whites, and twelve percent (12%) of Hispanics report at least one personal experience as the victim of gender discrimination in the workplace.⁹⁸ Two even more discriminated demographic groups reporting are Black men report gender discrimination in the workplace at twenty-five percent (25%) and Baby Boomer women at twenty-three percent (23%).⁹⁹

6. Harms Resulting from Gender Bias and Discrimination

Many people in the United States who experienced gender bias in the workplace report negative effects on their career.¹⁰⁰ Forty-three percent (43%) of people who indicated they were victims of discrimination “report that it has had a negative impact on their career.”¹⁰¹ Of the people reporting negative career effects of gender discrimination, approximately seventy-five percent (75%) indicated that the negative effect was significant and approximately twenty-five percent (25%) indicated that it was a small effect on their career.¹⁰²

94. WORLD BANK GROUP, *supra* note 10, at 2. *See also Women in S&P 500 Companies, supra* note 99.

95. WORLD BANK GROUP, GENDER AT WORK, *supra* note 47, at 22.; *2013 Catalyst Consensus: Fortune 500 Women Executive Officers and Top Earners*, CATALYST 1 (Dec. 10, 2013), http://www.catalyst.org/system/files/2013_catalyst_census_fortune_500_women_executive_officers_top_earners.pdf.

96. NATIONAL EQUAL PAY TASK FORCE, *supra* note 55, at 6.

97. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 47.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* There is a gender gap in the significance of the effect of the gender discrimination but the differences are not statistically significant and so are not included here. *See id.*

102. *Id.*

C. *Pace of Progress*

Workplace gender inequality exists in every country around the world and is harming individual employees, companies, national economies, and international development. Over the past decade, gender equality in the workplace has improved only slightly.¹⁰³ Estimates suggest that, if this pace is maintained, another 70-80 years will be required before gender equality can be achieved.¹⁰⁴ That means a total of over 120 years to achieve gender equality post-passage of targeted laws and legal instruments.¹⁰⁵

The magnitude of the time needed to secure equality – rights already guaranteed by law – seems even longer when compared to just a few of the achievements of the past fifty years. In the last fifty years alone, at the same time progress crawled sluggishly forward toward gender equality in the legal arena, dramatic progress was made in other fields like the medical and technology fields.¹⁰⁶ Achievements over the past fifty years include cassette tapes, CDs, cell phones, text messaging, home computers, laptops, non-invasive laser and robotic surgery, bypass surgery, pacemakers, bionic eyes, men on the moon, animal cloning, all-electric cars, identification of all of the 20,000 to 25,000 genes in human DNA, and the International Space Station to name a few.¹⁰⁷

Existing theory and practice have produced significant advancements. However, the current pace is too slow, progress is stagnating, and experts predict that we are at a critical turning point between continuing forward momentum and losing the progress already made. We need to assess and reform existing measures, develop and implement new approaches, and prioritize the pace of progress in addition to the end-goal of gender equality in the workplace.

Although countries around the world have progressively abolished legalized discrimination and passed new gender equality laws, progress toward gender equality in the workplace has been slow.¹⁰⁸ If this pace decreases or even reverses, gender equality in the workplace could be 100 years away or more. In some cases

103. Cann, 2095: The Year of Gender Equality, *supra* note 2, at 1 (“Overall gains in gender equality worldwide since 2006 are offset by reversals in a small number of countries.”)

104. *Id.* (“According to the Global Gender Gap Report 2014, launched today, the gender gap for economic participation and opportunity now stands at 60% worldwide, having closed by 4% from 56% in 2006 when the Forum first started measuring it.”); Ryder, *supra* note 2.

105. *Id.*

106. *15 Influential Innovations of the Past 50 Years*, CNBC, <http://www.cnbc.com/id/44504579/page/1> (last visited Apr. 5, 2015); *The Top 50 Scientific Achievements*, DAILYMAIL.COM <http://www.dailymail.co.uk/news/article-128375/The-50-scientific-achievements.html> (last visited Apr. 5, 2015).

107. *15 Influential Innovations of the Past 50 Years*, *supra* note 112; *The Top 50 Scientific Achievements*, *supra* note 112.

108. U.N. WOMEN, THE BEIJING DECLARATION, *supra* note 7, at 9.

progress toward gender equality has stalled and in other cases prior achievements are being lost.¹⁰⁹ This sluggish progress can have discouraging effects on ongoing efforts toward workplace gender equality and there is a concurrent danger of losing the achievements that have been made so far.¹¹⁰

II. Gaps in Perception & Engagement

Despite the calls to action by international and national policy-makers and the changing mindset of employers faced with a growing talent shortage, perceptions of gender inequalities differ significantly among different demographic groups.¹¹¹ One explanation for these differences is a lack of shared values, *e.g.*, resistance from people who are actively opposed to gender equality as identified in the report by U.N. Women mentioned in the introduction to this Article.¹¹² However, there is also an arguably much larger group of people for whom gender inequality in the workplace is not on their radar. In light of the fact that almost every adult on the planet has a connection to the workforce at some point in his or her lives, it might be surprising that perceptions could differ so dramatically about a pervasive, well-documented, and theorized issue.¹¹³

A recent survey on gender issues revealed differences in the perceptions of workplace gender equality and inequality between the men and women who participated in the survey.¹¹⁴ More than 240,000 men and women around the world were surveyed and over 100,000 quantitative and qualitative statements were

109. *Id.* at 6.

110. MORTON ET AL., GENDER AT WORK, *supra* note 6, at 6 (“[W]omen’s labor force participation has stagnated around 55 percent, and actually fell by two percent- age points since 1990.”) (last visited Mar. 8, 2015); Cann, 2095: The Year of Gender Equality, *supra* note 2, at 1 (“[W]ith all else remaining equal, it will take 81 years for the world to close this [gender] gap completely.”).

111. The authors describe these contradictory statements as resulting from “gender blind spots.” BARBARA ANNIS & JOHN GRAY, WORK WITH ME: THE 8 BLIND SPOTS BETWEEN MEN AND WOMEN IN BUSINESS 35 (2013) [hereinafter ANNIS & GRAY, WORK WITH ME]. This Article relies on data from numerous studies of employers, employees, and public perception. Data on public opinions is taken from studies by nonpartisan U.S. fact tanks that “conduct public opinion polling, demographic research, media content analysis[,] and other data-driven social science research” like the PewResearchCenter. *About Pew Research Center*, PEWRESEARCHCENTER, available at <http://www.pewresearch.org/about/> (last visited Apr. 4, 2015). This Article prioritizes the use of recent data, specifically data collected within the decade preceding the publication of this article. This Article focuses primarily on gender and also contextualizes gender with references to race and ethnicity and other demographic groupings.

112. U.N. WOMEN, THE BEIJING DECLARATION, *supra* note 7, at 50-54.

113. Ronald L. Jacobs & Joshua D. Hawley, *The Emergence of Workforce Development: Definition, Conceptual Boundaries and Implications*, in INTERNATIONAL HANDBOOK OF EDUCATION FOR THE CHANGING WORLD OF WORK 2546 (Rupert Maclean & David Wilson eds., 2009).

114. BARBARA ANNIS & JOHN GRAY, WORK WITH ME: THE 8 BLIND SPOTS BETWEEN MEN AND WOMEN IN BUSINESS 35 (2013) (hereinafter “ANNIS & GRAY, WORK WITH ME”) (citing Barbara Annis & Associates, Gender Survey (2005-2012)); Annis & Gray, *Are Women Being Excluded?*, *supra* note 4.

collected.¹¹⁵ As mentioned above, over eighty percent (80%) of women surveyed said “they feel some form of exclusion” while “[n]inety-two percent [(92%)] of men [said they] don’t believe that they’re excluding women[.]”¹¹⁶ These differences are not uncommon and understanding them helps explain varying levels of commitment to and success of measures to reduce gender inequality.

A. Own Workplace Perceptions of Equality & Inequality

Progress has been made toward gender equality in the workplace in the United States but gendered inequality persists.¹¹⁷ Seventy-five percent (75%) of men and seventy-three percent (73%) of women report approximately the same wages and opportunities for advancement to top positions at their workplace.¹¹⁸ Progress also has made in opportunities for advancement with fifteen percent (15%) of women and seventeen percent (17%) of men employed in managerial positions.¹¹⁹

However, others in the United States report gender inequality at their workplace. Ten percent (10%) of working men and women say that women are paid less than men at their workplace.¹²⁰ Fourteen percent (14%) of working men and women report that women at their workplace have fewer opportunities for promotion or advancement.¹²¹ Among Fortune 500 and Fortune 1000 CEO positions, women hold less than five percent (5%) of the positions in either category and men hold ninety-five percent (95%) of the positions in both categories.¹²²

B. Gender Gap in Perceptions of Workplace Gender Equality

Although seventy-one percent (71%) of people surveyed in the United States believe that more changes are needed to achieve gender equality in the workplace, this perception varies between men and women.¹²³ The gender gap is approximately fourteen percent (14%): seventy-seven percent (77%) of women and sixty-three

115. ANNIS & GRAY, WORK WITH ME, *supra* note 114, at 35; Annis & Gray, *Are Women Being Excluded?*, *supra* note 4.

116. ANNIS & GRAY, WORK WITH ME, *supra* note 114; Annis & Gray, *Are Women Being Excluded?*, *supra* note 4.

117. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 9.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (citation omitted).

123. PEWRESEARCHCENTER, WOMEN AND LEADERSHIP: PUBLIC SAYS WOMEN ARE EQUALLY QUALIFIED, BUT BARRIERS PERSIST 38 (2015), http://www.pewsocialtrends.org/files/2015/01/2015-01-14_women-and-leadership.pdf [hereinafter PEWRESEARCHCENTER, WOMEN AND LEADERSHIP]. The data in this study is based on two surveys conducted in 2014; one survey of 1,835 adults (921 women and 914 men) and a second survey of 1,004 adults. *Id.* at 1.

percent (63%) of men.¹²⁴ This gap is even more pronounced among people with college degrees: eighty-one percent (81%) of women and sixty percent (60%) of men.¹²⁵

C. Racial & Ethnic Gap in Perceptions of Workplace Gender Equality

There is a significant racial and ethnic gap in perceptions of gender equality in the United States.¹²⁶ Eighty-five percent (85%) of blacks, sixty-four percent (64%) of Hispanics, and sixty three percent (63%) of whites think more change is needed to achieve gender equality.¹²⁷ Eighty-six percent (86%) of black women, seventy percent (70%) of white women, and sixty-three percent (63%) of Hispanic women believe we have not yet reached gender equality.¹²⁸ Eighty-three percent (83%) of black men, sixty-four percent (64%) of Hispanic men, and fifty-six percent (56%) of white men believe more change is needed.¹²⁹

The gender gap in perceptions of workplace equality is not unique. A similar gap exists in relation to perceptions of racial equality in the workplace in the United States.¹³⁰ The black-white perception gap as to whether blacks are treated less fairly on the job or at work is even more pronounced at approximately thirty-eight percent (38%).¹³¹ Fifty-four percent (54%) of blacks and sixteen percent (16%) of whites believe that blacks are not treated equally in the workplace.¹³²

D. Urban-Rural Gap in Perceptions of Workplace Gender Equality

Perceptions of fair treatment of blacks in the workplace differ among urban-rural communities in the United States.¹³³ The urban-rural gap is approximately twelve percent (12%): thirty percent (30%) of people living in an urban setting believe that blacks are treated less fairly on the job or at work and eighteen percent (18%) of people living in a rural setting share this belief.¹³⁴

124. *Id.*

125. *Id.*

126. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 28.

127. *Id.*

128. *Id.*

129. *Id.*

130. Eileen Patten, *The Black-White and Urban-Rural Divides in Perceptions of Racial Fairness*, PEWRESEARCHCENTER (Aug. 28, 2013), <http://www.pewresearch.org/fact-tank/2013/08/28/the-black-white-and-urban-rural-divides-in-perceptions-of-racial-fairness/> [hereinafter Patten, *Racial Fairness*]. The data in this study is based on a survey of 376 blacks, 1,471 whites, 750 people who live in urban areas, and 1,021 people who live in rural areas. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

E. Generational Gap in Perceptions of Workplace Gender Equality

Women in every generation are more likely than men to believe that more change is needed in the United States to achieve equality in the workplace.¹³⁵ The gender gap in the perception of inequality in the workplace is highest for Millennials at eighteen percent (18%), followed by Baby Boomers at eleven percent (11%), with Generation Xers showing the smallest gender gap at seven percent (7%).¹³⁶

There is some variation among women and men in different generations in the United States. Among Millennials (born after 1980), seventy-five percent (75%) of women and fifty-seven percent (57%) of men believe more change is needed.¹³⁷ Sixty-eight percent (68%) of women and sixty-one percent (61%) of men in Generation X (born 1965 to 1980) do not believe that we have achieved workplace equality.¹³⁸ In the Baby Boomer Generation (born 1946 to 1964), seventy-seven percent (77%) of women and sixty-six percent (66%) of men believe that more change is needed to achieve gender equality in the workplace.¹³⁹

Overall, although they were born and entered the workforce after the passage of laws made gender discrimination illegal, sixty-seven percent (67%) of women and men believe there is still gender-based inequality in the workplace.¹⁴⁰ The gender gap regarding pay inequality is approximately twelve percent (12%) among Millennials: sixty percent (60%) of women and forty-eight percent (48%) of men believe men generally earn more than women for the same work.¹⁴¹ The gender gap regarding unequal access to top positions among Millennials is approximately twelve percent (12%): fifty-eight percent (58%) of women and forty-six percent (46%) of men believe it is easier for men to get top positions.¹⁴²

F. Experiential Gap in Perceptions of Workplace Gender Equality

There are gender gaps in perceptions of workplace gender equality around the world. In a survey of 48,643 people in forty-four countries, men in thirty-two countries “are significantly *more* likely than women to say gender is *very* important to get ahead.”¹⁴³ This gender gap is larger in emerging and developing economies

135. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 7.

136. *Id.*

137. *10 Findings About Women in the Workplace*, PEWRESEARCHCENTER (Dec. 11, 2013), <http://www.pewsocialtrends.org/2013/12/11/10-findings-about-women-in-the-workplace/> [hereinafter, *10 Findings*].

138. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 7.

139. *Id.*

140. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 1.

141. PEWRESEARCHCENTER, ON PAY GAP, *supra* note 55, at 1; *10 Findings*, *supra* note 137.

142. *Id.*

143. PEWRESEARCHCENTER, EMERGING AND DEVELOPING ECONOMIES MUCH MORE OPTIMISTIC THAN RICH COUNTRIES ABOUT THE FUTURE: EDUCATION, HARD WORK CONSIDERED KEYS TO SUCCESS,

than in advanced economies.¹⁴⁴

III. Inattentional Blindness in the Workplace

Inattentional blindness can explain some of these differences in perception. Although it is a significant explanatory factor for gaps between law, procedures, rules and actual human behavior, inattentional blindness has not received much attention in legal scholarship.¹⁴⁵ The exploration of the intersection of law and inattentional blindness offers many rich opportunities to explain the effectiveness or ineffectiveness of law-related measures intended to affect human behavior.

Despite the paucity of legal scholarship that directly addresses inattentional blindness, inattentional blindness can be set into the context of theoretical approaches that include unconscious bias, selective attention, implicit bias, intentional blindness,¹⁴⁶ and willful blindness.¹⁴⁷ However, although inattentional blindness is in the same family as these approaches, it occupies its own distinct place.

A. *Inattentional Blindness*

Inattentional blindness is “an error of perception result[ing] from a lack of attention to an unexpected object....”¹⁴⁸ People “tend not to notice unexpected [information], even when the [information is] salient, potentially important, and appear[s] right where they are looking” if it “fall[s] outside of [their] current focus of attention.”¹⁴⁹

BUT INEQUALITY STILL A CHALLENGE 10 (2014), <http://www.pewglobal.org/files/2014/10/Pew-Research-Center-Inequality-Report-FINAL-October-17-2014.pdf> (emphasis in original) [hereinafter PEWRESEARCHCENTER, INEQUALITY STILL A CHALLENGE]. The data in this report is based on a survey of 48,643 people in forty-four countries. The countries addressed in the survey are Argentina, Bangladesh, Brazil, Chile, China, Columbia, Egypt, El Salvador, France, Germany, Ghana, Greece, India, Indonesia, Israel, Italy, Japan, Jordan, Kenya, Lebanon, Malaysia, Mexico, Nicaragua, Nigeria, Pakistan, Palestinian Territories, Peru, Philippines, Poland, Russia, Senegal, South Africa, South Korea, Spain, Tanzania, Thailand, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States, Venezuela, and Vietnam. *Id.* at 17-29.

144. *Id.*

145. There is only limited mention of inattentional blindness in the U.S. Law Reviews database on Westlaw. A search performed in Spring 2015 turned up forty-two articles that mention inattentional blindness. Of these articles, there were a few articles on inattentional blindness in the context of personal injury torts and witness reliability, one article on inattentional blindness towards arbitration clauses in consumer contracts, and no articles on inattentional blindness and employment discrimination.

146. *See generally* Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (discussing intentional blindness).

147. *See generally* MARGARET HEFFERNAN, *WILLFUL BLINDNESS* (2011) (discussing willful blindness).

148. CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US* 6 (2011) (citation omitted).

149. *Id.* at 7.

In the case of inattention blindness, the behavior, object, or other information is fully visible and people would readily see it if they are looking for it but they do not because their attention is focused on something else. Inattention blindness does not result from a characteristic of the behavior, event, object, or other information. The key factors in occurrences of inattention blindness are: unexpected, fully visible, and attention focused on something else.

One of the most famous inattention blindness examples and experiments is the invisible gorilla.¹⁵⁰ In this experiment, people are asked to watch a short video in which people on a basketball court are passing basketballs to each other.¹⁵¹ The observers are asked to keep a count in their heads of “the number of passes made by the players wearing white while ignoring any passes by the players wearing black.”¹⁵² While the players are passing the basketballs back and forth, a person in a gorilla suit walks onto the court, thumps its chest, and walks back off of the court.¹⁵³

Most people would probably expect that anyone, or more likely everyone, would notice if a gorilla walked out into the middle of action on a basketball court.¹⁵⁴ A survey of a representative example of 15,000 American adults, who “matched the entire U.S. population in gender, age, and regional distribution,” carried out in June 2009 “found that more than [seventy-five] percent [(75%)] of people [believed] that they would notice ... unexpected events, even when they were focused on something else.”¹⁵⁵ However, when this experiment was done at Harvard, approximately fifty percent (50%) of the observers failed to notice the gorilla, hence, the “invisible” gorilla.¹⁵⁶

From this experiment, psychologists deduced that people fail to notice a lot of very obvious things going on right under their nose.¹⁵⁷ In a lab test using an eye tracker, researchers found that “subjects who failed to notice the gorilla had spent, on average, a full second looking right at it – the same amount of time as those who did see it!”¹⁵⁸ They also concluded that people are completely unaware that they are missing anything and surprised by just how much they are missing.¹⁵⁹ Some

150. The original study, which earned the authors an Ig Nobel Prize in 2004, was published in 1999 by Christopher Chabris and Daniel Simons, under the title *Gorillas in Our Midst*, in PERCEPTION (1999); see also CHABRIS & SIMONS, *supra* 148, at 5-8.

151. CHABRIS & SIMONS, *supra* 148, at 5.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 7 (citation omitted).

156. *Id.* at 5.

157. *Id.* at 7.

158. *Id.* at 13.

159. *Id.* at 7.

subjects experienced absolute denial that there had been anything for them to miss and others even accused the researchers of engaging in a slight of hand, which they had not.¹⁶⁰

Understanding how inattentional blindness works can help explain why some people might not be aware of gender inequalities and practices that perpetuate inequality even if they are looking right at them. It helps explain how some people could see gender inequalities while others could not only not see the inequality but also deny that it exists without any insidious intent even though they are looking at exactly the same behaviors and data.

Further, because the unnoticed behavior, events, objects, or other information fall below a person's or people's subjective awareness threshold, they are not only unable to report or address issues but they have significant doubts about whether an issue exists or the magnitude of an issue. However, insidiously, even if inattentional blindness prevents someone from noticing a behavior, event, object, or other information, that does not prevent the unnoticed behavior, event, object, or other information, from influencing the observer's perception or behavior.

Naturally, the magnitude of behaviors, events, objects, or other information that goes unnoticed due to inattentional blindness varies. In some cases, it may be merely a drip. But even drips vary in terms of the potential harm and havoc they can cause. A drip in a sink from a leaky faucet certainly presents less of a cause for concern than a drip in the wall due to a cracked pipe, or a drip that comes in through the ceiling every time it rains, or a drip that is due to an unnoticed but very large pool of water that has built up in an attic. The unnoticed behavior, event, object, or other information could also have gone on unnoticed for some time and have developed into a geyser that has begun to intermittently gush or burst out with real force. If behaviors, events, objects, or other information go unnoticed too long, they may even develop into gushers with a lot of water flowing steadily and that no longer requires an impetus to keep it moving – the laws of physics keep it flowing until there is an intervention to stop it.

IV. Reducing Inattentional Blindness in the Workplace

Efforts toward gender equality efforts should be aligned with corporate social responsibility (CSR) so they can be integrated into existing efforts. From a CSR perspective, reducing workplace gender inequalities furthers alignment with globally shared principles and values, including compliance with law and alignment with international commitments to promote equal rights. This also improves revenue generation and strengthens competitive advantages. Gender equality offers

160. *Id.* at 7.

societal benefits, *e.g.*, it is fundamental to poverty reduction and climate change policies. From an economic perspective, the business case for gender equality can be summarized as enhancing recruitment, retention, performance, and reputation.¹⁶¹

Strengthening organizational cultures by providing incentives and accountability to promote individual and group awareness and action can help address inattentive blindness. This can help by creating and refining institutional structures, initiative, and accountability measures on an ongoing basis. To achieve these goals, this Article proposes the following measures: integration of gender values in organizations' formal and informal culture, values, and corporate-level policies; awareness raising, common language, and shared attitudes; (re-)training and certification with periodic renewal; collection, evaluation, and dissemination of data; and establishing accountability at executive and lower levels for promoting gender values throughout all organizational activities.

A. Measures to Reduce Inattentive Blindness

Remedying inattentive blindness to allow more people to see existing gender inequalities requires repeated, daily awareness raising and practice looking for and expecting gender inequalities.¹⁶² It is not sufficient to raise awareness through one-time or irregular training.¹⁶³ Expectations are a significantly factor influencing the likelihood of inattentive blindness.¹⁶⁴ Expectations also reset almost completely unconsciously if we do not regularly look for and expect the behavior or information to which we have been previously inattentively blind.¹⁶⁵ Looking is necessary but not sufficient for seeing; the unexpected behavior or information must be made to be less unexpected.¹⁶⁶ Increasing people's familiarity with gender inequalities by establishing commonalities with other things and patterns people view as familiar is likely to reduce inattentive blindness and allow people to better see gender inequalities.¹⁶⁷ In addition, raising awareness about "mistaken beliefs about attention" is important because otherwise people will fail to question their own perceptions when confronted with contradictory perceptions of others.¹⁶⁸

161. Lisa Warth, *Gender Equality and the Corporate Sector*, 2009.4 UNCE DISCUSSION PAPER SERIES 3-5, (2009), http://www.unece.org/fileadmin/DAM/oes/disc_papers/ECE_DP_2009-4.pdf.

162. *See* CHABRIS & SIMONS, *supra* note 148, at 16.

163. *Id.* at 16.

164. *Id.*

165. *Id.*

166. *Id.* at 17 ("There is one proven way to eliminate inattentive blindness, though: Make the unexpected object or event less unexpected.")

167. *See Id.*

168. *Id.* at 21.

Most people are unaware of the limits on their attention and, without an openness and willingness to consider that others may see what they have not, many people will continue to deny that gender inequalities exist.¹⁶⁹ Even when they are looking, they cannot assume that they will always see everything there is to see. Finally, “[e]xpertise can help [people] notice unexpected events, but only when the event happens in the context of [their] expertise.”¹⁷⁰ However, “[o]nly becoming aware of the illusion of attention can help us to take steps to avoid missing what we need to see.”¹⁷¹

Therefore, a comprehensive approach should be implemented. The goals of the comprehensive approach are to: allow flexibility for companies to be responsive to their specific environment and workforce; and to include and promote a range of measures.¹⁷² To achieve these goals, this Article proposes the following measures: support for awareness campaigns and training programs, incentivize and reward voluntary target setting, initiatives, and disclosure, develop certification programs for the collection of data on gender equality, and collect data on information dissemination.

A cost-effective method to raise awareness of inattentive blindness involves training that incorporates a series of self-evaluation questions. These questions can provide employers and employees with a common language as well as tools that can be implemented in a variety of contexts. They can be implemented in a checklist format as well as on an ad hoc basis.

Contexts in which employers and employees should be mindful of unconscious bias include:

1. Communicating with others
 - a. Speaking with subordinates, clients, and people with equal status
 - b. Listening to people’s ideas and suggestions
 - c. Giving performance reviews
2. Recruiting employees
 - a. Making hiring decisions
 - b. Interviewing job applicants

169. See *id.* at 24.

170. *Id.* at 33.

171. *Id.* at 41.

172. Jee-Peng Tan et al., *Workforce Development in Developing Countries: A Framework for Benchmarking*, THE WORLD BANK GROUP (Jan. 10, 2010), http://siteresources.worldbank.org/EDUCATION/Resources/278200-1290520949227/WfD_Benchmarking_Framework.pdf (citing *Development Strategies That Work*, UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL (June 16, 2015), <http://webapps01.un.org/nvp/frontend!polCat.action?id=36>).

3. Allocating resources
 - a. Mentoring employees (or not!)
 - b. Giving people training opportunities (or not!)
4. Workplace decisions
 - a. Deciding unit policy
 - b. Making job assignments
 - c. Making promotional choices
 - d. Granting or denying requests
 - e. Enforcing rules (or not!)

Examples of questions that employers, managers, and employees can ask themselves to reduce inattentive blindness and uncover bias in their own actions include:

1. Do you feel an affinity to faculty, staff, administrators, or students who share a commonality with you like attending the same undergraduate school or reminding you of someone you know and like? How often does this occur with people you perceive as different?
2. Do you engage in “conformational behavior” by making decisions that generally conform to beliefs you already have? How often do you come to conclusions about people you perceive as different that are contrary to your first impression?
3. Do you tend to micro-manage people you perceive as different? How often do you do this with people you perceive as similar to you?
4. Have you made insulting statements or spoken to people you perceive as different in a tone that you might also use for a misbehaving child? How often do you do this with people you perceive as similar to you?
5. Have you publicly humiliated people you perceive as different? How often do you do this with people you perceive as similar to you?
6. Have you ever been in a situation when you were meeting with people you perceive as different and you were more preoccupied with the telephone, email, or documents on the desk that the person in front of you? How often do you do this with people you perceive as similar to you?
7. How often do you not return phone calls or emails of people you perceive as different? How often do you not return phone calls or emails of people you perceive as similar to you?

8. How often do you speak harshly to people you perceive as different? How often do you speak harshly to people you perceive as similar to you?
9. How often do you fail to acknowledge the efforts to speak in a meeting of people you perceive as different? How often do you fail to acknowledge the efforts to speak in a meeting of people you perceive as similar to you?

Examples of questions that employers, managers, and employees can use to reduce inattentive blindness and uncover bias (whether conscious or unconscious) in actions include:

1. Do you fail to challenge negative terminology about your own group or use negative terminology when speaking about others?
2. Do you take time to make sure you are speaking and acting appropriately by asking yourself: "Would I want someone to use a similar expression about me?"
3. Do you review your decisions from time-to-time to determine whether your decisions seem different toward people of different ethnicities, genders, physical abilities, or sexual orientations?
4. Do you evaluate from time to time whether your perceptions about people with different ethnicities, genders, physical abilities, or sexual orientations are influenced by your background of comfort with them based on some kind of affinity, *e.g.*, whether they remind you of yourself?
5. Do you identify, support, and collaborate with effective programs that increase diversity in your company or institution as a whole?
6. Have you been in a situation and not spoken up when, *e.g.*, a racial minority made a suggestion that was completely ignored and then someone else made the same or a similar statement a few minutes later and was recognized for their contribution?
7. Have you ever been in a situation when you were meeting with someone you perceive as different from you and you were more preoccupied with the telephone, email, or documents on the desk that the person in front of you?
8. Do you look for, identify, and take steps to remedy and prevent micro-inequities that happen in your company or institution as a whole?

B. Sustainable Workforce Development

Efforts toward reducing inattentive blindness should target sustainable

workforce development and aim to reduce gender inequalities in the workplace.¹⁷³ In this context, a focus on sustainability should shift the emphasis from measures to outcomes.¹⁷⁴ Although it is often used in the environmental context, sustainability is also applied to the workforce in the corporate and employment contexts. However, in those contexts the focus is often on the sustainability of the availability of the labor resources and skills that are needed by business. In the workforce context, sustainability takes the form of practices, cultures, and processes that promote increased individual employability via knowledge and skills training, improved employee productivity, and employers' ability to meet need for skills.¹⁷⁵ In terms of gender equality, we could think of this as practices, cultures, and processes that promote gender equality via knowledge and skills training, improved employee awareness, and employers' ability to provide appropriate support for relationships, offer incentives, and ensure accountability. Another way to think about this is as mainstreaming gender and balancing efforts to achieve gender equality today without undermining the long-term maintenance of gender equality in the future.

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173. Jacobs and Hawley, *supra* note 121, at 2543 (“Workforce development is the co-ordination of public and private sector policies and programmes that provides individuals with the opportunity for a sustainable livelihood and helps organizations achieve exemplary goals, consistent with the societal context.”). *See id.* at 2542-43, for a literature review of definitions of workforce development. *See also* Ronald L. Jacobs, Ph.D, *Understanding Workforce Development: Definition, Conceptual Boundaries, and Future Perspectives*, UNIVERSITY OF MANITOBA (October 17-19, 2002), <http://umanitoba.ca/unevoc/2002conference/text/papers/jacobs.pdf> (discussing future implications; “reconciling different sets of goals is a defining feature of an integrated perspective of workforce development.”).
174. Daniel C. Esty, Marc Levy, Tanja Srebotnjak, & Alexander de Sherbinin, *2005 Environmental Sustainability Index: Benchmarking National Environmental Stewardship*, YALE CENTER FOR ENVIRONMENTAL LAW & POLICY, available at <http://www.yale.edu/esi/ESI2005.pdf> (“Environmental Sustainability Index Building Blocks – Components[:] Environmental Systems: A country is more likely to be environmentally sustainable to the extent that its vital environmental systems are maintained at healthy levels, and to the extent to which levels are improving rather than deteriorating. Reducing Environmental Stresses: A country is more likely to be environmentally sustainable if the levels of anthropogenic stress are low enough to engender no demonstrable harm to its environmental systems. Reducing Human Vulnerability: A country is more likely to be environmentally sustainable to the extent that people and social systems are not vulnerable to environmental disturbances that affect basic human wellbeing; becoming less vulnerable is a sign that a society is on a track to greater sustainability. Social and Institutional Capacity: A country is more likely to be environmentally sustainable to the extent that it has in place institutions and underlying social patterns of skills, attitudes, and networks that foster effective responses to environmental challenges. Global Stewardship: A country is more likely to be environmentally sustainable if it cooperates with other countries to manage common environmental problems, and if it reduces negative transboundary environmental impacts on other countries to levels that cause no serious harm.”).
175. Jee-Peng Tan et al., *supra* note 180 (“Workforce Development. For our purpose WfD refers to a national, regional, provincial or sector-based system that serves a dual function: of enabling individuals to acquire technical knowledge, practical skills and attitudes for gainful employment or improved work performance in a particular trade or occupation; and of providing employers with an effective means to communicate and meet their demand for skills.”).

Conclusion

While many business leaders and policy-makers are aware of some of the benefits that are correlated with reducing gender inequality, questions about how to successfully and sustainably move toward gender equality with alacrity are not yet fully resolved. From a business perspective, companies' and countries' economic success is expected to be proportional to the level of access they have to economic talent.¹⁷⁶ At the individual company level, “[g]ender diversity in senior leadership [is] associated with higher company profits.”¹⁷⁷ For example, a study of approximately 2,400 companies around the world found a twenty-six percent (26%) performance improvement at the companies that have at least one woman on their board of directors.¹⁷⁸

Reducing inattentive blindness has the potential to not only increase the pace of progress toward gender equality in the workplace but also to reduce the global workplace crisis. There is evidence to support the claim that gender equality leads to improved recruitment and retention, access to a wider talent pool, reductions in costs associated with staff turnover, enhanced organizational performance, better financial performance and competitiveness, improved creativity and innovation, enhanced reputation, and attracting best talent.¹⁷⁹ As measures are implemented

176. See Cann, 2095: The Year of Gender Equality, *supra* note 2, at 3 (quoting Klaus Schwab, Founder and Executive Chairman of the World Economic Forum, “Achieving gender equality is obviously necessary for economic reasons. Only those economies who have full access to all their talent will remain competitive and will prosper.”).

177. WORLD BANK GROUP, GENDER AT WORK, *supra* note 47, at 6 (citing Cedric Herring, *Does Diversity Pay? Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208-24 (2009)).

178. WORLD BANK GROUP, GENDER AT WORK, *supra* note 47, at 6 (citing *Gender Diversity and Corporate Performance*, CREDIT SUISSE (Aug. 2012)).

179. Organization of American States, *CSR, SMEs, and Gender Equality: Training Module 8* (2013) (citing *The Business Case for Gender Equality*, AUSTRALIAN WORKPLACE GENDER EQUALITY AGENCY (2013), https://www.wgea.gov.au/sites/default/files/business_case_for_gender_equality.pdf, “The business case for gender equality is strong; the Government of Australia has compiled a business case for gender equality which includes the following benefits:” attracting the best employees, reducing the cost of staff turnover, and enhancing organizational performance and reputation. *Id.* “Attracting the best employees: An organization which is as attractive to women as it is to men will have access to the entire talent pool and is more likely to have a competitive advantage in attracting the best talent available.” *Id.* “Reducing the cost of staff turnover: staff turnover is expensive when one takes into account advertising costs, lost time spent on interviews, clerical and administrative tasks, use of temporary staff or lost output while waiting to fill the position, costs associated with training new employees, and termination pay, among others. Gender equality practices, such as flexible hours and pay equality, can reduce employee turnover.” *Id.* “Enhancing organizational performance: promoting gender equality is often associated with better organizational and financial performance. Well managed, diversity brings together varied perspectives, produces a more holistic analysis of the issues a company faces and spurs greater effort, leading to improved decision-making.” *Id.* “A study of over 500 US companies found a link between gender diverse workforces and organizational performance using measures such as sales revenue and number of customers.”

and awareness increases, employers, scholars, and policy makers will need to ensure that data is collected to measure the effects of reducing inattentional blindness.

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Organization of American States, CSR, SMEs, and Gender Equality: Training Module 8, 2013 (citing Cedric Herring, *Does Diversity Pay? Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208-24 (2009)). In addition, “[s]trategies that promote workplace gender equality by reducing sex discrimination and harassment can minimize a company’s risk of financial and reputational loss from lawsuits caused by discriminatory conduct. They also reduce the negative impact discriminatory behavior can have on performance.” Organization of American States, CSR, SMEs, and Gender Equality: Training Module 8, 2013 (citing *The Business Case for Gender Equality*, AUSTRALIAN WORKPLACE GENDER EQUALITY AGENCY (2013), https://www.wgea.gov.au/sites/default/files/business_case_for_gender_equality.pdf).