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See table of contents

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Article abstract

Despite evidence that both gender and ethnically diverse leadership is good for businesses' bottom line, just one in five senior North American business leaders is female, one in thirty a woman of colour. Little literature exists applying behavioural economics [BE] concepts to explain gender gaps. Yet, as demonstrated by the 2010 UK Conservative-Liberal Democrats coalition government, the Obama government in the US and Trudeau government in Canada, lawmakers, policymakers and business leaders are interested in BE's persuasive power to influence behaviour. My contribution exploits this interest, builds on the excellent existing scholarship analyzing gender gap concepts from a BE perspective, and fills this gap. Applying concepts of bounded rationality, bounded willpower, bounded self-interest, and the endowment effect to 2017's North American-focused Women in the Workplace report (Report) published by LeanIn and McKinsey, a vast study examining HR practices and pipeline data of 222 companies employing 12 million+ people and surveying 70,000+ employees' experiences, I find that hiring and promotion decisions are affected by the three bounds and endowment effect, undercutting businesses' compelling economic interest in diverse leadership. BE offers solutions to tackle biased behaviour and shows how gender gap scholars' and the Report's recommendations can be taken further to close the gender gap in advancement. I argue that normative best practice adoption by business and nudges and tax incentives from governments, ideally in combination, can spur businesses to adopt debiasing behaviours and practices that will contribute to closing the gender gap in advancement. Enabling women to achieve their full leadership and economic potential will enhance women's wellbeing, improve businesses' performance, and lead to greater social equity.

Closing the Gender Gap in Corporate Advancement: Insights and Solutions from Behavioural Economics

Lori Anne Heckbert*

Despite evidence that both gender and ethnically diverse leadership is good for businesses' bottom line, just one in five senior North American business leaders is female, one in thirty a woman of colour. Little literature exists applying behavioural economics [BE] concepts to explain gender gaps. Yet, as demonstrated by the 2010 UK Conservative-Liberal Democrats coalition government, the Obama government in the US and Trudeau government in Canada, lawmakers, policymakers and business leaders are interested in BE's persuasive power to influence behaviour. My contribution exploits this interest, builds on the excellent existing scholarship analyzing gender gap concepts from a BE perspective, and fills this gap. Applying concepts of bounded rationality, bounded willpower, bounded self-interest, and the endowment effect to 2017's North American-focused Women in the Workplace report (Report) published by LeanIn and McKinsey, a vast study examining HR practices and pipeline data of 222 companies employing 12 million+ people and surveying 70,000+ employees' experiences, I find that hiring and promotion decisions are affected by the three bounds and endowment effect, undercutting businesses' compelling economic interest in diverse leadership. BE offers solutions to tackle biased behaviour and shows how gender gap scholars' and the Report's recommendations can be taken further to close the gender gap in advancement. I argue that normative best practice adoption by business and nudges and tax incentives from governments, ideally in combination, can spur businesses to adopt debiasing behaviours and practices that will contribute to closing the gender gap in advancement. Enabling women to achieve their full leadership and economic potential will enhance women's wellbeing, improve businesses' performance, and lead to greater social equity.

Malgré les données qui indiquent que la diversité sexuelle et ethnique aux postes de direction améliore les résultats financiers des entreprises, la haute direction des entreprises en Amérique du Nord compte à peine une femme sur cinq et une femme de couleur sur trente. La littérature qui applique les concepts de l'économie comportementale (EC) pour expliquer l'écart entre les genres est peu abondante. Pourtant, comme l'ont démontré le gouvernement de coalition britannique entre les Conservateurs et les Libéraux-démocrates en 2010, le gouvernement Obama aux États-Unis et le gouvernement Trudeau au Canada, les législateurs, les décideurs politiques et les dirigeants d'entreprise

* I would like to thank Dr. Noel Semple, Editor-in-Chief of this publication, Drs. Constance Backhouse and Elizabeth F. Judge of the University of Ottawa, PhD Student Anastasia Berwald of the University of Ottawa, Mike Morin (Colonel Retired), my PhD and writing group colleagues, and two anonymous referees for their valuable insights and constructive guidance in the course of developing this work. I thank the University of Ottawa Faculty of Law for funding my PhD work.

s'intéressent au pouvoir de persuasion de l'économie comportementale pour influencer le comportement. Mon article exploite cet intérêt, s'appuie sur l'excellente littérature savante qui analyse les concepts de l'écart entre les genres du point de vue de l'économie comportementale et comble cette lacune. En appliquant les concepts de la rationalité limitée, de la volonté limitée et de l'intérêt personnel limité ainsi que l'effet de dotation au rapport Women in the Workplace *(le rapport), publié par LeanIn et McKinsey, vaste étude de la situation en Amérique du Nord qui a examiné les procédures des ressources humaines et les données en série de 222 compagnies employant plus de 12 millions de personnes, et qui a fait une enquête sur l'expérience de plus de 70 000 employés, je conclus que les décisions relatives à l'embauche et à la promotion sont influencées par les trois limitations et l'effet de dotation, ce qui est contraire à l'intérêt économique pressant des entreprises de pouvoir compter sur un leadership diversifié. L'économie comportementale offre des solutions pour lutter contre les comportements partiaux et montre comment les recommandations figurant dans les études sur l'écart entre les genres et dans le Rapport peuvent être poussées plus loin pour réduire l'écart entre les genres dans l'avancement au travail. Je soutiens que l'adoption de pratiques exemplaires normatives par les entreprises ainsi que des incitations et des encouragements fiscaux provenant des gouvernements, qui iraient idéalement de pair, peuvent pousser les entreprises à adopter des pratiques et des comportements impartiaux qui contribueront à réduire l'écart entre les genres dans l'avancement au travail. Si on permet aux femmes de réaliser pleinement leur potentiel économique et leur potentiel de leadership, cela améliorera leur bien-être et le rendement des entreprises et amènera une plus grande équité sociale.*

I. INTRODUCTION

On average, only one in five senior leadership roles in North American business organizations is held by a woman, one in thirty by a woman of colour, and progress to parity has slowed or stalled.[1] The gender gap in advancement[2] persists despite evidence that both gender and ethnically diverse leadership is good for businesses' bottom line. Considerable data exists showing that women and other diverse candidates'

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1 See Marianne Cooper *et al*, "Women in the Workplace 2017", (October 2017) LeanIn.Org and McKinsey & Company Report, online: <https://womenintheworkplace.com>, at 4 (the Report); also Deborah L Rhode, "The Difference 'Difference' Makes", in Deborah L Rhode, ed, *The Difference "Difference" Makes: women and leadership* (Stanford, CA: Stanford University Press, 2003) 3 at 6. In the Report, references to "senior leadership roles" refer to the most senior management roles within businesses, typically to C-suite roles where the title starts with the word "Chief" e.g. Chief Executive Officer, Chief Financial Officer, Chief Legal Officer, etc. (see e.g. Cooper *et al*, at 4). For consistency, I adopt the same meaning throughout this paper. That said, many of the recommendations I include in Sections V and VI of this paper are applicable to closing the gender gap in corporate advancement at *all* levels, not just at senior leadership levels.

2 Pauline L Rankin & Jennifer Stewart note in *Progress in Inches, Miles to Go: a Benchmarking Study of Women's Leadership in Canada*, (Toronto: Carleton University, Centre for Women in Politics and Public Leadership and Deloitte Canada, 2012), online: <http://books.scholarsportal.info/viewdoc.html?id=560621>, that the gender gap in senior management is less pronounced in the public sector in Canada than in the private sector: in 2011 the public sector average percentage was 43% vs. the average percentage in the private sector of 26% (at 18; *Progress in Inches* notes that these statistics vary by department, industry and sector, sometimes widely).

advancement into leadership roles enhances – or at a minimum, correlates with higher – firm growth, market share, revenues, return on investment, productivity and profitability.[3] *Why* do persistent systemic factors impede women's (especially minority women's) advancement into leadership roles?

Very little literature exists applying behavioural economics concepts (see Section II below) to explain gender gaps,[4] yet law- and policymakers and business leaders are keenly interested in its persuasive power to shape behaviour.[5] My contribution aims to exploit this interest, build on the excellent existing scholarship applying behavioural economics analysis to related gender gap topics, and fill this gap relating to women's corporate advancement. I argue the behavioural economics concepts of bounded rationality, bounded willpower, bounded self-interest (collectively, the "three bounds"), and endowment effect help explain the findings of LeanIn and McKinsey & Company's well-regarded North American-focused *Women in the Workplace 2017* report[6] (the "Report") articulating the persistence of, and perceptions about, the gender gap in corporate advancement. Furthermore, behavioural economics offers regulatory intervention options and other solution insights to avert and/or correct such decision-making mistakes and rectify third party harms caused by such biases.[7]

LeanIn and McKinsey's vast study examined human resources practices and pipeline data[8] of 222 companies employing 12 million+ people, and surveyed 70,000+ employees' experiences, building on

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3 See for example Vivian Hunt, Dennis Layton & Sara Prince, "Why Diversity Matters," (February 2015) McKinsey & Company Report, online: <https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%-20insights/why%20diversity%20matters/diversity%20matters.ashx>. Further, one 2012 article notes: "Fortune 500 companies that rank in the top quartile for women representation on their boards outperform the bottom quartile by more than 53 percent on return on equity. That's the gender dividend in action." See Joe Echevarria, "The True Economic Value of Women", *Fast Company* (11 May 2012), online: <https://www.fastcompany.com/1836989/true-economic-value-women>. See my note 95 for a brief discussion of literature arguing that a positive relationship has not yet been conclusively proved.

4 This literature is primarily focused on the related topic of gender gap in board appointments, and securities law or other legal requirements relating to board appointments such as quotas, "comply or explain" and "explain or explain" regimes, which governments such as Norway (in the case of quotas), the EU, Australia and various provinces and territories in Canada have adopted or proposed to address it. See e.g. Eleanore Hickman, "Boardroom Gender Diversity: A Behavioural Economics Analysis" (2014) 14:2 J Corporate L Studies 385, online: https://doi.org/10.5235/14735970.14.2.385; Alice Klettner, Thomas Clarke & Martijn Boersma, "Strategic and Regulatory Approaches to Increasing Women in Leadership: Multilevel Targets and Mandatory Quotas as Levers for Cultural Change" (2016) 133 J Business Ethics 395, DOI 10.1007/s10551-014-2069-z; and Kim Willey, "Bringing Canadian Women on Board: A Behavioural Economics Perspective on Whether Public Reporting of Gender Diversity Will Alter the Male-Dominated Composition of Canadian Public Company Boards and Senior Management" (2017) 29 CJWL 182, DOI: 10.3138/cjwl.29.1.182.

5 Richard H Thaler, *Misbehaving: The Making of Behavioral Economics* (New York: WW Norton & Company, 2015) at 5. As Philip Corr & Anke Plagnol explain in *Behavioral Economics: the basics* (New York: Routledge, [forthcoming in 2019]), "behavioral economics uses insights from the social sciences (e.g., sociology) … and psychology in particular, to inform economic thinking and theorizing. It takes knowledge from judgement and decision-making research to inform *realistic* assumptions about how people think, feel and act" [emphasis in original] at 3).

6 Cooper *et al supra* note 1.

7 Clara Martins Pereira, "Reviewing the literature on behavioural economics" (2016) 11:3 Capital Markets LJ 414 at 428.

8 The term "pipeline data" refers to data capturing the representation of women and people of colour at each of the key levels within a corporation's structure, encompassing entry level roles, managers, senior manager/director roles, vice president, senior vice president, and C-suite roles. See e.g. Cooper *et al*, *supra* note 1 at 5.

their survey of now over 350 companies and nearly 200,000 employees since 2012.[9] The Report's key North American findings evidence my argument, underscoring the existence and persistence of the gender gap in corporate advancement. They reveal the biased behaviours and beliefs perpetuating this gap, and some behaviours and initiatives that can contribute to closing it. I consider the Report in detail in my paper – two brief examples here illustrate my point. On one hand, the Report found nearly 50% of men believe women are well represented in companies where only one in ten senior leadership roles is occupied by women; 30% of women share this belief.[10] Would those same people believe men were well represented in companies where men occupied just one in ten senior leadership roles? This perception issue alone highlights the considerable challenge in shaping organizational culture to support gender parity in corporate advancement.[11] On the other hand, companies with the smallest gender gaps have just a 4% gender gap at the first promotion level,[12] compared with the 18% average, and significantly more initiatives aimed at driving gender parity in leadership than average or poorer performing companies.[13] This signals that the gender gap in corporate advancement can be closed, through behavioural and organizational culture change. My analysis of these and other key Report findings shows that the three bounds and endowment effect influence hiring and promotion decision-making, and undercut businesses' compelling economic interest in diverse leadership.

The unrealized leadership potential of women holds back their economic potential too. This hurts women's lifetime earnings, and underutilizes businesses' whole workforce's potential to contribute economic value, including incremental profitability and growth, to the enterprise.[14] Enabling women's advancement will help women realize their full career potential, and rectify chronic underemployment of women by those companies with sizable gender gaps in advancement. Failing to hire and promote women is irrational and inefficient.[15] Businesses, as rational economic actors, should clearly not prefer this. Strober says feminist economics rethinks economics "for the purpose of improving women's economic condition".[16] The goal of my paper, applying behavioural economic analysis, is to recommend initiatives to drive behavioural and organizational cultural changes that improve women's economic condition

9 *Ibid* at 1.

10 *Ibid* at 14.

11 This observation connects with Klettner *et al*'s (*supra* note 4) view that lasting cultural change is key, and with Willey's (*supra* note 4) view that normative measures are stronger than mere voluntary ones and likely to be more effective. Their views are both discussed in greater detail in Section II.D. and II.E. of this paper.

12 Cooper *et al*, *supra* note 1 at 10.

13 *Ibid* at 30.

14 See Section III of my paper below and the citations noted therein.

15 Katherine VW Stone notes at 308 in "The New Face of Employment Discrimination", in Martha Fineman & Terence Dougherty, eds, *Feminism Confronts Homo Economicus: Gender, Law, and Society* (Ithaca, NY: Cornell University Press, 2005) 297 [Fineman & Dougherty, *Feminism*], that Gary Becker characterized discrimination as both irrational and inefficient. This pervades from *the entry level* when more men than women are hired "despite women being 57 percent of recent college graduates", and grows more pronounced every step thereafter, dramatically so at senior levels for women of colour. See also Cooper *et al*, *supra* note 1 at 4.

16 Myra H Strober, "Can Feminist Thought Improve Economics? Rethinking Economics Through a Feminist Lens" (May 1994) AEA Papers and Proceedings, 143 at 143. While one could view some of the feminist critiques of economics as a call to critique the foundations of liberal capitalist economies, for purposes of this paper my primary concern is to understand why women are struggling to advance within North American corporations and propose solutions to fix this.

through reducing the North American gender gap in corporate advancement. Using behavioural economics will assist in identifying and debiasing[17] workplaces' tendency to disproportionately advance men.[18]

Gender gap problems, including in corporate hiring and advancement, are social justice issues across three dimensions. First, for aspiring women leaders themselves: when eight in ten senior North American business leaders is male, yet 51 percent of the population is female and women seek promotions at rates equal to or greater than men,[19] this implies three talented women's leadership potential got overlooked, delayed, sidetracked or derailed along the way. Second, for women looking ahead in search of career role models: women find outstanding female role models more inspiring than men, and draw confidence (self-efficacy) and inspiration that they can "be it when they see it".[20] Conversely, when women look ahead and see few or no successful women, they may believe they cannot succeed and either leave organizations or alter their career paths.[21] Women's career choices are thus affected by their workplace's representativeness. Third, for women's political representation, influence on broader social institutions and legislative priorities: this is because "the share of women in professional jobs has an impact on women's electoral success",[22] and women legislators bring different policy priorities,[23] as well as "better consideration of women in the drafting of law and policy".[24] Rectifying these inequalities is urgent, for businesses and governments, if women are to achieve and contribute their full potential and participate fully in public life.

My analysis proceeds as follows. My literature review identifies behavioural economics' additions to the discipline of economics and its contribution to law and economics. I explore a feminist perspective on behavioural economics, the existing gender gap scholarship, and its application of behavioural economics concepts to topics closely related to mine. My paper extends this scholarship by applying alternative behavioural economics concepts and strategies to my topic, both to understand why the gender gap in corporate advancement exists and identify possible solutions. I use the Report and findings of similar research studies as evidence for and to advance my argument that behavioural economics helps explain

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17 Christine Jolls, "Bounded Rationality, Behavioral Economics, and the Law", in Francesco Parisi, ed, *The Oxford Handbook of Law and Economics, Vol I: Methodology and Concepts*, (Oxford UK: Oxford University Press, 2017) 60 at 66.

18 See the discussion of employment discrimination in Stone, *supra* note 15 at 307-318.

19 See my note 131 below and accompanying text.

20 See: P Lockwood, "'Someone Like Me Can Be Successful': Do College Students Need Same-Gender Role Models?" (2006) 30 Psychology Women Q 36 at 41; J L Quimby & A M DeSantis, "The Influence of Role Models on Women's Career Choices" (2006) 54 Career Development Q 297 at 303; and Geena Davis Institute on Gender in Media, "Impact Study" (2013), online: <https://seejane.org/wp-content/uploads/geena-davis-institute-gender-in-media-impact-study-2013.pdf>, as well as "The Scully Effect: I Want To Believe In STEM", research report published by 21st Century Fox, Geena Davis Institute on Gender in Media, and J Walter Thompson Intelligence (2018), online: <https://seejane.org/research-informs-empowers/the-scully-effect-i-want-to-believe-in-stem/>.

21 See my discussion of the leaky pipeline problem in Section III below.

22 See L Kenworthy & M Malami, "Gender Inequality in Political Representation: A Worldwide Comparative Analysis" (1999) 78:1 Social Forces 235 at 251.

23 Audrey Carlsen & Denise Lu, "More Women Than Men: State Legislatures Could Shift for the First Time", *New York Times* (30 June 2018), online: <https://www.nytimes.com/interactive/2018/06/30/us/politics/women-state-legislators.html>.

24 See e.g. Brittany Bronson, "What Happens When Women Legislate", *New York Times* (18 April 2017), online: <https://www.nytimes.com/2017/04/18/opinion/what-happens-when-women-legislate.html>.

why the gender gap in corporate advancement exists and persists. The second part of my literature review reveals that behavioural economics increasingly informs design of nudges[25] and regulatory interventions aimed at correcting non-profit maximizing, bias-affected choices people make. I position solutions recommended by gender gap scholars and the Report on a spectrum from mandatory to voluntary to normative. On balance, I agree with those scholars advocating pragmatic, normative initiatives with the power to effect lasting cultural change. I argue the Report could go further in advocating initiatives to drive behavioural and organizational cultural changes to close the gender gap in corporate advancement, and suggest additional recommendations. I argue that tax incentives and related "comply or explain" disclosure regimes, ideally combined with nudges and process changes proposed by gender gap scholars and the Report, can nudge businesses to adopt norms and behaviours that contribute to closing the gender gap in corporate advancement. Finally, I conclude.

II. LITERATURE REVIEW: BEHAVIOURAL ECONOMICS AND THE STUDY OF GENDER GAPS

A. Behavioural Economics' Additions to the Discipline of Economics

The field of economics studies how society allocates scarce resources.[26] In market economies, market choices reveal preferences from which individual utility is inferred.[27] "Efficiency" means that the person willing to pay the most obtains the resource.[28] Economics' core hypothesis is "individuals are rational maximisers who choose the optimal combination … of goods and services that satisfy their preferences."[29] It assumes those choices are unbiased.[30]

Behavioural economists such as Thaler argue each one of these key premises of economic theory is flawed.[31] Human economic behaviour is not always rational or utility maximizing.[32] Humans' cognitive

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25 The terms "nudge" and "nudging" have been variously defined; one article recently defined a nudge to be "any aspect of choice design that is based on psychological insights into how our minds work and that alters people's behavior in a predictable way without restricting the freedom of individual choice". See Iris Bohnet, Alexandra van Geen & Max Bazerman, "When Performance Trumps Gender Bias: Joint vs. Separate Evaluation" (2016) 62:5 Management Science 1225 at 1225, online: <https://doi.org/10.1287/mnsc.2015.2186>. Their article advocates nudging managers to jointly evaluate candidates, to reorient decision-making from stereotypical characteristics to performance.

26 Alan Devlin, *Fundamental Principles of Law and Economics* (New York: Routledge, 2015) at 12. The feminist economist Strober would challenge this statement arguing that most economic problems are "maldistribution" problems, not scarcity problems. See Strober, *supra* note 16 at 146.

27 Devlin, *supra* note 26 at 12.

28 *Ibid*. This is the so-called willingness-to-pay principle – see Neil H Buchanan, "Playing with Fire: Feminist Legal Theorists and the Tools of Economics," in Fineman & Dougherty, *Feminism*, *supra* note 15, 61 at 64.

29 Devlin, *supra* note 26 at 13.

30 Thaler, *supra* note 5 at 5.

31 *Ibid* at 6. He notes this is because: 1) optimization problems are often too hard to solve; 2) people's choices are not unbiased – psychologists have documented numerous biases such as overconfidence, status quo and confirmation biases, etc.; and 3) the optimization model leaves out factors such as the endowment effect and loss aversion which influence decision-making in predictable ways. Much of *Misbehaving* discusses these critiques at length.

32 Christine Jolls, Cass R Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 Stanford L R 1471. Alessio M Pacces & Louis T Visscher, "Methodology of Law and Economics," in Bart van Klink & Sanne Taekema, eds, *Law and Method: Interdisciplinary Research Into Law, Series Politika No. 4* (Mohr Siebeck, 2011) 85,

limitations affect our judgment and decision-making – this is called bounded rationality.[33] We take actions we know to be in conflict with our own long-term interests, called bounded willpower.[34] We are motivated to be treated fairly and to treat others fairly to the extent that they are behaving fairly, and unexpected niceness and spitefulness accompany this motivation, called bounded self-interest.[35] Thus behavioural economics enriches economic theory[36] with psychological and other social science insights[37] to improve its predictive accuracy.[38]

B. Law and Economics, and Behavioural Economics' Contribution

Law and economics scholars aim to explore maximizing behaviours' legal implications.[39] Slaughter and Ratner believe US law and economics scholarship characterizes legal rules as economically efficient and advocates legal rules that maximize wealth.[40] Dougherty and Fineman see law and economics "aspir[ing] to a universal description of the way humans and markets operate … regardless of gender or … other individual-defining characteristics."[41]

Legal researchers largely applied traditional economic theory[42] until 1998, thereafter adding behavioural economics principles.[43] Behavioural economics aims to replicate conditions of real-world choices by actual humans. Psychology's close influence means behavioural economists use

online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2259058>, refer to standard economic assumptions as central to "rational choice theory" (at 85), and allude to Coase's Theorem and its practical limitations (at 94-5).

33 Thaler *et al, supra* note 32 at 1477.

34 *Ibid* at 1479.

35 *Ibid*.

36 Thaler, *supra* note 5 at 9.

37 *Ibid* at 9. As Thaler notes at 9, "We don't have to stop inventing abstract models that describe the behavior of imaginary Econs. We do, however, have to stop assuming that these models are accurate descriptions of behavior, and stop basing policy decisions on such flawed analyses. And we have to start paying attention to … *supposedly irrelevant factors* [such as the endowment effect and loss aversion]…" [emphasis in original].

38 *Ibid*. It should be noted that some neoclassical economists would dispute this claim, arguing for example that laboratory study findings based on small psychology student samples may not generalize "to the real, competitive world … where participants are truly incentivized and motivated to behave as rationally as possible" – see Corr & Plagnol, *supra* note 5 at 13.

39 Jeffrey L Dunoff & Joel P Trachtman, "The Law and Economics of Humanitarian Law Violations in Internal Conflict" (1999) 93 Am J Intl L 394 at 395, note these behaviours and their implications can be studied "both in and out of markets, and for markets and other institutions."

40 Anne-Marie Slaughter & Steven R Ratner, "Appraising the Methods of International Law: A Prospectus for Readers" (1999) 93 Am J Intl L 291 say at 294 that law and economics has: "a descriptive component that seeks to explain existing rules as reflecting the most economically efficient outcome, and a normative component that evaluates proposed changes in the law and urges adoption of those that maximize wealth".

41 Terence Dougherty & Martha Fineman, "Introduction to Part II: Feminism Confronts Neoclassical Economic Theory and Law and Economics", in Fineman & Dougherty, *supra* note 15, 57 at 57 [Dougherty & Fineman, "Introduction"].

42 See for example Ronald Coase, "The Problem of Social Cost" (1960) 3 J L & Economics at 1, and Posner's writings as discussed in Michael Trebilcock, "An Introduction to Law and Economics" (1997) 23 Monash UL Rev at 123. According to Thaler, such law and economics analysis was "based exclusively on models of Econs" and showed tremendous deference to the market to "sort things out". See Thaler, *supra* note 5 at 257.

43 See for example Thaler *et al*, *supra* note 32.

experimentation and other empirical methods to obtain evidence to buttress their claims.[44] Jolls and Sunstein categorize "departures from unbounded rationality" (i.e. from rational, maximizing behaviours), as either "judgment errors … [or] deviat[ions] from the precepts of expected utility theory".[45]

C. A Feminist Perspective on Behavioural Economics

Some feminist scholars view using economic efficiency arguments to justify women's advancement as dangerous.[46] Dougherty and Fineman view economic rationales as "often merely a way to preserve the patriarchal status quo."[47] Buchanan argues that rational choice theory[48] and its core optimizing principles could lead to irrational recommendations for change.[49] Efficiency arguments run counter to a justice and equality-based justification for women's advancement,[50] and can ignore the law's roots in morality.[51] McFarland sees equity issues as "of primary concern to feminists in law."[52] Since economic theory does

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44 Dunoff & Trachtman, *supra* note 39 at 394. Behavioural economics is not without its critics – see my note 38, *supra*. Berg and Gigerenzer (an economist and psychologist, respectively) while supportive of increasing economics' empirical content and incorporation of psychological insights and methods and "moving beyond the … rational choice model toward a tool kit approach to modeling behavior", argue that behavioural economics should focus on decision processes explaining outcomes, do more to challenge core neoclassical conceptions of rationality, and make predictions that can be tested with new data, not simply propose theories that fit existing data. See their IDEAS working paper, "As-If Behavioral Economics: Neoclassical Economics in Disguise?", MPRA Paper No. 26586, posted 2 December 2010, online: http://mpra.ub.uni-muenchen.de/26586/, at 3 and 9. This paper was later published as N Berg & G Gigerenzer, "As-if behavioral economics: Neoclassical economics in disguise?" (2010) 18 History Economic Ideas 133, and updated and included as Chapter 11 in Gerd Gigerenzer, ed, *Simply Rational: Decision Making in the Real World* (New York: Oxford University Press, 2015).

45 Christine Jolls & Cass R Sunstein, "Debiasing Through Law" (2006) 35:1 J Leg Stud 199 at 203 (Jolls and Sunstein, 2006a).

46 See for example Buchanan, *supra* note 28 at 90. As he notes at 73-74 [emphasis in original], "Pareto efficiency is based … on the endowments of wealth, property, talents and so forth, possessed by members of the economy when trading begins. … the one corresponding to the status quo. … any attempt to *change* people's endowments is, by definition, inefficient." Devlin notes, *supra* note 26 at 32 [emphasis added], "… given a *pre-existing resource distribution*, an exchange effects a Pareto improvement if it satisfies at least one person's preference without making any other individual worse off". Devlin's comment implies a challenge for feminists seeking solutions to close the gender gap in corporate advancement: even if they could devise such solutions, the reality is that some men will feel themselves worse off. There can be only one occupant of a given leadership role, and since traditionally such roles disproportionately went to men – white men, specifically – some of those men can be expected to feel worse off in the face of measures aimed at closing the gender gap in corporate advancement. The Report bears this out – see Cooper *et al*, *supra* note 1 at 15.

47 Dougherty and Fineman, "Introduction", *supra* note 41 at 58.

48 S K, "The Thinking behind feminist economics", *The Economist* (20 October 2015), online: <https://www.economist.com/blogs/economist-explains/2015/10/economist-explains-17>, noted that sexism goes unchallenged in "rational choice" models, and questioned notions of the "freedom" of women's choices, where gender stereotypes are strong.

49 Buchanan, *supra* note 28 at 62. As he notes at 87: "Agreeing to measure social outcomes by the neoclassical standard [of efficiency] might well lead us to endorse policies that we would – and should – otherwise reject."

50 *Ibid* at 91.

51 *Ibid* at 62, argues that "neoclassical economics should be morally troubling to feminist legal theorists".

52 See Joan McFarland, "Law and Economics: A Feminist Economist's Critique" (1995) 44 UNBLJ 329 at 332. For example, S K, *supra* note 48, noted that cuts to public services often fall to women to plug the gap, so distribution of cuts could worsen gender inequality.

not distinguish among humans or recognize the effect of social, cultural and wealth differences,[53] economists tend to ignore "the woman question".[54] Buchanan argues justice and morality should continue to be central to law.[55]

Defending law and economics analysis, Dunoff and Trachtman argue that human rights such as equality should not be treated as incommensurate with economic analysis.[56] Kysar believes feminists should "know their enemy",[57] and argues that not situating feminist scholarship "within a culture of virtual economic idolatry" risks being drowned out.[58] Strober sees feminism as challenging economists to evaluate utility from a broader social, not purely individual, perspective.[59] She argues most economic problems are "mal-distribution" problems.[60] A more feminist economics should concern itself with well-being, cooperation and equity.[61]

Kysar argues behavioural economic methodologies will "bring fresh analytical and rhetorical methods to the feminist project".[62] Using behavioural economics' insight that people depart from rationality in predictable ways to "predict behavior relevant to law"[63] in his view is promising for feminist legal theorists.[64]

My view can be distilled in four points. One, since policymakers listen to economists, feminist scholars must understand, influence and leverage economists' arguments where appropriate. Behavioural economics' challenge to accepted economic wisdom pairs well with feminism's challenge to patriarchal norms. Two, businesses understand profitability and efficiency objectives, and appreciate evidence-based approaches that can help them achieve both objectives. Behavioural economics' research questions, methods, and concepts can help feminists build evidence and advance solutions business leaders would

53 See e.g. Dougherty & Fineman, "Introduction", *supra* note 41 at 57-8.

54 Katharine T Bartlett, "Feminist Legal Methods" (1990) 103 Harv L Rev 829 at 829. Bartlett describes this as "identifying and challenging those elements … that leave out or disadvantage women and members of other excluded groups" (at 831), and asking questions "designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective … The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected" (at 837). Dunoff & Trachtman, *supra* note 39, advocate at 407: "In order to claim explanatory power, economics must recognize as valid the concerns of women (and other oppressed individuals and groups) that are not expressed in the market, and incorporate these concerns into its description and prescription."

55 Buchanan, *supra* note 28 at 86 puts it this way: "Our approach to issues of human equality should be the model for our approach to all public policy issues: specify our values first, and pursue the best route to affirming those values."

56 Dunoff & Trachtman, *supra* note 39 at 395. They argue at 401 this "would sharply and artificially curtail the domain of economic analysis."

57 See Douglas A Kysar, "Feminism and Eutrophic Methodologies", in Fineman & Dougherty, *Feminism*, *supra* note 15, 94 at 95.

58 *Ibid* at 99.

59 Strober, *supra* note 16 at 143.

60 *Ibid* at 146.

61 *Ibid* at 147.

62 See Kysar, *supra* note 57 at 96. Two others he recommends, social and ecological economics, are not discussed in this paper. The latter is not relevant to this paper's inquiry, and social economics is likely to be resisted in highly individualistic societies such as the US and to a somewhat lesser degree Canada, therefore it is not considered further here.

63 *Ibid* at 101.

64 See Kysar, *supra* note 57 at 96.

consider adopting. Three, behavioural economics insights, when coupled with feminists' focus on the woman question,[65] can challenge core assumptions about how hiring and promotion decisions are and should be made. Four, behavioural economics aids in uncovering cognitive mistakes - its proponents advocate rectifying those mistakes that negatively affect third parties. Feminists can use these insights to identify and debias[66] workplaces' tendency to disproportionately advance men.[67]

D. Existing Gender Gap Scholarship and Its Application of Behavioural Economics Analysis

As my Introduction notes, very little literature exists applying behavioural economics concepts to understand gender gaps. That which does focuses on the gender gap in board appointments. My research turned up three excellent scholarly articles on this gender gap, from the UK, Canada, and Australia. Each contains insights relevant to closing the gender gap in corporate advancement. Hickman and Willey explicitly apply behavioural economics concepts to the study of gender gaps in board appointments. While Klettner *et al* do not, they highlight important issues not discussed by Hickman or Willey bearing upon my present topic and forming the third leg of the mandatory vs. voluntary vs. normative framework I develop in the next subsection.

Hickman's contribution blends behavioural economics with transaction cost analysis. She argues that both boards of directors and female board candidates exhibit behavioural constraints in what she calls the "boardroom gender diversity transaction", and these constitute transaction costs.[68] Hickman examines five heuristics affecting decision making,[69] from the perspective of both board and female candidate.[70] Each of these heuristics, or forms of mental shortcuts[71] used as "tools to simplify decision-making under conditions of uncertainty or risk",[72] is a form of cognitive limitation on decision-making. The heuristics

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65 See my note 54, *supra*.

66 Jolls, *supra* note 17 at 66.

67 See the discussion of employment discrimination in Stone, *supra* note 15 at 307-318.

68 Hickman, *supra* note 4 at 386. According to Hickman, transaction costs refers to "'frictions', ie the forces that push against each other to limit a transaction's efficiency" (at 410). These unnecessary costs should be identified and eliminated where possible (at 409). In the case of the boardroom gender diversity transaction, Hickman notes these costs encompass "search and information costs; bargaining costs; and policing and enforcement costs", and notes the first category of costs is lower for men than women (at 411).

69 *Ibid* at 400-1.

70 *Ibid* at 399-409.

71 Jolls & Sunstein 2006a, *supra* note 45 at 203-4.

72 Hickman, *supra* note 4 at 398. Hickman properly credits the research of psychologists Kahneman and Tversky as foundational to theories of behavioural economics: see her discussion of those theories at 398-402 and accompanying notes 88 to 110.

Hickman examines are resemblance,[73] anchoring,[74] availability,[75] loss aversion,[76] and narrative fallacy.[77] Hickman's article details boards of directors' and female candidates' bounded rationality. Her key point is the *cumulative* effect of these limitations "becomes harder to overcome without some form of intervention".[78] Hickman unfortunately does not consider bounded willpower, bounded self-interest or the endowment effect in her analysis. My paper fills that gap in Section IV and analyzes how those additional key behavioural economics concepts help us understand why the gender gap in corporate advancement persists.

Willey's article applies Jolls and Sunstein's debiasing through law vs. traditional insulating strategies methodology[79] – discussed in Section V below – to assess whether the Canadian province of Ontario's Securities Commission's [OSC] "comply or explain" disclosure model[80] is effective from a behavioural economics perspective in encouraging board gender diversity.[81] Willey recommended revisions to proposed amendments to the OSC's existing model, to further debias board appointments and disclosures about them.[82] Willey does not discuss any of the three bounds or the endowment effect in her analysis or seek to use those concepts to explain why board gender diversity appears to be slowed or stalled in Canada.

While not engaged in a behavioural economics analysis, Klettner, Clarke and Boersma's (Klettner *et al*) consideration of "comply or explain" rules in Australia raises important issues related to my current topic. Klettner *et al* focused on the related issue of women's thin middle-management pipeline to the C-

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73 Resemblance, or representativeness, occurs when reliance is placed on stereotypical characteristics (see Hickman, *supra* note 4 at 400).

74 Anchoring occurs when decisions are influenced by their starting point (see Hickman, *supra* note 4 at 400). An example of anchoring is a business' decision to offer the minimum maternity leave required by law, even when a more generous policy can reduce turnover costs – see my notes 113 and 218 and accompanying text.

75 Jolls & Sunstein 2006a, *supra* note 45, note the availability heuristic is used when the "probability of an event is estimated after an assessment of how easily examples of the event can be called to mind" (see at 203-4).

76 Loss aversion describes human's "natural aversion to risk" whereby we "tend to weigh losses more heavily than gains" (see Hickman, *supra* note 4 at 401).

77 Narrative fallacy is "a compelling explanation of events or circumstances based on a favourable interpretation of historic events", typically driven by outcome knowledge (see Hickman, *supra* note 3 at 401). The "glass cliff" phenomenon is rife with narrative fallacy, where a woman is deemed after the fact to have failed at leadership because of her personal failings, not because she was placed in a precarious position to begin with. See e.g. Julie Creswell, "Even After the Glass Ceiling Yields, Female Executives Find Shaky Ground", *New York Times* (3 August 2017), online: <https://www.nytimes.com/2017/08/03/business/female-ceos-glass-cliff.html>, and Hickman's discussion of such precarious positions, *supra* note 4 at 408.

78 Hickman, *supra* note 4 at 399.

79 Willey uses the "debiasing through law" vs. "debiasing law" terminology reflected in Christine Jolls & Cass R Sunstein's working paper "Debiasing through Law", Harvard Law School Working Paper no 495 (2004). However, since it is clear from the Working Paper that the latter term "debiasing law" refers to "insulating strategies", and Jolls and Sunstein subsequently use the latter terminology in their published 2006 articles "The Law of Implicit Bias" (2006b, *infra* note 164) and "Debiasing Through Law" (2006a, *supra* note 45), in this paper I consistently use their later chosen language to contrast debiasing through law strategies with traditional anti-discrimination insulating strategies.

80 Klettner *et al* include a helpful short description of "comply or explain" schemes, *supra* note 4 at 407: "This gives companies the flexibility to either adopt the recommendations [e.g. to adopt a gender diversity policy or targets,] or explain why it is not appropriate for the company to do so".

81 Willey, *supra* note 4 at 183.

82 *Ibid*.

suite,[83] and noted that increasing representation of women on boards ought to go hand in hand with (a) corporate strategies to advance women in leadership roles,[84] and (b) government policies to address the reasons why women leave corporations at the middle management level.[85] Their analysis echoes the Report's findings, and contributed to my development of the mandatory vs. voluntary vs. normative framework, discussed next.

E. The Gender Gap Scholars' Central Debate: Mandatory Vs. Voluntary Vs. Normative Measures

I identified three broad camps within the literature's debate about what regulatory interventions best accomplish gender parity goals in board appointments. Camp One champions mandatory measures (i.e. quotas) to effect rapid change (e.g. the government of Norway, the EU proposals, and Hickman).[86] For this Camp, the boardroom gender diversity transaction exemplifies market failure,[87] and voluntary change is too slow and ineffective to correct it.[88] Camp Two advocates for voluntary measures (i.e. codes and targets, not quotas),[89] often accompanied by recommended disclosure regimes, to effect long-lasting cultural change within organizations (e.g. Klettner *et al*).[90] Camp Three is a pragmatic middle group, which believes mandatory measures may be difficult to implement, but advocates for inclusion of target, non-mandatory social norms in regulatory regimes to set the bar against which company actions are judged (e.g. Willey).[91] I categorize Willey as falling between Hickman and other champions of mandatory measures on the one hand, and Klettner *et al*, champions for solely voluntary measures on the other. On the most controversial issue of targets vs. quotas, Willey's recommendations are normative, as she rejects both mandatory and purely voluntary approaches, while on more procedural matters Willey appears comfortable recommending mandatory measures.[92] Though Willey believes hard quotas can be effective in achieving greater gender parity on boards, she recognizes that practically, they are unlikely to be adopted in Canada.[93]

On balance, I agree with Willey that neither Canada or the United States (US) is likely to adopt mandatory measures such as hard quotas, whether for board appointments or to close the advancement

83 This term is frequently used to describe the most senior management roles within businesses, typically to refer to roles where the title starts with the word "Chief" e.g. Chief Executive Officer, Chief Financial Officer, Chief Legal Officer, etc. See e.g. Cooper *et al*, *supra* note 1 at 4.

84 Klettner *et al*, *supra* note 4 at 395.

85 *Ibid*.

86 For a discussion of the Norwegian law, see Hickman, *supra* note 4 at 385-6, 397, 405, and 407, and Klettner *et al*, *supra* note 4 at 397-8, 400, 405-6 and 415. For a discussion of the EU proposals, see Klettner *et al*, *supra* note 4 at 401, 404, and 406-7.

87 Hickman, *supra* note 4 at 418.

88 *Ibid*.

89 Klettner *et al*, *supra* note 4 at 396.

90 See *ibid*, especially at 395-400. The authors note however at 398 that an Australian business leaders' voluntary drive in 2015-6 toward gender parity may well have been spurred in response to Norway's mandatory quota requiring 40% of board members to be women, if only to avoid imposition of such mandatory rules in Australia. This suggests the imposition of mandatory measures *somewhere* was necessary to trigger this action, and may undercut Klettner *et al*'s faith that voluntary measures alone can lead to gender parity.

91 See Willey, *supra* note 4.

92 See my detailed discussion of Willey's recommendations in Sections V and VI below.

93 Willey, *supra* note 4 at 208.

gender gap. My view is that pragmatic, normative initiatives with the power to effect lasting cultural change should instead be pursued, together with additional solutions from behavioural economics, to close the gender gap in corporate advancement. This mandatory vs. voluntary vs. normative framework informs my later discussion of recommended interventions to close the advancement gender gap.

III. THE CONTEXT: THE BUSINESS CASE AND ESSENTIAL RATIONALITY OF ADVANCING WOMEN – VS. REALITY

> Employers tend to ... disproportionately promote people they feel 'comfortable' with or who they think would 'fit in' ... unless unconscious biases are acknowledged, the monochromatic composition of organisations will persist and, despite all the diversity talk, highly qualified women and minorities will continue to face biases and barriers that inhibit advancement.
>
> - *Dr. Malinda Smith, then Vice-President of the Canadian Federation for the Humanities and Social Sciences*[94]

As noted in the Introduction, considerable data exists showing that women and other diverse candidates' advancement into leadership roles is good for business' bottom line – or at a minimum, correlates with better business results.[95] According to Rhode, "[a] wide array of research indicates that the representation

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[94] Quoted in Rankin & Stewart, *supra* note 2 at 11.

[95] I acknowledge that not all scholarship conclusively agrees that diversity is good for business' bottom line. As noted by L Christiansen *et al* in "Gender Diversity in Senior Positions and Firm Performance: Evidence from Europe", IMF Working Paper, March 2016, "existing evidence on the impact of gender diversity in the boardroom on firm performance is inconclusive". For example, K Ahern & A Dittman's "The Changing of the Boards: The Impact on Firm Valuation of Mandated Board Representation" (2012) 129:1 Q J Economics 137 noted a negative effect among 248 listed Norwegian firms of the mere announcement in Norway of board gender quotas on stock price reaction, and of the implementation of the quota on "Tobin's Q" (at 139-140). Tobin's Q refers to "the ratio between a physical asset's market value and its replacement value" (see https://en.wikipedia.org/wiki/Tobin's_q). J Marinova, J Plantenga & C Remery, "Gender diversity and firm performance: evidence from Dutch and Danish boardrooms" (2016) 27: 15 Intl J Human Resource Management 1777 found no relation between board diversity and firm performance among a sample of 186 listed firms. M del Carmen Triana, T L Miller & T M Trzebiatowski's "The Double-Edged Nature of Board Gender Diversity: Diversity, Firm Performance, and the Power of Women Directors as Predictors of Strategic Change" (2014) 25:2 Organization Science 609, available at <https://doi.org/10.1287/orsc.2013.0842>, suggests that "diversity is double-edged because it can propel or impede strategic change depending on firm performance and the power of women directors" (at 609), though notably it does not address the glass cliff phenomenon (see Creswell, *supra* note 77) in its discussion. The foregoing studies focused on board, not senior management, gender diversity. AA Perryman, GD Fernando & A Tripathy found in "Do gender differences persist? An examination of gender diversity on firm performance, risk, and executive compensation" (2016) 69 J Business Research 579, that "firms with greater gender diversity in [top management teams] show lower risk and deliver better performance", measured by beta, standard deviation of daily returns, and Tobin's Q (at 579). Stock price reaction and Tobin's Q may be less useful measures of the actual impact of gender diversity on firm performance than e.g. the EBIT measures used by Hunt *et al*, supra note 3, or the return on assets measures used by Christiansen *et al*, *supra* this note 95. On balance, the conclusion drawn by A Schwab *et al* in their article "Managerial Gender Diversity and Firm Performance: An Integration of Different Theoretical Perspectives" (2016) 41:1 Group & Organization Management 5, available at

of women in leadership positions has a positive correlation with economic performance, measured in tangible terms such as organizational growth, increased market share, and return on investment."[96] Rankin and Stewart state that "… firms with a higher proportion of women in top management positions are leaders in terms of corporate financial performance including productivity, revenues, and profitability."[97] Hunt *et al*'s report "Why Diversity Matters", published by McKinsey & Company and based on data from 366 public companies across a range of industries in Canada, Latin America, the US and United Kingdom,[98] included six key findings: (i) companies in the top quartile for diversity outperform those in the lowest quartile by 15% (gender-diverse companies) and 35% (and ethnically-diverse companies), and have financial returns exceeding national industry medians;[99] (ii) according to UK data, greater gender diversity on the senior-executive team corresponded to the highest performance uplift in McKinsey's data set – for every ten percent (10%) increase in gender diversity, EBIT (earnings before interest and tax) rose three and a half percent (3.5%);[100] (iii) bottom-quartile companies' financial returns lag, rather than merely not leading;[101] (iv) diversity is likely shifting market share to more diverse companies over time;[102] (v) diverse companies are better able to win top talent and improve customer orientation, employee satisfaction, and decision making, leading to a virtuous cycle of increasing returns;[103] and (vi) no industry or company is in the top quartile on both gender and ethnic diversity dimensions – this means all companies still have room for gains.[104] Christiansen *et al* found that replacing one male senior manager or board director with a woman increased return on assets [ROAs] by 8–13 basis points.[105] Talent shortage and the need to reflect, understand and communicate with customers, also drive the diversity business

<DOI:10.1177/1059601115588641>, based on their own literature review appears apt (at 6): "Combined, these results suggest that gender diversity at the highest levels of an organization tends to improve firm performance."

96 See Rhode, *supra* note 1 at 17.

97 Rankin & Stewart, *supra* note 2 at 9, citing Credit Suisse, *Gender Diversity and Corporate Performance*; Orser, *Creating High-Performance Organizations: Leveraging Women's Leadership*; Anastasopoulos, Brown, and Brown, *Women on Boards: Not Just the Right Thing ... but the 'Bright' Thing*; and McKinsey & Company, *Women Matter: Gender Diversity, A Corporate Performance Driver*.

98 Hunt *et al*, *supra* note 3 at 2.

99 *Ibid* at 1.

100 *Ibid* at 2.

101 *Ibid*.

102 *Ibid* at 3.

103 *Ibid* at 1-2. Rhode adds *supra* note 1 at 18: "Organizations that create a culture of equal opportunity are better able to attract, retain, and motivate the most qualified individuals. Reducing the obstacles to women's success also reduces the costs of attrition. It increases employees' morale, commitment, and retention and decreases the expenses associated with recruiting, training, and mentoring replacements."

104 Hunt *et al*, *supra* note 3 at 2.

105 Christiansen *et al*, supra note 95 at 5-6, analyzed more than 2 million public and private firms across 34 European countries. They note (at 6): "As causal interpretation of this correlation is difficult, we use a simple difference-in-difference strategy to shed light on the underlying mechanisms behind the better financial outcomes … First, the positive association between gender equality in senior positions and firm performance is significantly stronger in sectors that employ more women in the labor force … In contrast, a firm in an industry with relatively few women in its labor force would not see a positive change in its profitability. Second, knowledge intensive and high-technology sectors—which demand higher creativity and critical thinking that diversity in general may bring—seem to benefit significantly more from a higher share of women in senior management. In these sectors, an additional woman on the board or in senior management is associated with about 30 basis points higher ROAs."

case.[106] Finally, women have distinct perspectives to contribute, and can help businesses identify markets for products and services that male leaders just do not see.[107]

Gender diverse leadership, in short, appears to be good for the bottom line, yet the business case remains invisible to employees. While nearly four in five companies surveyed for the Report (78%) say they articulate the business case for diversity to employees, just sixteen percent share figures showing how diversity benefits company financial returns or diversity progress.[108]

Despite the evidence that gender diversity in leadership economically benefits business, persistent systemic factors impede women's (particularly minority women's) advancement into leadership roles. Pervasive patterns contribute to chronic underrepresentation of women at the top in both the private and public sectors.[109] Women's opportunities for leadership are constrained by traditional gender stereotypes, inadequate access to mentors and informal support networks, and inflexible workplace structures.[110] Women are less likely to receive advancement advice from managers and senior leaders, yet employees who receive it are more likely to have been promoted in the last two years.[111] Women also face sexual harassment and retaliation for reporting it, which may result in unfavourable reviews, unreasonable assignments and leaving the workplace.[112] Leadership ranks will continue to be largely populated by white males, unless conscious and unconscious biases in businesses' hiring and promotion procedures are addressed.

Who does this hurt? Certainly businesses. If businesses with more gender-diverse leadership enjoy significant incremental EBIT and other financial returns, it follows that businesses with less gender-diverse leadership miss out. As they compound year over year, such foregone returns represent substantial

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106 Claire Armstrong *et al*, "The Impact of Diversity and Equality Management on Firm Performance: Beyond High Performance Work Systems" (2010) 49:6 Human Resource Management 977, quoting Lew Platt, former CEO of Hewlett, Packard.

107 Rhode, *supra* note 1 at 18.

108 Cooper *et al*, *supra* note 1 at 21. Page 30 of the Report states that sharing "a majority or all of gender diversity metrics with all employees", including tracking data on, and targets for, "gender representation at all levels and in external hiring and promotions" supports gender equality.

109 See Rhode *supra* note 1 at 6 and the last sentence of note 2, citing Rankin & Stewart, *supra* note 2.

110 See Rhode, *supra* note 1 at 7.

111 Cooper *et al*, *supra* note 1 at 10. LeanIn's January and February 2018 surveys of close to more than 8,800 employed adults revealed that, in the wake of the #MeToo movement which crested in 2017 with widespread reporting about the damaging effects and pervasiveness of sexual harassment in the workplace, almost fifty percent of male managers are "uncomfortable participating" in such common work activities with women as mentoring, and 1 in 6 "may now hesitate to mentor a woman". Sexual harassment and increased awareness of it thus creates a double bind for women seeking advancement. See the survey results published online: <https://leanin.org/sexual-harassment-backlash-survey-results/>.

112 See e.g. Claire Cain Miller, "It's Not Just Fox: Why Women Don't Report Sexual Harassment", *New York Times* (10 April 2017), online: <https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html?em_pos=small&emc=edit_up_20170410&nl=upshot&nl_art=0&nlid=76445819&ref=headline&te=1>; Katie Benner, "At the Justice Dept.'s Death Penalty Unit, Accusations of Favoritism, Gender Bias and Unwanted Groping", *New York Times* (31 March 2018), online: <https://www.nytimes.com/2018/03/31/us/politics/justice-department-harassment-bias.html>; and Lisa Rein, "Justice in the #MeToo era is not nearly as swift for federal employees", *Washington Post* (2 April 2018), online: <https://www.washingtonpost.com/politics/justice-in-the-metoo-era-is-not-nearly-as-swift-for-federal-employees/2018/04/01/51c98e0a-2c72-11e8-8688-e053ba58f1e4_story.html?utm_term=.1a2117b7cfa7>.

lost economic opportunity. They underscore the "inefficiency" of male-centric hiring and promotion choices. Since market share tends to shift over time to more diverse companies, such lost economic opportunity becomes entrenched, hampering such business' future growth and revenues. Even a mere decade of such lost economic opportunity dramatically affects a business' bottom line relative to its competitors with more gender-diverse leadership.

The "leaky pipeline" phenomenon noted by feminist scholars – whereby women leave organizations that they don't believe will promote them – also negatively affects business' bottom line.[113] The leaky pipeline means businesses need to repeatedly renegotiate employment agreements with new participants, to replace and retrain talent; this represents a substantial cost to businesses.[114] And while that talent may reappear as entrepreneurship, its full economic value often continues to be unfulfilled.[115] The Report confirms women's concerns about advancement prospects are justified, particularly outside of top-performing companies.

Women, businesses, and society lose out when women's unrealized leadership potential remains untapped. According to Clinton Foundation research, "as much as $28 trillion, or 26 percent, could be added to the global GDP by 2025 if women played an identical role in formal labor markets to that of men."[116] Bank of Canada Governor Stephen Poloz noted in March 2018 that boosting Canadian labour force participation by women and others by 500,000 people "could raise the country's output by $30 billion per year or 1.5 per cent", resulting in "a permanent increase in output of almost $1,000 per Canadian every year".[117] Adopting childcare programs similar to the Province of Quebec's across Canada, would "add almost 300,000 people to our country's workforce."[118] Women now attend university in equal to or

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113 See Rhode, *supra* note 1 at 17. As Rhode notes, not only do "… the barriers to women's advancement compromise fundamental principles of equal opportunity and social justice … [but t]hese barriers carry an organizational price as well. Workplaces that are preoccupied with short-term measures of productivity and bottom-line costs of family policies may fail to calculate the longer-term costs in recruitment and retention that the absence of such policies impose."

114 Trebilcock, *supra* note 42 at 131, notes renegotiation of agreements is a type of transaction cost.

115 See Kerry Hannon, "Inspired or Frustrated, Women Go to Work for Themselves", *New York Times* (3 October 2017), online: <https://www.nytimes.com/2017/10/03/business/women-entrepreneur-career.html>. Hannon attributes the growth in female entrepreneurship in part to stalled progress on "issues like the salary gap and advancement to positions on corporate boards". She argues that in entrepreneurship as well, however, women face systematic biases such as: not being taken seriously at first, especially if young; being refused credit, even with evidence of employment; and having their business acumen underestimated.

116 See Anna Powers, "The Secret To Future Economic Growth And Prosperity? More Women In STEM", *Forbes.com* (29 August 2017), online: <https://www.forbes.com/sites/annapowers/2017/08/29/tapping-into-the-untapped-potential-to-drive-economic-growth/#420a5dcc63a0>. McKinsey's September 2015 report titled "The Power of Parity: How Advancing Women's Equality Can Add $12 Trillion to Global Growth", from which the Clinton Foundation drew its $28 trillion figure, notes that in the thirty year period 1980-2010 across sixty countries, as women expanded their labour force participation by 19.7 percent, male labour force participation declined by just 1.5 percent. Given this historical pattern, McKinsey's report assumed no decline in male participation in arriving at its $28 trillion figure (see at 5). Available at: <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Employment%20and%20-Growth/How%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/MGI%20Power%20of%20parity_Executive%20summary_September%202015.ash>.

117 See Andy Blatchford, "Bank of Canada head underlines potential of Quebec child care for entire country", *CBC News | Politics* (March 13 2018), online: <http://www.cbc.ca/news/politics/poloz-child-care-quebec-1.4574195>.

118 See *ibid*.

greater numbers than men in 95 countries – yet the World Economic Forum's *Global Gender Gap Report 2016* found that the sexes will not achieve economic parity for another 170 years.[119] The unharnessed economic value such women's underutilized knowledge represents and the expected time lag to rectify their under-compensation is staggering.

Finally, individual women suffer economically each time a promotion is delayed, or never materializes, whatever the cause.[120] Even a single year delay[121] in promotion can dramatically affect a woman's lifetime earnings potential, and constitutes another substantial transaction cost incurred by women and not men.

In sum, this Section demonstrates that businesses, women and society all lose out from businesses' failure to advance women in equal numbers to men, women disproportionately so. While resistant to change, this situation is fixable. As Coase notes, firms can rearrange activities through administrative decisions, and/or governments can regulate directly.[122] Firms' capacity to rearrange activities in particular is promising. A business can adopt initiatives, such as companies with better track records in advancing women have, at any time. They need not wait to be compelled by regulation. For example, encouraging fairness in advising *both* genders on how to advance[123] could improve women's advancement opportunities. Businesses can take action to prioritize women's leadership. This is apt to be far less costly and controversial over the long run[124] than waiting to be regulated into adopting mandatory changes.

IV. *WHY* DON'T ORGANIZATIONS ADVANCE AND PROMOTE MORE WOMEN? THE EVIDENCE: A BEHAVIOURAL ECONOMICS ANALYSIS OF THE WOMEN IN THE WORKPLACE 2017 REPORT

Traditional economics rests on rational choice theory. The chronic under-advancement of women is hardly rational (i.e., wealth-maximizing).[125] What can help explain this? I argue that behavioural economic analysis can assist businesses, law- and policy-makers to identify potential behavioural impediments to women's advancement, and help them address and remove them.

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119 See Hannon, *supra* note 115.

120 *Ibid*. As Hannon notes, "[t]ime out of the work force to raise children continues to be a major barrier. A study from Visier, a work force analytics firm, found the gender wage gap at large United States employers widens at age 32 because that's when many women leave work to have and care for children; it's also around the age workers start to advance up the corporate ladder. While men and women hold about the same number of management positions throughout their 20s, once workers hit the age of 32, men hold a notably higher proportion of those positions. *And managers earn, on average, double what non-managers do, according to the report*." [emphasis added].

121 This example is not random. As noted in Susan Chira's "Why Women Aren't C.E.O.s, According to Women Who Almost Were", *New York Times* (21 July 2017), online: <https://www.nytimes.com/2017/07/21/sunday-review/women-ceos-glass-ceiling.html>, one of the women leaders she interviewed shared that "[a]t Dupont … men were being promoted within two years, women in three. 'It wasn't as overt as, 'She's too aggressive.' … 'It came down more to, 'We're not sure she's ready for that job.'" This means delay is not uncommon, and can of course recur in a woman's rise.

122 Coase, *supra* note 42 at 16-17.

123 See note 111 above and accompanying text.

124 Though it perhaps bears noting that company and industry level changes and/or employment law changes to advance gender parity in corporate leadership are likely to give rise to their own perceptions of transaction costs, especially from men's perspective, as their status quo endowments are affected (see my note 144 and accompanying text).

125 Devlin, *supra* note 26 at 34.

Jolls, Sunstein and Thaler noted that humans' decision-making is constrained by bounded rationality, bounded willpower and bounded self-interest. Law can serve as a brake on bounded rationality and bounded willpower, and to bolster fair treatment. These three bounds, together with the endowment effect, offer a means to explore the Report's findings of men and women's differing perceptions of the extent of the advancement gender gap, and men's more limited support for prioritizing women's advancement.[126] My analysis now turns to each concept.

A. Bounded Rationality

The Report contains rich detail concerning how women and men perceive the extent to which women are underrepresented in leadership and/or that companies are addressing their concerns. The Report notes that "[m]en are more likely to think the workplace is equitable; women see a workplace that is less fair and offers less support. Men think their companies are doing a pretty good job supporting diversity; women see more room for improvement. Given the persistent lag in women's advancement, women have the more accurate view."[127] As evidence, the Report notes the 18% gender gap on average at the first promotion to manager level, and increasing disparity thereafter.[128] The first promotion gap constrains women's earning potential and capacity for further advancement, and contributes to the leaky pipeline problem. In 2003, Rhode similarly highlighted widespread assumptions that barriers had been coming down, women had been moving up, and equal treatment was an accomplished fact.[129] Another belief, held by two-thirds of male CEOs, that women have not been in the pipeline long enough is belied, Rhode states, by the continuing underrepresentation of women in law and management, where she noted women have long made up between one-third and one-half of new entrants.[130] Yet another popular belief (mistaken, according to the Report) is that women are less ambitious than men.[131] Hickman notes that research shows "women are consistently evaluated more harshly than their male counterparts".[132] Further, the belief the Report highlights that women are well represented in companies where just one in ten senior leaders is a woman, shared by nearly half of men and 30% of women, make challenging the status quo difficult, and underscore Buchanan's and Dougherty and Fineman's concerns discussed in Section II above.

All of these beliefs are cognitive limitations upon business leaders' and managers' prioritizing of women's advancement: they cannot solve a problem they do not see or understand clearly.[133] Inability or unwillingness to recognize and treat women's underrepresentation in leadership as a problem is a bounded

126 Cooper *et al*, *supra* note 1 at 14-15.
127 See *ibid* at 14.
128 *Ibid* at 10. We can infer that since the average includes top performers, the bottom performers' results were appreciably *worse* than the average.
129 Rhode, *supra* note 1 at 6. She noted that fully two-thirds of surveyed men and three-fourths of male business leaders did not then believe that women encounter significant discrimination for top positions in business, the professions or government.
130 *Ibid* at 7.
131 Cooper *et al*, *supra* note 1, found at 10 that "[t]he disparity in promotions is not for lack of desire to advance. Women are just as interested in being promoted as men, and they ask for promotions at comparable rates. In fact, senior-level women ask for promotions more often than senior-level men. Despite this, women are still not advancing at the same pace as men. And external hiring is not making up the disparity in promotion rates."
132 Hickman, *supra* note 4 at 408, citing Lee and James.
133 See Cooper *et al*, *supra* note 1 at 2.

rationality problem. This affects business leaders' and managers' judgments about corporate priorities, and day to day interactions with women who could be potential candidates for leadership roles.[134] It impedes businesses from taking necessary steps to close the gender gap in advancement, particularly at the first promotion stage, where the Report projects that closing this gap *alone* would double the total women in senior vice-president and C-suite roles.[135] As the Introduction notes, top performing companies have just a 4% gender gap at the first promotion level, and generally many more initiatives aimed at driving gender parity in leadership than do average or poorer performing companies. Understanding which initiatives have the greatest effect in closing the gender gap in advancement is key to its rapid closure. Failing to understand the answers to these key questions bounds business leaders' and managers' rationality, inhibiting their ability to maximize firm profits.

B. Bounded Willpower

As previously noted, managers' tendencies to disproportionately hire and promote men over women, and to evaluate women more harshly than men, conflicts with their businesses' interest in a diverse workforce with diverse leadership whose full potential can be realized. It increases businesses' recruitment and retraining costs, when highly skilled women leave because they do not believe they will be promoted. Therefore, policies and programs designed to support women's advancement could be seen as braking managers' preference for promoting from within the good old boy's club. Since they exist to mitigate the tendency of managers to sustain a mainly white and male leadership group, such policies and programs can be seen as bounded willpower initiatives. Such programs are significantly more common among top performing companies.[136] This underscores the importance of overcoming managers' blind spots, whether cognitive or behavioural, that conflict with their business' long term interests. Initiatives such as setting diversity targets, requiring managers to participate in unconscious bias training and establish mentorship programs for women, all bound managers' willpower by inducing them to adopt company priorities and practices they might not otherwise.

C. Bounded Self-interest

As discussed in Section II.A. above, human beings are motivated to be treated fairly, and to treat others fairly to the extent that they are behaving fairly; unexpected niceness and spitefulness accompany this bounded self-interest.[137] This concept, then, has both positive and negative connotations.

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[134] Rhode, *supra* note 1, highlights how such beliefs, judgment and decisions affect day to day interactions with women: female professionals receive fewer opportunities to develop leadership qualifications than male colleagues (at 7); between 33 and 50% of women in upper-level management surveys cited lack of influential mentors as a major advancement barrier (at 12); and men's greater opportunities to receive mentoring in the workplace means that "[m]en pick up career tips; women pick up laundry, kids, dinner, and the house" (at 13). This is consistent with Cooper *et al*'s finding, *supra* note 1 at 10, that women are less likely to receive advancement advice from managers and senior leaders. See my note 98 and accompanying text.

[135] Cooper *et al*, *supra* note 1 at 10.

[136] *Ibid* at 30.

[137] See Thaler *et al*, *supra* note 32.

The Report found that men place less personal priority on gender diversity, and "point to concern over de-emphasizing individual performance as the primary reason."[138] The Report notes "[s]ome men even feel that gender diversity efforts disadvantage them: 15 percent of men think their gender will make it harder for them to advance, and white men are almost 50 percent more likely than men of color to think this."[139]

This suggests some men are concerned gender diversity is unfair to them. Were mandatory quotas required, this would not be an unreasonable perception, when seen from such men's loss aversion perspective, based on a prior sense of entitlement to hold leadership positions. However, in context of softer efforts to be more inclusive, balanced and fair in the treatment of women and ethnically diverse candidates, this concern seems overblown. This perception of unfairness suggests that a framing effects problem – and opportunity – exists.[140] Recasting gender diversity initiatives as fairness programs aimed at leveling the playing field and overcoming unfair bias in hiring, evaluation and promotion would be a direct appeal to bounded self-interest. Until and unless this fairness concern is addressed, unexpected spitefulness, e.g. through white male backlash against gender or racial diversity efforts, could ensue.[141]

On the positive side, the Report highlights that companies and managers prioritizing gender diversity efforts, managers giving employees guidance on how to improve gender diversity, and companies making the case that gender diversity leads to positive business results and is fair to all people, all predict greater employee commitment to gender diversity.[142] The Report found that "[i]f men believe their organizations prioritize gender diversity because it leads to better business results, they are significantly more likely to think it matters. … [W]hen men think companies prioritize gender diversity because it is 'fair to all people,' they are more likely to be personally committed."[143] This is a good example of the niceness implications of bounded self-interest at work.

D. The Endowment Effect

Finally, the endowment effect – another key behavioural economics concept – is pertinent to my argument. Under the status quo, white males are more likely to occupy or advance into leadership roles. Thaler and others found through experimentation with something as trivial as brief ownership of coffee mugs that humans would resist giving up their entitlement (once I have that mug, I think of it as mine) in

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138 See Cooper *et al*, *supra* note 1 at 15.

139 See *ibid*. One could argue that the "glass cliff" phenomenon represents a form of the spitefulness encompassed within bounded self-interest. As Creswell notes, *supra* note 77, according to a Utah State University research report, "… women [were] more likely than men to be promoted to the top job of a troubled company. And then … the women 'often lacked the support or authority' to make the kind of changes the company needed, leading to shorter tenures".

140 Jolls and Sunstein note that "there is usually no neutral way to present information" (2006a, *supra* note 45 at 232), and the manner in which employees, managers, colleagues, businesses and governments describe a situation will affect how that situation is perceived and how people will respond (at 205-6). This is called a framing effect.

141 See e.g. Nellie Bowles, "Push for Gender Equality in Tech? Some Men Say It's Gone Too Far", *New York Times* (23 September 2017), online: <https://www.nytimes.com/2017/09/23/technology/silicon-valley-men-backlash-gender-scandals.html>.

142 See Cooper *et al*, *supra* note 1 at 30.

143 *Ibid* at 27.

rational exchanges, at least in part because of loss aversion, as well as status quo bias.[144] Imagine how much more resistant white males would be to give up privileges that society currently affords them, including dominance of leadership roles, when one considers the wealth and advancement opportunity such status quo endowments afford them. This is why the endowment effect, loss aversion and status quo bias may help explain why progress toward gender parity in leadership is stalling or stalled. The endowment effect and bounded rationality are also interconnected. Some people lack awareness of the extent and severity of the gender gap in advancement. This bounded rationality impedes their capacity to question the status quo or challenge the endowment effect. Others however – both men and in some cases women, it must be said – are well aware of the gap and seek to preserve the status quo and accompanying privileges enjoyed by mostly white men. This latter group may prefer that the former group remains ill-informed, or sees the issue framed as white men needing to protect themselves against losses. Particularly when added to the other two bounds, the cumulative effect of these cognitive and behavioural factors underscore how crucial it is to intervene to correct this gender gap and perceptions and behaviours surrounding it.

V. INSIGHTS AND SOLUTIONS FROM BEHAVIOURAL ECONOMICS: THEORETICAL UNDERPINNINGS FOR DEVELOPING CHANGE STRATEGIES

Turning next toward potential solutions, I recommend using behavioural economists' insights in developing strategies to modify organizational behaviour and culture. Section IV argued the Report's (and similar studies') findings show that the three bounds and endowment effect all contribute to explain why the gender gap in corporate advancement persists. This Section establishes theoretical underpinnings to guide measure development to close it. I describe Martins Pereira's framework of regulatory strategies animated by behavioural economics' insights and rationales for intervention. I position the gender gap scholars' recommended measures within that framework. I contrast carrot vs. stick approaches to modifying behaviour, incorporate important incentive design insights, and relate carrots and sticks to Martins Pereira's framework. I explain how Jolls and Sunstein's debiasing through law framework can bring behavioural economics insights to bear on identifying measures to close the gender gap. I argue that carrots should be preferred in devising incentives to overcome implicit bias. In combination with normative measures, carrots and incentives could encourage more businesses to adopt top performing companies' best practices.

A. Behavioural Economics' Interventionism

Mandate, nudge, incentivize, or leave it to the market: which possible direction(s) does behavioural economics suggest? Martins Pereira's review of behavioural economics literature identifies the emerging trend of regulatory intervention.[145] She groups such interventions by type of regulatory strategy. Her first

[144] Thaler, *supra* note 5 at 149-155, especially at 154. See the definition of loss aversion set out in my note 76 above, citing Hickman, *supra* note 4. See my discussion of Buchanan's critique of classical economics' tendency to sustain the status quo in my note 46 above and accompanying text.

[145] Martins Pereira, *supra* note 7 at 422-8. Though her article focuses on regulatory intervention where consumer financial decisions are involved, her strategy categories are equally useful for our purposes.

three groupings are pertinent: information-based (i.e. correcting asymmetries between parties); nudging (leading to better choices); and behaviour-constraining (for example, whether of the more powerful party, or the making of a present choice to constrain future behaviour).[146] A "comply or explain" securities law requirement to disclose whether a company has diversity policies in place that encourage diverse board leadership and if not to explain why not,[147] or a regulatory obligation to disclose gender pay gap information,[148] fits Martins Pereira's information-based category. Because such requirements also spur companies to examine themselves, they also subtly nudge companies to adopt measures to rectify such gaps, thereby straddling Martins Pereira's nudging category.[149] Mandatory board composition quotas fit Martins Pereira's behaviour-constraining category.[150]

Martins Pereira states the two leading behavioural economics rationales for regulatory intervention are to: (a) identify and intervene when individuals make mistakes due to bias; and (b) intervene where third parties are negatively affected by individuals' choices based on such biases.[151] Regulation can be "understanding of the reasons behind past injustice or harm", developing and supporting "reforms to prevent recurrence and instigate repair".[152] All of these justifications for intervention avail respecting the gender gap in corporate advancement. Women are being delayed or passed over in corporate advancement due to mistaken bias. Businesses and their stakeholders are negatively affected when the higher financial performance correlated with gender diverse leadership is not attained. Finally, women's capacity to reach their full potential is negatively affected.

B. Carrots Vs. Sticks and Understanding Motivation - What Works Best When

According to Dari-Mattiaci and De Geest, "[i]ncentives can be generated by either carrots … or sticks",[153] yet "they are not chosen at random".[154] Carrots (rewards) are received upon compliance, sticks

[146] *Ibid* at 424-7. Her fourth grouping, product regulating, is relevant to goods and services, not people, and is not considered further here. See Martins Pereira, *supra* note 7 at 427.

[147] See the Willey and Klettner *et al* articles, *supra* note 4.

[148] See e.g. Emma Rumney, "Goldman Sachs reports gender pay gap of 55.5 percent", *Reuters* (16 March 2018), online: <https://www.reuters.com/article/us-goldman-sachs-pay-gender/goldman-sachs-reports-gender-pay-gap-of-55-5-percent-idUSKCN1GS1T3?utm_source=Facebook&utm_medium=Social>, which reported that "[t]housands of large UK employers have been ordered to disclose their gender pay gaps by April … [this] deadline [was] set last year by Prime Minister Theresa May."

[149] For example, Goldman Sachs acknowledged that "its gap reflected the fact that there were more men than women in senior positions at the firm … The Wall Street bank said it is committed to promoting diversity and inclusion at all levels of the firm. … [I]t said it wanted women to make up half of its global workforce, starting with a target of 50 percent of its new analysts being women by 2021." See Rumney, *supra* note 148. While this goal is laudable, committing to paying male and female workers more equally and devising policies to advance more women into senior positions would better address Goldman Sachs' gender wage gap problems.

[150] For a discussion of the Norwegian quota, see Hickman, *supra* note 4 at 385-6, 397, 405, and 407, and Klettner *et al*, *supra* note 4 at 397-8, 400, 405-6 and 415.

[151] Martins Pereira, *supra* note 7 at 428.

[152] Klettner *et al*, *supra* note 4 at 397.

[153] See Giuseppe Dari-Mattiaci & Gerrit De Geest, "Carrots vs. Sticks", in Parisi, *supra* note 17, 439 at 439.

[154] See *ibid* at 439. By way of example, they note that theft is generally punished, and inventiveness rewarded, across legal systems (at 439).

(punishments) upon violation.[155] Carrots are increasingly used in complex society, particular where a principal (e.g. lawmaker) is unsure what can reasonably be expected from an agent (e.g. a hiring and promotions manager working within a given business).[156] While loss aversion and the endowment effect may make negative incentives more effective, positive incentives may be relatively more effective when salient,[157] and less likely to signal mistrust.[158] Gneezy, Meier and Rey-Biel (Gneezy *et al*) urge researchers to take care in incentive design, considering form, motivation and aftermath.[159] They emphasize intrinsic motivation's importance to sustain change.[160] This may buttress Klettner *et al*'s argument that cultural change is best achieved through voluntary measures,[161] because such measures are more likely to reflect intrinsic motivation. They argue that how the decision to which the incentive will be applied is framed is critical to spurring the desired behaviour.[162]

In Martins Pereira's regulatory categories framework, carrots are more likely nudges, and sticks behaviour constraints. Since carrots preserve choice, they align with voluntary measures. Sticks align with mandatory measures, particularly when punishments are severe. On balance, when the policy objective is encouraging greater gender parity in leadership and inspiring cultural change, my view is that a carrot approach (incentives) is likely to be more effective and less resisted than a sticks approach (mandatory rules applicable to all). In particular, I argue that devising incentives to overcome implicit bias, discussed at length by Jolls and Sunstein (see Section V.C. below), should lean toward carrots. This is because the goal is aspirational, to motivate businesses to positively identify and modify beliefs and behaviours that may be unconsciously contributing to the gender gap. Even higher performing businesses could perhaps be motivated to go further, raising the bar of expectations for other businesses. Sticks, by contrast, would likely be defined by a lowest common denominator, inducing businesses to do the bare minimum necessary to avoid punishment. Poorly performing businesses in particular might raise concerns of unequal treatment,[163] because the effort required for them to achieve parity would be so much greater than that of top performing companies, since they have much further to go. Such businesses could be expected to push back hard against sticks (punishments), but might well embrace carrots (rewards) encouraging them to adopt top performing companies' best practices.

C. Debiasing Through Law: Connecting to the Frameworks

Jolls and Sunstein's closely related 2006 articles "The Law of Implicit Bias" and "Debiasing Through Law" considered anti-discrimination law's struggle to address implicit bias[164] and how it manifests in

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155 See *ibid* at 443 and 446.

156 See *ibid* at 446.

157 See *ibid* at 462.

158 Uri Gneezy, Stephan Meier & Pedro Rey-Biel, "When and Why Incentives (Don't) Work to Modify Behavior", (2011) 25:4 J Economic Perspectives 191 at 199-200.

159 *Ibid* at 206.

160 *Ibid*.

161 See Klettner *et al*, *supra* note 4, especially at 395-400.

162 Gneezy *et al*, *supra* note 158 at 200.

163 See Dari-Mattiaci & De Geest, *supra* note 153 at 463.

164 Jolls & Sunstein describe implicit bias as "people … treating others differently even when they are unaware they are doing so". See Christine Jolls & Cass R Sunstein, "The Law of Implicit Bias", (2006) 94 Cal L Rev 969 at 969 (Jolls & Sunstein, 2006b).

behaviour, including employer behaviour.[165] They identified parallels "between implicit bias and the heuristics and biases emphasized by cognitive psychology and behavioural economics."[166] Implicit bias is a form of bounded rationality. They argue in favour of a "debiasing through law" approach,[167] to debias "by steering people in more rational directions"[168] to counter implicit bias and the biased behaviour stemming from it. Debiasing strategies aim to "reduce people's level of bias" at first instance.[169] Such strategies seek to balance preserving choice with error correction, which "help[s] to address boundedly rational behavior while avoiding the imposition of significant costs on those who do not exhibit bounded rationality."[170] They see debiasing through law as "likely to be effective, cost justified, and minimally intrusive".[171] Jolls and Sunstein tend to advocate restrained measures falling short of behavioural constraints. Their approach fits closest with Martins Pereira's information-based and nudging regulatory strategies, and positions them on the voluntary to normative end of the framework I developed above.

VI. LAW & BEHAVIOURAL ECONOMICS INSIGHTS: AN ASSESSMENT OF THE REPORT'S RECOMMENDATIONS, AND THE CASE FOR ADDITIONAL NUDGES, PROCESS CHANGES AND INCENTIVES TO MODIFY ORGANIZATIONAL BEHAVIOUR

To be effective and durable, any solutions aimed at modifying organizational behaviour and culture to close the gender gap in corporate advancement should take into account the cognitive limitations, gaps in willpower, fairness-impacting issues and status quo biases that animate the three bounds and endowment effect. Business leaders and law- and policy-makers should adopt improved messaging, best practices and incentives to close this gender gap. Such initiatives should be assessed in light of the theoretical framework set out in Section V. The goal of such measures should be to induce leaders to (a) adjust how they champion women for advancement opportunities, and (b) adopt best practices conducive to women's corporate advancement. This Section now revisits the gender gap scholars' recommendations, and assesses the Report's recommendations in light of behavioural economics insights. It evaluates whether the Report could go further. It contributes ideas for additional process changes including adoption of normative best practices, nudges, and incentives including training and research tax credits to close this gender gap. Finally it recommends the use of behavioural economics' methods of experimental empirical research to establish which messaging, best practices and initiatives most effectively close the gender gap in corporate advancement.

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165 *Ibid* at 972.
166 *Ibid* at 976.
167 *Ibid* at 969.
168 Jolls & Sunstein 2006a, *supra* note 45 at 199.
169 Jolls & Sunstein 2006b, *supra* note 164 at 977. They contrast debiasing strategies with traditional anti-discrimination law's insulating strategies. The latter restore, not prevent - discriminators are monetarily and/or otherwise liable after the fact for the effects their behaviour causes – see at 977-8.
170 Jolls & Sunstein 2006a, *supra* note 45 at 202 and 226.
171 *Ibid* at 234.

A. Incorporating the Gender Gap Scholars' Recommendations: Mandatory Vs. Voluntary Vs. Normative Measures Revisited

As described in Section II, advocates for intervention to close the gender gap in women's advancement at the board level seek: (1) mandatory measures to effect rapid change; (2) voluntary measures, often accompanied by recommended disclosure regimes, to bring about long-lasting cultural change; or (3) normative measures against which progress toward parity may be judged. I return now to gender gap scholars' debate regarding these measures, to extract lessons relevant to closing the gender gap in women's corporate advancement more broadly.

Hickman reasons that mandatory regulatory change (i.e. the imposition of quotas) is the fastest, most effective and necessary route to rectify the gender gap in board appointments.[172] Without such intervention, her view is the compounding bounded rationality exhibited by both parties will not be overcome, certainly not through voluntary change.[173] Such mandatory regulatory change would be an explicit debiasing through law initiative, albeit stronger than Jolls and Sunstein would likely recommend, and situate Hickman's recommendations within Martins Pereira's behavioural constraint regulatory strategy. If Hickman is correct in her assessment, gender gap scholars should entertain mandatory regulatory and other measures to close the gender gap in corporate advancement, at least as a last resort.

On the voluntary end of the spectrum, information is centrally (though often implicitly) important for Klettner *et al*, to ensure correct policy choice. This aligns with Martins Pereira's information-based strategies' focus on correcting information asymmetries. Without information, mistakes cannot be identified, let alone corrected, and harms cannot be rectified. Klettner *et al* take the view that decreasing gender bias and achieving cultural change in business is likely best achieved through voluntary measures – for example, business- and business association-defined targets – not mandatory measures such as government-defined quotas.[174] Klettner *et al*'s recommendations straddle Martins Pereira's information-based and nudging regulatory strategies, though the nudges recommended are quite soft. Organizational cultural change and decreasing the gender bias that hinders women's corporate advancement would on this view also likely be best achieved through voluntary measures including business- and business association-defined targets.

In the more pragmatic, normative middle, Willey considers whether mandatory or normative gender representation quotas should be considered.[175] She suggests debiasing through law changes to improve the OSC's proposed "explain or explain"[176] amendments to its "comply or explain" disclosure model. One senses she finds the alternative of quotas – at least on a short term basis – appealing.[177] Willey suggests

172 Hickman, *supra* note 4 at 418.
173 *Ibid* at 399.
174 Klettner *et al*, *supra* note 4 at 396.
175 Willey, *supra* note 4 at 204-5.
176 Willey, *supra* note 4, makes the case that these amendments fall well short of a true "comply or explain" approach such as that reflected in Australian law, since they "do not require a gender diversity policy but only ask for an explanation if one is not in place and, further, do not recommend targets or a nomination or selection process for hiring women". Thus, she labels the amendments an "explain or explain" approach – see at 193.
177 Interestingly, Willey's article, *supra* note 4 does not take up backlash concerns that quota debates sometimes raise. By way of example, Jolls and Sunstein 2006b, *supra* note 164, citing Hamilton Krieger, that explicit quotas can increase

specifying a recommended (not mandatory) gender board representation target of 30% women by 2020,[178] so that issuers' disclosure of failure to meet the target will cause more meaningful reflection and debiasing efforts.[179] This solution is a normative one, against which businesses would be measured. On more procedural matters, such as her recommendation to require disclosure of nominating committees' composition, mandate inclusion of photographs of board members, and require annual publication of a "simple breakdown of the proportion of females on the board and in senior management positions … by the OSC or the Toronto Stock Exchange",[180] Willey appears comfortable recommending mandatory measures be adopted. Willey aims to erode unconscious gender bias and "prime" corporations to be less gender biased in selecting and evaluating candidates for board roles.[181] Like Klettner *et al*'s, Willey's recommendations straddle information-based and nudging strategies, though I would argue they both correct information asymmetries and nudge a little more aggressively than the former. On more procedural matters, Willey supports mandatory measures. If Willey's view is correct, then by analogy, a combination of normative and mandatory measures is best used to rectify the gender gap in corporate advancement.

As previously stated, my view is that mandatory regulatory change to close the gender gap in corporate advancement is unlikely to be adopted in either Canada or the US. Even if adopted, such change would likely be short-lived.[182] That said, the difficulty in overcoming the gender gap in corporate advancement because of compounding effects of the three bounds is an urgent point. Purely voluntary measures alone, in my view, will neither be enough nor sufficiently widely adopted to surmount this difficulty. I argue that pragmatic, normative initiatives with the power to effect lasting cultural change combined with nudges, carrots and other incentives to adopt corrective behaviours should be pursued, guided by insights and solutions from behavioural economics, to close the gender gap in corporate advancement. Businesses and governments can consider mandatory measures and sticks as a last resort to correct mistakes and rectify the effects of bias errors when nudges and incentives fail.

B. The Report's Recommendations

1. The Message Matters

The Report recognizes that the framing of the "gender diversity is good" message will affect employees' – including managers – support for that message. The Report argues that men's support for

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implicit bias toward particular groups – see at 981-2, including their note 61. Willey's focus on critiques of quotas, by contrast, is largely centered on tokenism and cultural concerns – see *supra* note 4 at 207.

178 Willey, *supra* note 4 at 210.

179 *Ibid* at 204-5.

180 *Ibid* at 202-3 and 205.

181 *Ibid* at 202-3. Willey explains that behavioural economists identify priming as "associations that make accessible a subsequent interpretation of relevant stimulus", e.g. the term "chairman" of the board genders the role as male (at 199), hence her recommendations described above to foster images of counter-priming.

182 For example, in August 2017 after industry lobbying, the Trump Whitehouse repealed the Obama-era rule "requiring U.S. employers to report detailed pay data broken down by gender and race" starting in March 2018: see Daniel Wiessner, "White House blocks Obama-era rule expanding pay data from companies", *Reuters* (30 August 2017), online: <https://www.reuters.com/article/us-trump-paydata/white-house-blocks-obama-era-rule-expanding-pay-data-from-companies-idUSKCN1BA21Y>.

gender parity is needed,[183] and that "[t]he specific case companies put forth for gender diversity also makes a difference. … [C]ompanies need to better communicate that gender diversity efforts are not a zero sum game but rather benefit all employees."[184] In other words, the content of the "diversity is good" message matters to men's support for it, and should illustrate "the positive impact of gender diversity on your company's long-term success [to] help bring more employees on board."[185] This underscores Jolls and Sunstein's argument in "Debiasing through Law" that framing effects can and should be employed to debias boundedly rational actors.[186] Thus, if businesses provided concrete examples of economic results achievable with increased diversity, then described that economic opportunity in a manner that activated employees' loss aversion biases,[187] this could help increase male employees' prioritization of diversity in leadership.

Behavioural economists would put to good use the Report's insights discussed in Section IV that men are more likely to value gender diversity because it leads to better results, and more personally committed when gender diversity is prioritized because it is "fair to all people". Those insights should inform design of messages and/or nudges to steer managers toward closing the gender gap in hiring and promotion. By way of example, the U.K.'s Behavioural Insights Team (the "Team")[188] used behavioural economics experiments to uncover the most effective payment reminder notice messaging sent to U.K. taxpayers.[189] Businesses could learn from the Team's experience and run controlled experiments in different divisions or across different managers' teams. Goals could include: to see what messaging best mitigated the three bounds and endowment effect; to measure how unconscious bias training affects managers' hiring, review and promotion behaviour; and to assess which nudges toward best hiring, evaluation and promotion practices succeed in closing the gender gap in advancement, comparing teams.[190] Such experiments can help businesses adopt effective, evidence-based strategies that decrease unconscious bias at first instance, and modify employee and manager behaviour toward fairer treatment and increased support for gender

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183 See *Cooper et al, supra* note 1 at 2. It also notes that men do not fully understand women's true position in the workplace, and men's support for gender parity generally lags women's – see the Report at 2 and 14-15, as well as my discussion of the Report's other findings, below.

184 See Cooper *et al*, *supra* note 1 at 27.

185 *Ibid* at 21.

186 Jolls & Sunstein 2006a, *supra* note 45 at 206 and 210-1. By way of example, Jolls & Sunstein's article discusses findings that loss aversion messaging most effectively spurred breast cancer self-exams.

187 For example, applying lessons learned from the coffee cup experiments, businesses could hand employees a physical envelope with a sheet inside showing them how their bank accounts would be expected to grow from rising salaries and the growth in value of $10,000 in shares held in the company. Taking or asking them to bargain away the envelope contents could induce both an endowment effect as well as loss aversion bias.

188 Thaler, *supra* note 5 at 330-345. The Team was formed following the 2010 formation of the Conservative-Liberal Democrats coalition government.

189 The reminders were of second payments due, sent to typically self-employed U.K. taxpayers who have to file a return and make twice annual payments. After three rounds of experimentation, the Team found the final recommended messaging increased the total taxpayers who made early payments by more than five percent (5%). The Team found that "the most effective message combined two sentiments: most people pay and you are one of the few who hasn't." See Thaler, *supra* note 5 at 334-337.

190 The Report includes a lengthy list of initiatives that support gender parity objectives, and charts the extent to which top performing and other companies pursue them. See Cooper *et al*, *supra* note 1 at 30.

parity in leadership. Such approaches align with Martins Pereira's nudging strategies and champions of voluntary and normative measures.

2. Other Report Recommendations – and Could They Go Further?

The Report recommends business organizations focus on six core actions to close the gender gap in advancement: "make a compelling case for gender diversity; invest in more employee training; give managers the means to drive change; ensure that hiring, promotions, and reviews are fair; give employees the flexibility to fit work into their lives; [and] focus on accountability and results".[191] For each, I identify where behavioural economics insights could help the authors go further, assist in overcoming Hickman's compounding effects concerns, and embolden the authors to advocate for normative measures and incentives to drive lasting cultural change.

(a) Make a Compelling Case

The Report calls out a discrepancy between what companies *say* about prioritizing diversity, and whether employees *perceive* priority actually being given. While 9 in 10 companies say diversity is a high priority, only 5 in 10 employees think actions match words.[192] Most don't see steps being taken to increase diversity, and only a third say they hear frequently it is important.[193] Under 40 percent say their managers make sure diverse voices are heard in decision-making and prioritize gender diversity.[194] Employees believe their company's motivations for supporting gender diversity are more image- than results-driven; companies say the opposite.[195] Just 5 in 10 employees place high personal priority on the issue, men less so than women.[196] To fix this, the Report recommends organizations show commitment, make the business case, and back it up with numbers.[197]

The challenge with these recommendations is that they are arguably too vague to be actionable. It would be helpful if the Report went further to guide businesses how to address these gaps between companies' stated objectives and employees' perceptions. Gaps in *perception* exist because gaps between manager *behaviour and* companies' stated objectives persist. Until those behaviour gaps and the biases – unconscious or otherwise – that give rise to them are rectified, perceptions will not change. Managers could be guided as to what the best practice of showing commitment to diversity and articulating the business case looks like,[198] and measured and rewarded based on how well they adhere to that ideal. Defining best practices is normative, and an information-based strategy using Martins Pereira's categories.[199] Articulating the business case would explain the importance of diversity to employees, and

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191 *Ibid* at 20.
192 *Ibid* at 21.
193 *Ibid*.
194 *Ibid*.
195 *Ibid*.
196 *Ibid*.
197 *Ibid*, as well as my note 108 above and the accompanying text.
198 Simple examples of showing commitment could include intentionally and frequently raising diversity objectives in meetings, visibly taking steps to share information about diversity progress within the team and company e.g. by circulating links to topical news stories and internal company reports, ensuring women especially women of colour are heard from in meetings and given stretch assignments, etc.
199 See Willey, *supra* note 4 at 204-5 and Martins Pereira, *supra* note 7 at 424-7.

create awareness of where the status quo falls short of fair treatment. This would address bounded rationality problems, and appeal to bounded self-interest as well as delegitimate any sense of entitlement arising from the endowment effect. Measuring managers' adhesion to best practices would be a bounded willpower initiative as well as a form of nudging strategy, if it resulted in carrots (e.g. elevating an otherwise average manager's performance review, potentially triggering bonuses, enlarging team size, etc.). Should repeated failure to adhere to best practices eventually result in sticks (e.g. potentially smaller team size, budgets or manager bonuses, or impacts to the manager's future promotion opportunities), then it would become a behaviour constraining strategy.

(b) More Employee Training

Employees involved in hiring decisions or performance reviews receive unconscious bias training at *less than 20 percent* of the companies the Report surveyed.[200] While 2 in 3 companies offer employees unconscious bias training,[201] the obvious point is that they *don't* make sure hiring and promotions managers receive it. Less than a third of employees say managers address gender-biased language and behaviour when it happens, and only 34 percent say disrespectful behaviour toward women is quickly addressed.[202] Such training and contemporaneous addressing of bias is critical to debiasing at first instance.[203] The Report recommends more companies provide this training, urging that it be "backed up by a call to action … [that] directly encourages people to avoid thinking of others in a stereotypical way."[204] The Report could go further to (1) set the normative expectation that companies require all

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200 See Cooper *et al*, *supra* note 1 at 22 [emphasis added].

201 *Ibid* at 22.

202 *Ibid*.

203 Jolls & Sunstein 2006a, *supra* note 45 at 211-2 advocate for "intervening in and altering the situation which produces the boundedly rational behavior" such that "the environment is restructured in a way that alters not the individuals' motivation but the actual process by which they perceive the world around them."

204 See Cooper *et al*, *supra* note 1 at 22. It is worth noting that Alexandra Kalev, Erin Kelly & Frank Dobbin's article "Best practices or best guesses? Assessing the efficacy of corporate affirmative action and diversity policies" (2006) 71:4 American Sociological Rev 589, suggests the effectiveness of diversity training programs in closing the gender gap in advancement may be muted, relative to other initiatives. The authors surveyed a sample of 708 annual Equal Employment Opportunity Commission private sector filers' EEO-I annual workforce composition reports, to understand the filers' personnel and diversity programs' effects on workforce diversity (at 590 and 596). Because the filings collapse into management all jobs above first-line supervisor, the authors' analyses could only indicate which programs more effectively help women and African Americans move into bottom ranks of management, but not show which practices help women and minorities move into senior leadership roles (at 590). This limitation acknowledged, they found: (i) responsibility-establishing structures such as affirmative action plans (white women benefited most from these, followed by black men, see at 603), diversity committees (black women benefited most, followed by white women, see at 603), and diversity staff positions (black men benefited most followed by black women) led to the greatest increase in managerial diversity; (ii) networking programs were nearly as effective for white women as affirmative action plans, but had a negative effect on black men (see at 603), while mentorship programs were the second most effective program for black women, and almost as effective for black men as affirmative action plans (see at 603); and (iii) diversity training had a modest benefit for black men but negative effect on black women and virtually no effect for white women (see at 603), while diversity evaluations had a positive effect for white women but negative for black men and women (see at 603). When combined with structures establishing responsibility, both (ii) and (iii) were found to be more effective (at 590), with black men followed by black women benefiting most in the case of (ii) (networking), black women followed by white women benefiting most in case of (ii) (mentoring), and white women and black women benefiting most in the

managers to participate in such training, (2) provide best practice guidance as to the training's form, duration and content, (3) recommend combining training with accountability structures such as diversity plans, committees and/or staff positions,[205] and urgently, (4) recommend that managers' performance be measured in part on how effectively they foster a more gender inclusive, less biased working environment. The first would be normative, aimed at correcting the bounded rationality inherent in unconscious bias.[206] The latter three would be a bounded willpower initiatives and/or nudges in Martins Pereira's categories, if structured as carrots, or behaviour constraints if structured as a stick.

(c) Give Managers the Means to Drive Change

Managers play a make or break role in gender diversity efforts: they "determine whether policies and programs are used and how widely …[and] they make many of the day-to-day decisions that impact women's career progression. … Women are more likely to be promoted when managers advocate for them, give them stretch assignments, and advise them on how to advance."[207] But, women get less mentorship and sponsorship than men; only half of the surveyed companies have formal mentorship programs; under a third have sponsorship programs "that commit individual leaders to advocate for and create opportunities for women";[208] and employees don't believe their managers prioritize gender diversity.[209] Managers are key to closing the gender gap. The Report recommends businesses implement formal mentorship and sponsorship programs, and ensure "managers have the know-how to support women's career development".[210] Further, businesses should ensure managers "understand why gender diversity matters, give them the insights and tools to make a difference, and reward them when they do."[211]

I argue that the Report could go further than it has done here. It would be helpful if the Report recommended specific tools, practices and training that companies should provide to managers to counter implicit bias and support women's career development. Examples could include: basing hiring and promotion decisions on standardized candidate assessments; consistently rating, ranking and qualifying talent; using blind processes at early stages in the hiring process; using gender neutral job descriptions;

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case of (iii), across both initiatives (at 606). Interestingly, companies under EEOC enforcement orders show that diversity training has a strong beneficial effect across all three demographics (at 608). Finally companies that had a minimum of three diversity programs saw greatest across the board diversity improvements among white women, black women and black men all (at 606). Unfortunately, the authors' summary conclusions (at 590) compress their more nuanced findings described above.

205 See my discussion of Kalev *et al*'s findings, *supra* note 204. Interactive and ongoing guided training, for example, may be more effective than a once-a-year passive viewing of a short online module.

206 Interestingly the Report makes no calls to action of governments. Governments of course could adopt regulations requiring businesses to provide unconscious bias training to all managers, or allowing them to use evidence of provision of such training to hiring and promotions managers as a due diligence defense against anti-discrimination claims. The former would be a mandatory measure, the latter an insulating strategy employing loss aversion framing to nudge businesses toward unconscious bias training best practices.

207 See Cooper *et al*, *supra* note 1 at 23.

208 *Ibid*.

209 *Ibid* at 24.

210 See Cooper *et al*, *supra* note 1 at 23. As Kalev *et al* note, *supra* note 204, this would particularly benefit women of colour.

211 See Cooper *et al*, *supra* note 1 at 24.

ensuring women have access to career experiences needed to succeed; eliminating requests for salary history information from recruits; and ensuring similar earning, mentorship and management training opportunities.[212] In addition, managers and others involved in selection, evaluation and promotion processes must receive unconscious bias training. Further, the Report could recommend that managers be evaluated on their incorporation of such or similar tools, practices and training into their management activities. Tools and practices countering implicit bias are bounded rationality correctives. Measuring managers' incorporation of such into management activities would be a bounded willpower initiative and, if carrots were used, a nudge. Repeated failure to incorporate such or similar tools could as a last resort lead to sticks, a behaviour constraining strategy.

(d) Ensuring Hiring, Promotions, and Reviews Are Fair

The Report found that "very few [companies] have end-to-end processes in place to ensure that hiring and promotions are fair".[213] While a majority have a stated goal of increasing underrepresented groups through hiring, "less than a third mandate a diverse slate of candidates".[214] The Report recommends companies examine "hiring and review processes to make sure there aren't gaps or inconsistencies", and "track outcomes and set gender targets so they have clear goals and can gauge their progress"; it argues that "a more comprehensive approach will lead to better outcomes".[215]

The Report could go further, by guiding companies as to what best hiring and review process practices look like.[216] It could call for establishment of a norm that implicitly biased behaviour will not be tolerated,[217] and for diverse selection committees and candidate slates: Jolls and Sunstein note that population diversity has been shown in and *of itself* to reduce implicit bias.[218] Including a case study of a company that had succeeded in closing the gender gap through identifying problem areas or inconsistencies, goal setting and measurement, and holding managers accountable to best practices, would have been a compelling addition to the Report. Defining best practices is normative, an information-based strategy and can also be a nudging strategy. The Report could go a step further and recommend that

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212 See Dawn Onley, "HR Key in Helping Employers Achieve Gender Equality" (24 October 2016), online: Society for Human Resource Management <https://www.shrm.org/hr-today/news/hr-magazine/1116/pages/hr-key-in-helping-organizations-achieve-gender-equality.aspx>; Deborah Ashton, "What HR Can Do to Fix the Gender Pay Gap", *Harvard Business Review* (2 December 2014), online: <https://hbr.org/2014/12/what-hr-can-do-to-fix-the-gender-pay-gap>; Maham Abedi, "14 factors lead to workplace gender equality — here's how Canada measures", *Global News* (7 March 2018), online: <https://globalnews.ca/news/4065346/workplace-gender-equality-canada/>; and Ellyn Shook & Julie Sweet, "Getting to Equal 2018: Creating a culture where everyone thrives" (2018), online: Accenture <https://www.accenture.com/t20180306T024312Z__w__/us-en/_acnmedia/PDF-73/Accenture-When-She-Rises-We-All-Rise.pdf#zoom=50>.

213 See Cooper *et al*, *supra* note 1 at 26.

214 *Ibid*.

215 *Ibid*.

216 See e.g. the sources cited *supra* at my note 212 and the accompanying text.

217 Jolls & Sunstein 2006b, *supra* note 164 note that prohibiting implicitly biased behaviour could induce employers "to adopt general decisionmaking structures or processes that reduce the intensity and frequency of implicit bias, implicitly biased behaviour, or both," and cite Green's examples of such structures or processes possibly including "'creating interdependence among in-group and out-group members, providing structure and guidance for appraisal and evaluation, and making decisionmakers accountable for their decisions'." See at 986.

218 Jolls & Sunstein 2006b, *supra* note 164 at 980.

employees be jointly evaluated, following Bohnet *et al*'s recommendation (see Section VI.C. below). Again, hiring and promotions managers' adherence to best hiring, review and promotions practices could be measured and either rewarded by carrots or, as a last resort, punished by sticks. The Report could recommend such a beneficial bounded willpower initiative, nudging strategy and normative best practice.

(e) Give Employees Flexibility to Fit Work Into Their Lives

The Report found companies' support for workers with families wanting. More than a third of companies offer the minimum maternity leave required by law, and only half offer fathers the same parental leave benefit.[219] Less than half offer extended leave transition programs.[220] Just 40 percent "provide emergency child care and less than 20 percent offer subsidized or on-site child care."[221] It found that "companies that offer these types of programs have a higher representation of women", since "57 percent of women have partners who work full-time, compared to 38 percent of men",[222] and therefore cannot look to their partners to take on child-care responsibilities.

The Report provides this data and makes the obvious connection to women's representation in the workforce. It could go further, making explicit Rhode's connections to the training and recruiting costs companies incur when they lose highly skilled workers,[223] e.g. to competitor firms offering better parental and childcare benefits. The Report did not highlight managers's unconscious biasing of hiring and promotion decisions e.g. because of social stereotypes about the effect of motherhood on women's ambition or commitment to the workplace.[224] It would be helpful if the Report contrasted the financial results of companies that have such programs with companies lacking them, and highlighted the workforce continuity benefits associated with such policies. Including such information would move the Report further toward Martins Pereira's information-based strategies. This would correct information asymmetries and address bounded rationality problems such as anchoring heuristics.[225]

(f) Focus on Accountability for Progress on Gender Diversity

The Report calls "tracking, targets and transparency … the building blocks of accountability".[226] 85 percent of companies track gender representation by role level, however fewer track external hirings or promotions by gender, and *just 17 percent* track high-visibility assignments by gender – but these predict greater representation of women.[227] Under a third define targets for gender representation, only 25 percent for external hiring and promotions, and just 7 percent for high-visibility assignments.[228] Transparency is

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219 See Cooper *et al*, *supra* note 1 at 28.
220 See *ibid*.
221 See *ibid*.
222 See *ibid.*
223 See my note 113 above.
224 See Rhode's discussion of the effects of gender stereotypes on women in the workplace, *supra* note 1 at 7-12, especially at 10. Note however that the Report does counter stereotypes about women's ambition and their likelihood of leaving the workplace: See Cooper *et al*, *supra* note 1 at 8 and 10.
225 See my note 74 above. Here, the anchoring bias is to minimums required by law, regardless of whether that is in the business' best long-term interests.
226 See Cooper *et al*, *supra* note 1 at 29.
227 See *ibid*.
228 See *ibid*.

also disappointing: a majority of gender diversity metrics is shared by companies with senior leaders, managers and all employees just 81 percent, *23 percent*, and *8 percent* of the time, respectively, and "*43 percent* of companies don't share any metrics at all with employees".[229] Senior leaders are held accountable for gender diversity progress by just 40 percent or 20 percent of companies, depending on whether you ask companies or their employees, and few use financial incentives to accomplish this.[230] Employees don't believe their companies walk the talk.

Despite marshalling all this data, the Report simply states that companies need to place more emphasis on tracking, targets and transparency. The Report could go further to define norms, which could include: potential step measures that could be differentiated between already higher performing companies with room still to improve, and a recommended smaller set of key metrics lower performing companies could start to measure themselves with; and recommended representation targets by level, external hires, promotions and high-visibility assignments, to spur greater representation of women. The Report could advocate using diversity committees and/or diversity staff positions as accountability structures.[231] The Report could encourage companies to investigate and address causes for stubbornly low metrics. Governments could incorporate this last suggestion in a "comply or explain" regulation, using an information-based strategy and subtle nudge to indirectly alter business behaviour. Tracking, setting targets and increasing transparency would all address bounded rationality problems through changing information availability. Setting targets and making reporting progress against them highly visible would be forms of bounded willpower initiatives, aimed at overriding manager's ad hoc preferences and aligning their actions with company diversity objectives. Framing awareness of the gap between the status quo and equal treatment once again would support bounded self interest and delegitimate any sense of entitlement arising from the endowment effect.

To summarize, the Report could go further, from a behavioural economics perspective. While the Report's data detailing the nature and scope of the gender gap in corporate advancement is superb, its prescriptions leave considerable room to go further. Its recommendations tend toward purely voluntary measures, underutilizing its platform to define norms and call businesses to real, measurable behaviour change. Until gaps in manager behaviour are rectified, perceptions about the urgency of closing this gender gap will not change. As I argue, behavioural economics insights can be used to build on and exceed the Report's recommendations.

C. Additional Recommendations and Possible Future Directions drawing on Behavioural Economics Insights: Process Changes, Nudges and Incentives; Recommendations for Future Research and Experimentation

This final subsection of the paper looks to the future, drawing on behavioural economics insights and regulatory strategies. It identifies possible additional process changes that businesses could adopt, nudges and tax incentives that governments could implement, and recommends future research and experimentation. These ideas expand past the analogies drawn from the gender gap scholars'

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229 See *ibid*.

230 See *ibid*.

231 As Kalev *et al*, *supra* note 204, found at 590, such structures are effective in increasing gender diversity, at least at lower levels of management.

recommendations, the Report's recommendations, and my suggestions above where the Report could go further.

1. Behavioural Economics Insights, Process Changes by Businesses and Nudges from Governments

I start with two suppositions. First, many businesses could not manage a long list of initiatives, but likely would take on a few that were evidence-based and demonstrated to debias hiring, evaluation and promotion decisions, and/or lead to improved business results. Second, such evidence-based strategies could persuade in particular male employees, managers and their companies to prioritize gender parity in leadership.

One additional process change businesses could adopt is joint evaluation procedures to reduce incidence of gender bias in employee evaluations. Bohnet *et al*'s research applied the behavioural economics finding that "people make more reasoned choices when examining options jointly rather than separately" to the process of employee evaluations. They found that when jointly evaluated, individual performance drives evaluation decisions; when separately evaluated, group stereotypes drive such decisions.[232] Businesses could adopt joint evaluation at each of the hiring, review and promotion stages as a normative best practice and fairness mechanism.[233] Further, they could frame it as helping managers maximize profits and team results, by ensuring consistent selection of higher-performing candidates.[234] Framing such a procedure as a fairness mechanism should appeal to individuals' bounded self-interest.[235] Governments could nudge businesses toward adopting joint evaluation procedures. This could be incorporated in a "comply or explain" regulation, using an information-based strategy to indirectly alter business behaviour.

A second promising process change businesses could adopt is focusing on employee potential rather than skills in allocating training opportunities. Jena McGregor's article "How most leadership training programs fail women", discussed key findings of the *Harvard Business Review* report "Turning Potential into Success: The Missing Link in Leadership Development". "Turning" found that corporate training programs value skills and competencies without also measuring how employees score on potential; this leads managers to overlook promising female leaders.[236] It is a form of availability bias. "Turning" noted that women outscored men on three-quarters of potential traits – curiosity, determination and engagement - predictive of who will excel at certain leadership skills.[237] This is a bounded rationality problem.

Businesses could adopt normative best practices aimed at (a) getting managers to focus on developing employee – particularly female – potential, (b) changing what they measure in evaluating candidates for promotion, and (c) changing criteria for allocating employee training budgets. Expecting managers to adhere to best practices rather than their own ad-hoc preferences would be a form of bounded willpower

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232 Bohnet *et al*, *supra* note 25 at 1225.

233 *Ibid* at 1233.

234 *Ibid* at 1225.

235 See e.g. Thaler, *supra* note 5 at 258.

236 See Jena McGregor, "How most leadership training programs fail women", *Washington Post* (23 October 2017), online: <https://www.washingtonpost.com/news/on-leadership/wp/2017/10/23/how-most-leadership-training-programs-fail-women/?utm_term=.442951869552>. This has similarities to the behaviour highlighted in Rankin & Stewart, *supra* note 2 at 11 whereby existing leaders pick candidates most like themselves.

237 See McGregor, *supra* note 236.

initiative, as it would constrain managers from choices in conflict with their business' interest in developing women's full leadership potential. Businesses should subsequently evaluate the effect such changes have on women's advancement rates, and on women's success following promotion. Demonstrating the positive effects achieved following adoption of such a new best practice would help correct the bounded rationality problems that plague training allocation decisions. Further, it would build a case for an approach that is fairer to all people and therefore appealing to bounded self-interest. Governments could also nudge businesses, through financial incentives such as grants and training tax credits,[238] toward adopting broader training allocation criteria than skills and competencies, and expand the training pool to include more women including women of colour. This would have two key debiasing through law benefits. First, as previously noted, population diversity has been shown in and *of itself* to reduce implicit bias.[239] Diversifying who receives leadership training would reduce implicit bias toward women including women of colour's advancement. Second, receiving such training would increase women's likelihood of promotion and success in new roles.

A third promising normative process change businesses could adopt is requiring managers to set gender advancement targets, or at least ensure a diverse group of candidates be considered at each hiring and promotion decision, in support of corporate-wide gender advancement targets. This could be augmented by "withholding bonuses [a stick] if leaders do not promote enough women or minorities and increasing bonuses [a carrot] if they do."[240] In the case of withholding, businesses could tie a substantial portion (e.g. 40%) of each manager's own bonus to requirements that managers explain (1) why this portion should be given despite failure to meet gender advancement targets, and (2) what measures they will take to meet targets in future. Loss aversion, particularly for managers accustomed to receiving their full bonus, would powerfully motivate them to achieve their targets. Similarly to joint evaluation procedures, governments could nudge businesses toward such normative changes.[241] Requirements to disclose a) whether a business sets gender advancement targets or requires diverse candidate pools, and b) what consequences if any exist at the individual manager level for achieving or failing to meet such targets, could be incorporated in a "comply or explain" regulation. This would be an information-based, debiasing through law strategy and nudge to indirectly alter business behaviour. Governments could also explore offering tax incentives relating to that portion of manager bonuses tied to advancement achievements, provided businesses meet stated promotion (nudge) goals for women and minorities.

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238 Governments such as Canada and Ontario already provide training tax grants and apprenticeship tax credits to encourage businesses to invest in upgrading their workers' skills, so this proposal should not be a great stretch. See e.g. the Canada-Ontario Job Grant program described at <http://www.cbo-eco.ca/en/index.cfm/financing/government-loans-and-grants/wage-subsidies-and-tax-credits-for-employers/> and the Ontario apprenticeship training tax credit program described at <https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/provincial-territorial-corporation-tax/ontario-provincial-corporation-tax/ontario-apprenticeship-training-tax-credit.html>.

239 Jolls & Sunstein 2006b, *supra* note 164 at 980.

240 Deborah Gillis, president & chief executive of Catalyst, suggested this idea – see Chira, *supra* note 121.

241 See Bohnet *et al*, *supra* note 25 at 1225, Martins Pereira, *supra* note 7 at 424-7 and Willey, *supra* note 4 at 204-5.

2. Behavioural Economics Insights and Research/Evidence-Building Incentives

Governments should consider implementing tax incentives to encourage businesses to research and implement gender gap closing initiatives.[242] I argue research tax credits could encourage companies to undertake novel programs in support of women's corporate advancement, and incentivize them to share information publicly concerning their effectiveness. As Devlin notes, where negative externalities exist, Coase and other authors suggest that taxation can serve as a corrective.[243] I view inequality effects disproportionately borne by women resulting from businesses' gender-biased hiring and advancement practices as negative externalities. Traditionally, public policy would respond by imposing a tax i.e. extracting a fee from the creator of the externality.[244] However, I argue – and anticipate that Jolls and Sunstein, and Klettner *et al* would approve – that especially where such inequality stems from implicit bias, the more effective taxation response would be to incentivize correction of the underlying bias at first instance.

Research tax credits[245] could incentivize businesses to either pursue research agendas relating to their own advancement gender gap, to participate in broader research efforts such as the LeanIn/McKinsey Women in the Workplace gender gap studies, or to engage in parallel research processes.[246] Such tax credits would be debiasing through law carrots available only to participating businesses. They would arguably be less likely to attract resistance and lobbying to defeat such measures than if they were sticks mandated by regulation to be obeyed by all organizations[247] - though conversely, this might increase their vulnerability to future budget cuts, particularly upon any change of government.

Finally, Willey's article briefly mentioned a possible form of "short-term financial incentive (… lower [Toronto Stock Exchange] listing fees or a tax break) … as a positive incentive to encourage boards to reach higher gender parity."[248] Securities regulators could use lowered listing and/or ongoing filing fees

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[242] For example tax credit structures across the Canadian provinces have achieved great success in fostering a vibrant Canadian film and television industry: see e.g. Nordicity, *The Economic Contribution of the Film and Television Sector in Canada* (July 2013) at 12, online: <http://www.nordicity.com/media/2013724dgfjbufnd.pdf>. While the types of tax credits I am proposing here are not typically industry-specific, the notion of using carrots to encourage certain business behaviours seems to me both a classic nudge as well as something that fits the traditional economic model which recognizes that taxes and incentives can be appropriate market-altering activities to rectify aberrations in market activity.

[243] See Devlin, *supra* note 26 at 30. This is particularly the case, according to Devlin, "where actors do not internalize the harm of their behaviour on others. The law steps in to 'tax' such behaviour, forcing people to consider others' interests, as well as their own."

[244] See *ibid*. While such a fee would not be a behavioural constraint in itself, if it was sufficiently costly that businesses might choose to modify their behaviour to avoid it, then it would arguably fit within Martins Pereira's behaviour constraining regulatory strategy.

[245] Canada invests heavily (in the form of foregone tax revenues) in a scientific research and development tax credit scheme – see for example the description of the Scientific Research and Experimental Development Tax Credit Program online: Wikipedia <https://en.wikipedia.org/wiki/Scientific_Research_and_Experimental_Development_Tax_Credit_Program>.

[246] For example, Cooper *et al*, *supra* note 1, note at 34 that data were gathered from certain companies concerning their gender and ethnic/racial diversity performance in Latin America, Europe, the Asia-Pacific region and the Middle East/Africa, but will be used for those companies' private benchmarking only and not yet included in the scope of the Women in the Workplace studies' reporting.

[247] In making this claim, I am mindful of Dunoff & Trachtman's observation, *supra* note 39 at 400: "Different individuals, and different societies, respond differently to different types of sanctions."

[248] Willey, *supra* note 4 at 206, fn 114.

as debiasing through law carrots to nudge businesses toward, and reward their accomplishments in, closing gender gaps in board appointments, corporate advancement and wages.

3. Future Research and Experimentation

Any North American government which adopted the tax incentives or other nudges I recommend above should investigate which most effectively closes the advancement gender gap. Governments could then align incentives to supporting those which evidence shows are effective. Government should draw lessons from the Behavioural Insights Team's work in the U.K. and similar teams' work under the Obama and Trudeau governments, and run controlled experiments to gather this evidence to inform future public policy. Governments should publicly share such data, so that other governments, businesses and advocacy organizations can learn what works best.

Businesses too can learn from research and experimentation. Businesses could survey women promoted within their organizations and the managers who promoted them, to learn which of the company or manager's practices or initiatives best contributed to the women's advancement - or conversely, most harmed e.g. having resulted in promotion delays). This would take the Report work and similar studies a crucial step further. It would also benefit those businesses that could only manage a few initiatives, by focusing them on those offering the greatest benefit. Such surveys could be augmented with in-depth interviews to learn more about the most and least influential initiatives or practices, to help companies further refine and implement best practices, training and messaging.

Behavioural economics methodology and methods could be used to identify what initiatives top performing organizations use that most dramatically influence women's first promotion to manager, how they differ from practices used at average or bottom performing organizations, and recommend changes to the latter's practices. As part of the next phase of its ongoing Women in the Workplace research, for example, LeanIn & McKinsey could gather data focused specifically on women's first promotion to manager and the participating companies' initiatives brought to bear at that particular stage, if any. This would help businesses and governments understand how top performing companies behave differently from average or bottom performing companies at this crucial stage, and use these insights to define normative best practices, bounded willpower initiatives, and nudges to replicate that behaviour.

Lastly, Rankin and Stewart note that sector-wide initiatives dispelling myths of full representation and taking "concrete steps necessary to advance women's leadership" increase the likelihood of success.[249] The technology and mining industries could particularly benefit here.[250] Behavioural economics methods such as attitude surveys, controlled nudging experiments and in-depth interviews could be used sector-wide, to learn which initiatives and messaging correctives most effectively motivate managers to change their hiring, review and promotion practices to be fairer to all people, thus responsive to bounded self-interest concerns.

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[249] Rankin & Stewart, *supra* note 2 at 2.

[250] In both cases, women are significantly underrepresented across the industry and not just in leadership roles: see Rankin & Stewart, *supra* note 1 at 27, and Laura Colby, "Women are underrepresented in the high tech industry globally", *Bloomberg* (8 August 2017), online: <https://www.bloomberg.com/quicktake/women-are-underrepresented-in-the-high-tech-industry-globally>.

VII. CONCLUSION

My paper has argued that the gender gap in corporate advancement is irrational, inefficient and a social justice issue. I have shown, using key findings from the Report and similar studies, that managers' hiring and promotion decisions are negatively affected by bounded rationality, bounded willpower, bounded self-interest and the endowment effect. This has contributed to the persistent gender gap in corporate advancement.

Unless conscious and unconscious biases are addressed through businesses' hiring and promotion procedures, leadership ranks will continue to be largely populated by white males. Behavioural economics recommends intervention to correct mistakes caused by biased thinking and rectify harms suffered by third parties caused by bias effects. I categorized gender gap scholars' recommended solutions from mandatory to normative to voluntary. I aligned myself with scholars advocating pragmatic, normative initiatives with the power to effect lasting cultural change. I considered both carrot and stick approaches to incentive development, and argued that on balance carrot incentives better fulfill debiasing through law strategies.

Blending that framework with Martins Pereira's information-based, nudging and behavioural constraint regulatory strategy categories, I evaluated the Report's recommendations, identifying where it could go further. I recommend businesses adopt normative best practices as well as carrots (and the occasional stick) to nudge hiring and promotion managers, and governments develop nudges and tax incentives such as training and research tax credits and "comply or explain" disclosure regulatory regimes. In each case, these measures would debias behaviours negatively affecting women's corporate advancement and foster positive measures to support such advancement. Particularly in combination, normative best practices, nudges and incentives can spur businesses' progress toward closing the advancement gender gap.

Considerable room exists to extend behavioural economics analysis to explore why gender gaps exist and persist, whether in advancement, board appointments, candidate evaluations, wages, or otherwise. Feminist scholars should exploit lawmakers, policymakers and business leaders' interest in behavioural economics' persuasive power to shape behaviour. Encouraging business organizations to research and experiment with initiatives aimed at closing the gender gap in corporate advancement will identify proven, evidence-based strategies that effectively close this gap.[251] This can help avoid the risks of overshooting in debiasing through law efforts.[252]

Top performing companies' significant achievements in nearly closing the gender gap at the first promotion stage give reason to hope the advancement gender gap can be closed. Changing behaviours and organizational cultures to enable women to achieve their full leadership and economic potential will enhance women's wellbeing, improve businesses' financial performance, lead to greater social equity, and

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[251] Both Croson and Doherty encourage legal researchers to engage in similar efforts, to expand the audience and support for their scholarship. See the excellent articles by Rachel Croson, "Why and How to Experiment: Methodologies from Experimental Economics" (2002) U Ill L Rev 921, and by Michael Doherty, "Getting Down and Dirty: The Case for Empirical Legal Research", in L Cahillane and J Schweppe, eds, *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016), early version online: <https://ssrn.com/abstract=2809555>.

[252] Jolls & Sunstein 2006a, *supra* note 45 at 230.

grow the economy. Evidence-based research results will make the case for taking action more compelling, and spotlight practicable initiatives of long-lasting benefit for both women and organizations.