

FOCUS

GENDER AND BUSINESS

UNCOVERING: THE ECONOMIC BENEFITS OF LGBT WORKPLACE INCLUSION

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Abstract Lesbian, gay, bisexual, and transgender (LGBT) people constitute approximately five percent of the population, but workplace discrimination based on sexual orientation and gender identity remains troublingly commonplace. This article summarizes a large and growing body of social science research demonstrating the economic benefits of LGBT inclusion (and the costs of LGBT exclusion) in the workplace. It concludes with recommendations for (1) future research, stressing the need for more China-specific studies, which would inform policymaking and theoretical understanding of diversity and inclusion practices on business performance, (2) improving employer LGBT-inclusion policies, and (3) strengthening state protection of the equal employment rights of LGBT people.

Keywords lesbian, gay, bisexual, and transgender (LGBT), business, gender, equal employment rights, LGBT inclusion

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INTRODUCTION

In 2017, Charlene LIU submitted an employee benefits application to her new employer, a large multinational company in Shanghai. What most employees would consider perfunctory paperwork raised an anxiety-inducing choice for Charlene: Should she apply for spousal health insurance for her wife, just like her straight colleagues do for their spouses? Although legally married in the United States, Charlene did not know if her company or its China-based insurance provider would recognize their relationship — or worse, if coming out would hurt her career at the company. Overcoming her fear, Charlene decided to submit the application. After weeks of nervous waiting, two health insurance cards came in the mail. “It was one of the happiest days of my life,” Charlene recalled. “It wasn’t just because we got the health insurance. It was because we were recognized.”¹

Charlene’s story illustrates the pressures that lesbian, gay, bisexual, transgender (LGBT)² employees face in the workplace. The decisions that cisgender heterosexual people might make without much consideration — whether to put a picture of their spouse on their desk, how to answer the question “What did you do this weekend?” whether to provide an employer with their diploma — could significantly hurt the career prospects of an LGBT employee. It could even get them fired.

Fortunately, Charlene’s story has a happy ending, but would it not have been better if the story had a happy beginning? If her company had clearly communicated its same-sex partner benefits policy at the outset, Charlene would have been spared the fear of discrimination. Instead of worrying, she could have spent her energy in more productive ways. The company could have better recruited talent that valued same-sex partner benefits or that valued diversity and inclusion more generally. A more diverse workforce would have been more innovative and would have created more value for the company. Charlene would have been happier, and the company would have been, too.

A large and increasing number of businesses, inside China and globally, have come to this same conclusion, that LGBT inclusion is not only good for employees but also good for businesses.³ A senior economist adviser at the Joint United Nations Programme on

¹ Speech by Charlene LIU, on Out and Equal China Roundtable, Shanghai, China (Jun. 14, 2018).

² This article uses “LGBT,” “LGBTQ” (“Q” meaning “Queer”), or LGBTI (“I” meaning “Intersex”) depending on the terminology used in the original cited study. Most cited studies use the term “LGBT”; therefore, this article uses “LGBT” for consistency.

³ Oliver Cann, *Global Businesses Launch Partnership for Global LGBTI Equality*, World Economic Forum, (Jan. 22, 2019), available at <https://www.weforum.org/press/2019/01/global-businesses-launch-partnership-for-global-lgbti-equality/> (last visited Nov. 26, 2019).

HIV/AIDS (UNAIDS) estimates that LGBT exclusion costs countries US\$100 billion a year globally,⁴ while a World Bank study estimates that it costs India between 0.1% and 1.4% of its GDP.⁵ The Williams Institute at UCLA School of Law, concisely distills the relationship between social stigma and economic loss in a 2018 report, “The evidence on the ground of ongoing stigma, violence, and discrimination against LGBT people documents treatment that reduces the ability of LGBT people to contribute to the economy and that holds back LGBT people from fully participating.”⁶ Researchers approximate that there are 70 million LGBT people in China⁷ and 11 million in the United States,⁸ representing approximately 4.5%–5% of the adult population. If a community — whether it is a business or a country — denies LGBT people equal dignity and opportunity, they are repressing a wellspring of human potential.

This article presents recent research demonstrating the economic benefits of LGBT inclusion (and the costs of LGBT exclusion) in the workplace. Part I examines the discrimination that LGBT people face in the workplace in China and the United States. Part II describes the phenomenon of LGBT “minority stress” — *i.e.* how social stigma negatively affects the mental and physical health of LGBT people, hindering their ability to participate fully in the workplace. Part III outlines the impact of LGBT inclusion/exclusion on specific business outcomes including employee recruitment and retention and on individual, team, and firm performance. The effects of organizational-level policies (*e.g.* corporate same-sex partner benefits) and structural-level policies (*e.g.* anti-discrimination laws) are addressed. Part IV outlines recommendations for the following: (1) future research, with a particular emphasis on further China-specific studies, which would better inform policymaking and theoretical understanding of how the regulatory and normative legitimacy of diversity and inclusion practices affects business performance; (2) improving employer LGBT-inclusion policies, which draw upon the *Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex*

⁴ Charlie Ensor, *Homophobia Costs Countries \$100 Billion a Year, Economist Argues*, Humanosphere, (Feb. 6, 2017), available at <http://www.humanosphere.org/human-rights/2017/02/homophobia-has-an-economic-cost-for-countries-economist-argues/> (last visited Nov. 26, 2019).

⁵ M. V. Lee Badgett, *The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India*, World Bank Group, (Oct. 3, 2014), available at <http://documents.worldbank.org/curated/en/527261468035379692/The-economic-cost-of-stigma-and-the-exclusion-of-LGBT-people-a-case-study-of-India> (last visited Nov. 26, 2019).

⁶ M. V. Lee Badgett, Andrew Park & Andrew Flores, *Links between Economic Development and New Measures of LGBT Inclusion*, (Mar. 1, 2018), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/GDP-and-LGBT-Inclusion-April-2018.pdf> (last visited Nov. 26, 2019).

⁷ Malcolm Surer, *Do LGBT-Friendly Businesses Herald Greater Rights in China?*, Caixin, (Jul. 28, 2017), available at <https://www.caixinglobal.com/2017-07-28/do-lgbt-friendly-businesses-herald-greater-rights-in-china-101123524.html> (last visited Nov. 26, 2019).

⁸ Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, Gallup, (May 22, 2018), available at <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx> (last visited Nov. 24, 2019).

People: Standards of Conduct for Business (hereinafter referred to as “the UN Standards”)⁹ and will foster greater firm productivity; and (3) strengthening state protection of the equal employment rights of LGBT people, which will help not only to drive economic growth but also to meet state obligations set out by the United Nations. There is also a brief discussion of regulatory requirements that Chinese companies participating in the Belt and Road Initiative (BRI) will need to comply with when operating in jurisdictions that prohibit LGBT-based discrimination.

I. LGBT DISCRIMINATION IN CHINESE AND U.S. WORKPLACES

In China, a story like Charlene’s is rare. According to a United Nations Development Programme (UNDP) report, only 5% of LGBT people in China choose to come out at the workplace.¹⁰ “Most strikingly,” the report found that “the workplace remains the last place where Chinese LGBTI people feel comfortable living openly.”¹¹ Empirical and anecdotal evidence indicates that this discomfort is well founded. Although few LGBT people come out at work, a research report by the UNDP and the International Labour Organization (ILO) shows that 20% of LGBT employees surveyed in China had experienced workplace bullying, harassment, or discrimination and 9% of the respondents said they had “often” or “sometimes” seen employees fired because of their sexual orientation or gender identity.¹² Only 11.3% of the Chinese respondents described their workplaces as “open and accepting,” while about half of the respondents in the Philippines and Thailand gave the same description.¹³ Discrimination can often be subtle and hard to identify and quantify. One woman recounted in the UNDP report:

*In the company I worked in before, I used to have lunch with a bunch of female colleagues. But after they knew I was a lesbian, although they said they could understand and accept me, they never invited me to lunch anymore.*¹⁴

⁹ United Nations Human Rights Office of the High Commissioner, *Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of Conduct for Business* (hereinafter referred to as “the UN Standards”), (Sep. 2017), available at <https://www.unfe.org/wp-content/uploads/2017/09/UN-Standards-of-Conduct.pdf> (last visited Nov. 26, 2019).

¹⁰ UNDP, *Being LGBTI in China: A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression*, (May 16, 2016), available at http://www.cn.undp.org/content/china/en/home/library/democratic_governance/being-lgbt-in-china.html (last visited Nov. 26, 2019).

¹¹ *Id.*

¹² UNDP & ILO, *LGBTI People and Employment: Discrimination Based on Sexual Orientation, Gender Identity and Expression, and Sex Characteristics in China, the Philippines and Thailand*, (Jun. 26, 2018), available at http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/lgbti-people-and-employment-discrimination-based-on-sexual-orie.html (last visited Nov. 26, 2019). This may indicate that minorities are more likely to come out in the other settings, whereas in the workplace “coming out” undergoes further consideration, in that people choose to “come out” only once they have confirmed that there is no risk to be discriminated against.

¹³ *Id.*

¹⁴ See UNDP, fn. 10 at 30.

In recent years, the media has reported a steady stream of cases illustrating the widespread nature of LGBT-related employment discrimination in China. In 2014, a gay man sued 58 Town (58 同城) in Beijing for rescinding a job offer after he came out on Weibo.¹⁵ The same year, a man was fired from an interior decoration company in Shenzhen after a video of him, possibly on a date with another man, emerged online.¹⁶ In 2016, a transgender man sued Ciming Checkup in Guiyang, a health services company, who fired him because they felt his gender identity and expression presented an “unhealthy” image.¹⁷ In September 2018, a gay teacher in Qingdao was forced out of his job after his boss discovered a WeChat post about his participation in a local LGBT event.¹⁸ In December 2018, a human resource manager at Da Xiang, a condom-making company with a hip brand, told a gay job applicant that hiring him was not preferable because an “iron and steel straight man” (“钢铁直男”) colleague did not want to work with gays.¹⁹ These are just a few examples. The risks of coming out at the workplace in China are so well-known that the need to conceal is conventional wisdom. A mother in Shanghai in 2011 warned her gay son before he started work at Apple, a very LGBT-friendly company, “Hide yourself. Don’t tell anyone that you are gay.”²⁰

The U.S. experience shows that the fight to eliminate stigma is long and difficult. Despite significant gains in legal rights and social acceptance over the past several decades, almost half of LGBT workers in the United States choose to remain closeted, often out of fear of discrimination. A February–March 2018 probability-based survey by the Human Rights Campaign Foundation’s Workplace Equality Program found that 46% of LGBTQ workers are still closeted.²¹ This is only a 5% decrease from the same

¹⁵ LIU Yang, 被指“歧视同性恋” 58 同城起诉求职者 (*For Being Deemed to Discriminate Homosexuality, 58 Town Sued Job Seeker*), 新京报 (The Beijing News), (Feb. 19, 2014), available at <http://www.bjnews.com.cn/news/2014/02/19/305531.html> (last visited Nov. 26, 2019).

¹⁶ *Chinese Court Hears First Lawsuit on Gay Workplace Discrimination*, Guardian, (Jan. 26, 2015), available at <https://www.theguardian.com/world/2015/jan/26/chinese-court-first-lawsuit-gay-workplace-discrimination> (last visited Nov. 26, 2019).

¹⁷ Emily Rauhala, *Transgender Chinese Man Wins First-of-Its-Kind Labor Discrimination Case*, Washington Post, (Jul. 27, 2017), available at https://www.washingtonpost.com/news/worldviews/wp/2017/07/27/transgender-chinese-man-wins-first-of-its-kind-labor-discrimination-case/?utm_term=.c4be27ac5a35 (last visited Nov. 26, 2019).

¹⁸ ZHOU Shiling, 青岛一幼儿教师自称因同性恋被解雇 起诉幼儿园获受理 (*A Kindergarten Teacher in Qingdao Claimed to Be Dismissed Because of Homosexuality, the Case Has Been Accepted*), 新京报 (The Beijing News), (Jan. 15, 2019), available at <http://www.bjnews.com.cn/news/2019/01/15/539768.html> (last visited Nov. 26, 2019).

¹⁹ See 同志之声微博 (Tongzhi Zhi Sheng, Weibo), (Dec. 28, 2018), available at <https://m.weibo.cn/detail/4322932178058009> (last visited Nov. 26, 2019).

²⁰ See Darius Longarino (@dariuslongarino), Twitter, (Jan. 1, 2019), available at <https://twitter.com/DariusLongarino/status/1080300220221665285> (last visited Nov. 26, 2019).

²¹ Human Rights Campaign Foundation, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide*, available at <https://www.hrc.org/resources/a-workplace-divided-understanding-the-climate-for-lgbtq-workers-nationwide> (last visited Nov. 26, 2019).

survey's 2008 results.²² LGBT people in senior executive positions are even less likely to come out. In a 2016 Credit Suisse survey, 72% of LGBT senior executives said they had not come out openly at work.²³

The 2018 Human Rights Campaign Foundation survey also shows that LGBTQ employees still encounter a disquieting amount of discrimination, which discourages them from coming out. According to the survey, 53% of the respondents had encountered coworkers making jokes about lesbian or gay people; 20% of the LGBTQ workers had been told or had had colleagues hint that they should dress in a more feminine or more masculine manner;²⁴ and 18% had had colleagues make sexually inappropriate comments to them because they thought their sexual orientation or gender identity made it acceptable.²⁵ Non-LGBTQ employees also self-reported treating their LGBTQ colleagues differently. For example, 36% reported that they would feel uncomfortable hearing an LGBTQ colleague talk about dating, and 59% said they thought it was unprofessional to talk about sexual orientation and gender identity in the workplace. LGBTQ employees face a discriminatory double-standard since it is widely accepted that cisgender heterosexual people may discuss these same topics without consequence, such as mentioning their upcoming wedding.

Even before discussing the workplace, discrimination hinders LGBT people from securing employment, including employment at purportedly LGBT-friendly companies. In 2011, Harvard's András Tilcsik sent near-identical resumes to Fortune 100 companies that had LGBT-inclusive non-discrimination policies and LGBT employee resource groups. One set of resumes listed the applicant's leadership and management experience in a gay community organization, while the other showed the applicant had an analogous experience in a non-LGBT-related organization. The former applicant was 40% less likely to be granted an interview.²⁶ In a similar 2016 study, women who had resumes that suggested they were lesbian, bisexual, or transgender were 30% less likely to be called for an interview.²⁷

The persistent presence of discrimination is troubling, but research indicates that

²² Id.

²³ Julia Dawson, Stefano Natella & Richard Kersley et al., *LGBT: The Value of Diversity*, (Apr. 15, 2016), available at https://research-doc.credit-suisse.com/docView?document_id=x695480&serialid=u0qj22TwXJAwyF%2FreBXW%2FeSFdVYwRIZQGZP1IAumTo%3D (last visited Nov. 26, 2019).

²⁴ See Human Rights Campaign Foundation, fn. 21 at 6.

²⁵ Id.

²⁶ András Tilcsik, *Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States*, 117(2) *American Journal of Sociology*, 586–626 (2011), available at <https://www.jstor.org/stable/pdf/10.1086/661653.pdf?refreqid=excelsior%3A846e286786d07f757d8021ba5cf54e3d> (last visited Nov. 26, 2019).

²⁷ Emma Mishel, *Discrimination against Queer Women in the U.S. Workforce: A Résumé Audit Study*, *Socius: Sociological Research for a Dynamic World*, 1–13 (2016).

positive change is occurring fast. Out Leadership surveys in 2013 showed that “only 9% of LGBT+ women and 17% of LGBT+ men believed that their LGBT+ status was an asset in their career or field.” However, five years later, in 2018, Out Leadership’s Out to Succeed study showed that more than 60% of LGBT employees expressed that being out “has improved their ability to do business and engage with customers.”²⁸ Corporate-level and government-level policies have played a significant role in pushing forward this positive change.

II. IMPACT OF DISCRIMINATION ON LGBT PEOPLE’S HEALTH

LGBT people’s experiences with stigma and discrimination negatively affect their physical and mental health,²⁹ which in turn creates barriers to educational and professional attainment. Studies across multiple countries show that LGBT individuals suffer higher rates of mental distress than cisgender heterosexual people do.³⁰ The U.S. Centers for Disease Control and Prevention estimates that lesbian, gay, and bisexual youth are almost three times as likely to contemplate suicide, and almost five times as likely to attempt suicide, than their heterosexual peers.³¹ Transgender people are at an even greater risk of poorer mental health, including suicidality. A large 2015 survey of transgender people’s health in the United States found that “40% of respondents have attempted suicide in their lifetime — nearly nine times the attempted suicide rate in the U.S. population (4.6%).”³²

Research in China has found similar mental health disparities between LGBT people and cisgender heterosexual people. A 2014 survey conducted by the Beijing LGBT Center and the Institute of Psychology of the Chinese Academy of Sciences found that “LGBT youth’s high risk of depression proportion is three times that of the nation-wide youth... and LGBT adults’ high risk of depression proportion is four times that of the nation-wide adults.”³³ Other studies in China by academics and government researchers at the

²⁸ Todd Sears & Jon Terry, *Out to Succeed: Realising the Full Potential of LGBT+ Talent: Global Survey Finds Businesses Need to Do More to Attract and Support LGBT+ Talent*, (Aug. 7, 2018), available at <https://preview.thenewsmarket.com/Previews/PWC/DocumentAssets/508587.pdf> (last visited Nov. 26, 2019).

²⁹ Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129(5) *Psychological Bulletin*, 674–697 (2003).

³⁰ John Pachankis & Richard Bränström, *Hidden from Happiness: Structural Stigma, Sexual Orientation Concealment, and Life Satisfaction across 28 Countries*, 86(5) *Journal of Consulting and Clinical Psychology*, 403–415 (2018).

³¹ Laura Kann, Emily O’Malley Olsen & Tim McManus et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors among Students in Grades 9–12 — United States and Selected Sites, 2015*, 65(9) *Surveillance Summaries*, (Aug. 12, 2006), available at <https://www.cdc.gov/mmwr/volumes/65/ss/ss6509a1.htm> (last visited Nov. 26, 2019).

³² Sandy E. James, Jody L. Herman & Susan Rankin et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality, (2016).

³³ The Beijing LGBT Center & Institute of Psychology of the Chinese Academy of Sciences, *Report on the Mental Health of LGBT People in China*, (2014).

Chinese Center for Disease Control and Prevention have shown that men who have sex with men (MSM) show higher levels of life dissatisfaction, anxiety, depression, and suicidality than non-MSM.³⁴

What causes such large disparities? In a 2018 article, Professor John Pachankis of the Yale School of Public Health and Dr. Bränström of the Karolinska Institutet in Sweden summarized decades of research on this question: “Clear and consistent evidence locates the source of this disparity in sexual minority individuals’ *disproportionate exposure to stigma and associated stress* compared with heterosexuals”³⁵ (italics added). The same principle applies to transgender and gender-diverse people.³⁶ This phenomenon, whereby discrimination causes poorer mental health in socially stigmatized groups, is known as “minority stress.”³⁷

The minority stress model explains how experiencing (or merely anticipating) discrimination causes stress on multiple levels. Stress can be caused by both the experience and the anticipation of being rejected, harassed, and/or physically attacked, and by the material consequences of such discriminatory treatment (e.g. not having income after being fired by a homophobic boss, becoming homeless after being kicked out by parents, physical injury, etc.). LGBT people’s exposure to these forms of discrimination is disturbingly commonplace. In China, over half of LGBT respondents in the 2016 UNDP survey reported being unfairly treated or discriminated against because of their sexual orientation, gender identity, or gender expression, with schools and the family being the most common contexts where discrimination takes place.³⁸ A November 2017 national survey by the Gay & Lesbian Alliance against Defamation (GLAAD) found that 55% of LGBTQ adults in the United States had experienced discrimination based on their sexual orientation or gender identity — an 11% increase from 2016.³⁹ The

³⁴ TIAN Baowei & HU Xinyi, 压力知觉、歧视知觉及社会支持对同性恋男大学生心理健康的影响 (*The Effects of Perceived Stress, Perceived Discrimination and Social Support on the Mental Health of Gay College Students*), 12 中国特殊教育 (Chinese Journal of Special Education), (2016); PENG Xiaoxue, LI Lintao & QI Jie et al., 深圳市男男性行为者焦虑和抑郁状况及其相关因素分析 (*Status of Anxiety and Depression and Related Influence Factors among Men Who Have Sex with Man in Shenzhen*), 23(7) 中国艾滋病性病 (Chinese Journal of AIDS & STD), (2017); JIANG Tingting, PAN Xiaohong & WANG Hui et al., 浙江省男男性行为者抑郁和焦虑状况及其相关因素分析 (*Depressive, Anxiety Symptoms and Related Influential Factors among Man Who Have Sex with Man in Zhejiang*), 22(5) 中国艾滋病性病 (Chinese Journal of AIDS & STD), (2016); LI Rui & CAI Yong, 男男性行为者自杀行为的现状、影响因素及自杀理论模型 (*Suicidal Behaviors in Men Who Have Sex with Men: Status Quo, Influencing Factors and Theoretical Models*), 36(11) 上海交通大学学报(医学版) (Journal of Shanghai Jiao Tong University (Medical Science)), (2016).

³⁵ See Pachankis & Bränström, fn. 30 at 403.

³⁶ Margaret Schneider, Walter O. Bockting & Randall D. Ehrbar et al., *Report of the APA Task Force on Gender Identity and Gender Variance*, American Psychological Association, 137–141 (2008).

³⁷ See Meyer, fn. 29 at 674.

³⁸ See UNDP, fn. 10 at 8.

³⁹ GLAAD, *Accelerating Acceptance 2018: A Survey of American Acceptance and Attitudes toward LGBTQ Americans*, (2018), available at <http://www.glaad.org/files/aa/Accelerating%20Acceptance%202018.pdf> (last visited Nov. 26, 2019).

continuous presence of possible threats in the external environment causes LGBT people to anticipate rejection and to be on guard against hostility. The constant state of vigilance, and for many, even fear, is mentally and physically taxing. A 2007 study titled “Making the Invisible Visible: Fear and Disclosure of Sexual Orientation at Work” found that for closeted lesbian and gay employees, “their fears about disclosing a gay identity at work had an overwhelmingly negative relationship with their career and workplace experiences and their psychological well-being.”⁴⁰

Another source of minority stress is concealment. The UNDP report affirms the risks of coming out in an unfriendly environment, “Generally, there is a direct correlation between ‘coming out’ and the ensuing experience of discrimination within the family, in schools, and religious communities.”⁴¹ In these contexts, a reasonable strategy is to conceal one’s identity, but concealment requires significant energy. Gay and lesbian friends in China often describe how colleagues ask prying questions, such as, “Why aren’t you married yet?”; “Can I set you up on a date?”; “Who were you walking with after work?” Concealment requires constant maintenance of an elaborate web of cover stories and justifications. Concealment also cuts individuals off from communities of support. At the 2018 Out and Equal China Roundtable, corporate managers shared that many LGBT employees avoided joining LGBT employee resource groups out of fear that others might think that any members of the group are LGBT and, thus, they would risk exposing themselves to discrimination. LGBT employees face a stressful dilemma: come out and risk the consequences or conceal and endure the pressure.

The minority stress model also identifies internalized stigma as a source of psychological distress. Having grown up in and/or lived in discriminatory environments, LGBT people may internalize society’s negative attitudes toward them, leading to feelings of shame, guilt, or inferiority.⁴² A 74-year-old gay man in China once told an interviewer, “For 58 years, I didn’t know what I was. I thought I was a freak or a monster.”⁴³ Feelings of self-negativity have compelled many LGBT individuals to seek changing their sexual orientation or gender identity by pursuing “conversion therapy” — a fraudulent practice that is harmful, ineffective, and oftentimes very expensive.⁴⁴ Consistent with studies outside of China, researchers from Southwest University in Chongqing found that a high level of internalized homophobia is associated with greater

⁴⁰ Belle Rose Ragins, John M. Cornwell & Romila Singh, *Making the Invisible Visible: Fear and Disclosure of Sexual Orientation at Work*, 92 *Journal of Applied Psychology*, 1114 (2007).

⁴¹ See UNDP, fn. 10 at 28.

⁴² See Meyer, fn. 29 at 253.

⁴³ Lin Meilian, *Elderly Gay Men Shrug off Guilt after Life of Denial*, *Global Times*, (Feb. 7, 2013), available at <http://www.globaltimes.cn/content/760818.shtml> (last visited Nov. 26, 2019).

⁴⁴ Judith M. Glassgold, Lee Beckstead & Jack Drescher et al., *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, (Aug. 1, 2009), available at <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> (last visited Nov. 26, 2019).

psychological distress and risk behavior (e.g. substance abuse, condom-less sex with casual partners, etc.) among MSM in southwest China.⁴⁵ Generally, MSM in China report higher levels of internalized homophobia than MSM in studies conducted outside China.⁴⁶

The picture painted above is bleak, but the good news is that creating supportive environments reduces these stressors and mental health disparities. For example, a 2016 study published in the official journal of the American Academy of Pediatrics concluded that transgender children who are supported by their families in their social transitioning (e.g. changing their pronouns and gender expression at school, etc.) “have developmentally normative levels of depression and only minimal elevations in anxiety, suggesting that psychopathology is not inevitable within this group.”⁴⁷ A 2009 study found that gay and lesbian youth who had experienced family rejection because of their sexual orientation were 8.4 times more likely to have attempted suicide and 5.9 times more likely to have experienced high levels of depression than their gay and lesbian peers who had not experienced family rejection.⁴⁸ This principle holds true for the workplace. Muñoz found “that organizations that have an affirming organizational climate decrease the job stress of gay or lesbian employees,”⁴⁹ while Ragins, Singh, and Cornwell found that “LGB employees with supportive coworkers and supervisors reported less fear and disclosed more than those who lacked a supportive group.”⁵⁰ Overall, “In a more supportive climate, gay and lesbian employees were more satisfied with their jobs, more committed to their organizations, more satisfied with their careers, and had less intentions to leave.”⁵¹

Government-level policymaking has an important role to play in creating more

⁴⁵ XU Wenjian, ZHENG Lijun & XU Yin et al., *Internalized Homophobia, Mental Health, Sexual Behaviors, and Outness of Gay/Bisexual Men from Southwest China*, *International Journal for Equity in Health*, (Feb. 17, 2017), available at <https://equityhealthj.biomedcentral.com/track/pdf/10.1186/s12939-017-0530-1> (last visited Nov. 26, 2019).

⁴⁶ T. Pyun, G. M. Santos & S. Arreola et al., *Internalized Homophobia and Reduced HIV Testing among Men Who Have Sex with Men in China*, 26(2) *Asia Pacific Journal of Public Health*, (Feb. 14, 2014), available at <https://www.ncbi.nlm.nih.gov/pubmed/24554493> (last visited Nov. 26, 2019).

⁴⁷ Kristina R. Olson, Lily Durwood & Madeleine DeMeules et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137(3) *Pediatrics*, (Mar. 1, 2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4771131/> (last visited Nov. 26, 2019).

⁴⁸ Caitlin Ryan, David Huebner & Rafael M. Diaz et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123(1) *Pediatrics*, (Jan. 1, 2009), available at <https://www.ncbi.nlm.nih.gov/pubmed/19117902> (last visited Nov. 26, 2019).

⁴⁹ Corey S. Muñoz, *A Multi-Level Examination of Career Barriers for Sexual Minorities Employees*, Ph.D. Dissertation, The University of Georgia, at 27 (2005), available at https://getd.libs.uga.edu/pdfs/munoz_corey_s_200505_phd.pdf (last visited Nov. 26, 2019).

⁵⁰ See Ragins, Cornwell & Singh, fn. 40.

⁵¹ See Muñoz, fn. 49 at 35.

supportive environments. In Oregon, the risk of suicide among gay and lesbian youths was significantly lower in the most inclusive school districts (*i.e.* districts with LGBT-inclusive anti-bullying policies and Gay-Straight Alliances) (16.67%) than in the least inclusive school districts (31.08%).⁵² State and national laws, such as the legalization of same-sex marriage, also affect health. A study of U.S. states that have legalized same-sex marriage found that, “After same-sex marriage laws were implemented, the proportion of high school students reporting suicide attempts in the past year decreased by 0.6 percentage points, equivalent to a 7% decline,” and that “reductions in the proportion of high school students attempting suicide were concentrated among students identifying as sexual minorities.”⁵³

III. THE ECONOMIC BENEFITS OF LGBT INCLUSION AND THE COSTS OF EXCLUSION

This part describes the corporate consensus regarding the benefits of LGBT inclusion in the workplace. It then presents research, mostly from the United States, on the impact of LGBT-inclusive policies on recruitment, employee, team, and firm performance, and attracting consumers.

A. The Corporate Consensus: LGBT Inclusion Is Good for Business

Businesses have come a long way since AT&T first adopted a prohibition on sexual orientation discrimination in 1975,⁵⁴ and the Village Voice started providing same-sex domestic partner benefits to employees in 1982,⁵⁵ purportedly the first companies to do so in the United States. According to Out and Equal, an advocacy network dedicated to improving LGBT inclusion in the workplace, in 1996, only four percent of Fortune 500 companies included sexual orientation in their non-discrimination policies.⁵⁶ By 2018, the percentage had risen to 91%. Similarly, in 2002, only three percent of Fortune 500 companies’ non-discrimination policies covered gender identity discrimination. In 2018,

⁵² Mark L. Hatzenbuehler & Katherine M. Keyes, *Inclusive Anti-Bullying Policies and Reduced Risk of Suicide Attempts in Lesbian and Gay Youth*, 53 *Journal of Adolescent Health*, (2013), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3696185/> (last visited Nov. 26, 2019).

⁵³ Julia Raifman, Ellen Moscoe & S. Bryn Austin et al., *Difference-in-Differences Analysis of the Association between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171(4) *JAMA Pediatrics*, (Apr. 1, 2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5848493/> (last visited Nov. 26, 2019).

⁵⁴ AT&T, *Our Commitment to the LGBTQ+ and Ally Community*, available at <https://www.att.jobs/article-att-supports-lgbtq-community> (last visited Nov. 26, 2019).

⁵⁵ Ashlea Ebeling, *Married or Not, Gays Gain Partner Coverage*, *Forbes*, (Apr. 7, 2004), available at https://www.forbes.com/2004/04/07/cz_ae_0407beltway.html#428b95345781 (last visited Nov. 26, 2019).

⁵⁶ Out & Equal Workplace Advocates, *2017 Workplace Equality Fact Sheet*, available at <http://outandequal.org/2017-workplace-equality-fact-sheet/> (last visited Nov. 26, 2019).

the percentage rose to 83%.⁵⁷ The chairperson and CEO of Goldman Sachs, Lloyd Blankfein, summed up corporate America's evolution in his announcement supporting marriage equality in 2012: "America's corporations learned long ago that equality is just good business, and is the right thing to do."⁵⁸

Goldman Sachs is not the only corporation that has spoken out publicly. When the U.S. Supreme Court was preparing to hear *Obergefell v. Hodges*, 379 companies submitted an amicus brief to the court in support of marriage equality. The amicus brief signatories included companies from a broad range of sectors covering a large portion of the U.S. economy, including Apple, Coca-Cola, Disney, Nike, PricewaterhouseCoopers, United Airlines, and Visa. The brief argued, "The value of diversity and inclusion in the workplace has been well-documented following rigorous analyses. *Amici* and others recognize that diversity is crucial to innovation and marketplace success."⁵⁹

Corporate advocacy of LGBT inclusion is growing globally. In January 2019 at the World Economic Forum's Annual Meeting in Davos, a consortium of multinational corporations launched the Partnership for Global LGBTI Equality.⁶⁰ This initiative aims to, by 2020, "enlist 50–100 companies from World Economic Forum members and beyond to join the Partnership for Global LGBTI Equality to implement UN LGBTI Standards."⁶¹ Commenting on the launch, Sander van't Noordende, Group Chief Executive Products at Accenture said, "LGBTI inclusion is not only the right thing to do from an interpersonal point of view, it is also a business imperative because CEO's recognize that a culture of equality creates trust, innovation and therefore business growth."⁶²

B. The Positive Impact of LGBT Inclusion on Business Outcomes

1. Recruitment and Retention. — The UN Standards explain why discrimination leads to poor outcomes:

When employers pass over talented individuals based on characteristics with no

⁵⁷ Human Rights Campaign Foundation, *Corporate Equality Index 2018: Rating Workplaces on Lesbian, Gay, Bisexual, Transgender, and Queer Equality*, available at https://assets2.hrc.org/files/assets/resources/CEI-2018-FullReport.pdf?_ga=2.206871184.2074711720.1548356762-697523320.1546221153 (last visited Nov. 26, 2019).

⁵⁸ Chris Isidore, *Goldman's Blankfein Endorses Same-Sex Marriage*, CNNMoney, (Feb. 6, 2012), available at https://money.cnn.com/2012/02/06/news/companies/goldman_same_sex_marriage/index.htm (last visited Nov. 26, 2019).

⁵⁹ Meghan Rhea, Susan Baker Manning & Michael L. Whitlock et al., *Brief of 379 Employers and Organizations Representing Employers as Amici Curiae in Support of Petitioners*, U.S. Supreme Court, available at https://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_379_Employers_and_Organizations_Representing_Employers.pdf (last visited Jul. 1, 2019).

⁶⁰ See Cann, fn. 3.

⁶¹ See the UN Standards, fn. 9.

⁶² *Id.*

bearing or relevance for the job, such as their sexual orientation, gender identity and sex characteristics, businesses are left with a sub-optimal workforce, diminishing their ability to deliver.⁶³

As companies compete against each other in the “war for talent,” discriminating against LGBT people amounts to shooting themselves in the foot. Business leaders such as Apple CEO Tim Cook illustrate this point.

Refraining from discrimination is only half the battle in recruiting talent. Without express LGBT-inclusive policies, LGBT job applicants will not know if a company’s workplace is welcoming or not. Job seekers might decline to take their chances to apply to companies that do not have an express policy, and instead favor employers with clearly stated benefit policies. A 2013 study by the Center for Talent Innovation shows that “77 percent of LGBT job seekers take into account a company’s LGBT-friendly benefits and 70 percent evaluate a company’s reputation in the LGBT community.”⁶⁴

In order not to lose talented LGBT people in recruitment, companies have invested in communicating their LGBT-inclusive policies to job seekers.⁶⁵ This includes companies in China, where an increasing number of firms are joining LGBT job fairs. Natalie XU, the human resource director for Eldeman China, explained to *Foreign Policy* magazine why her company was participating in an LGBT job fair, “We want to let people know they don’t have to worry about discrimination if they work for us.”⁶⁶

Research has also shown that having express LGBT-inclusive policies is attractive not only to LGBT job seekers but to non-LGBT job seekers as well. As LI Feng and Venky Nagar point out, “Attitudes toward gays can reflect broader attitudes related to tolerance and diversity. An organization’s stance on gay rights is thus likely to be a good proxy for its real attitudes toward diversity in general.”⁶⁷ Job applicants from groups that have been discriminated against historically such as women, ethnic minorities, people with disabilities, and people from certain geographic regions may perceive a company

⁶³ Id.

⁶⁴ Center for Talent Innovation, *The Power of “Out” 2.0: LGBT in the Workplace*, available at https://www.talentinnovation.org/_private/assets/PowerOfOut-2-ExecSumm-CTI.pdf (last visited Nov. 26, 2019).

⁶⁵ Hilary Metcalf & Heather Rolfe, *Barriers to Employers in Developing Lesbian, Gay, Bisexual and Transgender Friendly Workplaces*, National Institute of Economic and Social Research, (Mar. 1, 2011), available at <https://pdfs.semanticscholar.org/aeb4/6c100cbb85b05d85ec104285ffb6eb5e7236.pdf> (last visited Nov. 26, 2019). *Website Aims to Help LGBT Job Seekers Find a Comfortable Workplace*, The Japan Times, (May 20, 2015), available at <https://www.japantimes.co.jp/news/2015/05/20/national/website-aims-help-lgbt-job-seekers-find-comfortable-workplace/#.XGL4BM9Kg3E> (last visited Nov. 26, 2019).

⁶⁶ Joanna Chiu, *China’s New Multibillion-Dollar Target Market: LGBT Youth*, *Foreign Policy*, (Feb. 27, 2017), available at <https://foreignpolicy.com/2017/02/27/chinas-new-multibillion-dollar-target-market-lgbt-youth/> (last visited Nov. 26, 2019).

⁶⁷ LI Feng & Venky Nagar, *Diversity and Performance*, 59(3) *Management Sciences*, 529, (Mar. 1, 2013), available at <https://pubsonline.informs.org/doi/abs/10.1287/mnsc.1120.1548> (last visited Nov. 26, 2019).

committed to LGBT inclusion to be committed to inclusion generally, including inclusion of them.

LGBT-inclusive policies can also be attractive to non-LGBT job applicants. Research by Sylvia Ann Hewlett, the CEO of the Center for Talent Innovation and Professor Kenji Yoshino of the New York University School of Law found a whopping 72% of LGBT allies (*i.e.* non-LGBT individuals who support LGBT people) surveyed said that they were more likely to take a job at an LGBT-supportive company.⁶⁸ They also found that “inclusive policies for LGBT individuals send a friendliness cue that resonates with other employees, even when they are not active allies.” Inclusive policies signal that a company is a fair employer whose employees are not subject to the capricious and biased exercise of power.⁶⁹

With regard to retention, Hewlett’s research showed that closeted LGBT employees who feel isolated at work are 73% more likely than ‘out’ employees to leave their job,⁷⁰ while the 2018 Human Rights Campaign Foundation survey found that 20% of LGBTQ employees have stayed home from work because of unaccepting workplaces. In China, the 2018 UN ILO report found that 64.3% of LGBTI respondents had looked for a new job within the past six months because of harassment and discrimination.⁷¹ The UN Standards capture what a waste all this is: “Discrimination forces otherwise qualified LGBTI employees to quit their jobs, creating unnecessary turnover-related costs and loss of talent.”⁷²

2. Performance. — (1) Employee Performance

When LGBTQ people are compelled to stay closeted on the job, everyone loses.⁷³ 397 U.S. employers made this same point in their amicus brief to the U.S. Supreme Court in support of marriage equality, “A diverse, inclusive workplace environment ‘increases the total human energy available to the organization. People can bring far more of themselves to their jobs because they are required to suppress far less.’”⁷⁴ Stephen Frost, who led diversity and inclusion for the 2012 London Olympics, estimates, “When gay people remain in the closet, they are 10 percent less productive than when they feel able

⁶⁸ Sylvia Ann Hewlett & Kenji Yoshino, *LGBT-Inclusive Companies Are Better at 3 Big Things*, Harvard Business Review, (Feb. 2, 2016), available at <https://hbr.org/2016/02/lgbt-inclusive-companies-are-better-at-3-big-things> (last visited Nov. 26, 2019).

⁶⁹ “A corporate culture that values diversity and inclusion bolsters a company’s reputation as a fair employer, attracts a broader pool of well-qualified candidates, boosts employee morale and productivity, drives innovation, and reduces risks of discrimination and harassment.” See the UN Standards, fn. 9 at 27.

⁷⁰ Sylvia Ann Hewlett, *Why LGBT Employees Need Workplace Allies*, Harvard Business Review, (Jun. 20, 2013), available at <https://hbr.org/2013/06/the-power-of-out> (last visited Nov. 26, 2019).

⁷¹ See UNDP & ILO, fn. 12.

⁷² See the UN Standards, fn. 9 at 19.

⁷³ See Human Rights Campaign Foundation, fn. 21 at 3.

⁷⁴ See Rhea, Manning & Whitlock et al., fn. 59 at 21.

to be themselves,” while a 2013 Goldman Sachs presentation at the Conference Board put this productivity loss at 30 percent.⁷⁵

As noted above, concealment of sexual orientation negatively affects mental and physical health, including immune functioning.⁷⁶ In several studies, from China and the United States, LGBT employees report that the stress of concealment leads to less engagement with colleagues, higher rates of absenteeism, and hindered focus. In a 2013 survey conducted by Aibai, an LGBT advocacy group in China, 45% of the respondents said that they spent “a lot of energy concealing their identity” and 34% said they “avoided certain colleagues or activities” at work.⁷⁷

In the United States, a 2016 study found that 27% of LGBT employees said that being closeted at work inhibited them from sharing their ideas or speaking out at work.⁷⁸ The 2018 Human Rights Campaign Foundation survey found that 17% of sexual minority respondents felt exhausted from spending time and energy hiding their sexual orientation and 13% of gender minority respondents felt exhausted from hiding their gender identity.⁷⁹ Being able to come out allows LGBT employees to better connect with colleagues and excel in the workplace. Hewlett and Sumberg found that 42% of closeted LGBT workers surveyed reported feeling isolated at work, while only 24% of openly LGBT workers felt the same way.⁸⁰ This might explain why 70% of closeted middle managers report feeling that their career has stalled, versus 51% of “out” middle managers.⁸¹

LGBT employees notice cues in the work environment that help them assess the risks of coming out. In the late 1990s, Todd Sears, a gay employee at a New York investment bank, decided to stay closeted after hearing a manager use “faggot” and other

⁷⁵ Stephen Frost, *The Inclusion Imperative: How Real Inclusion Creates Better Business and Builds Better Societies*, Kogan Page (London), at 75 (2014).

⁷⁶ Steve W. Cole, Margaret E. Kemeny & Shelley E. Taylor et al., *Elevated Physical Health Risk among Gay Men Who Conceal Their Homosexual Identity*, 15(4) *Health Psychology*, (1996), available at https://cancer-network.org/wp-content/uploads/2017/02/Elevated_Physical_Health_Risk_Among_Gay_Men_Who_Conceal.pdf (last visited Nov. 26, 2019).

⁷⁷ Amanda Yik & Kevin Burns, *Creating Inclusive Workplaces for LGBT Employees in China — A Resource Guide for Employers*, (Sep. 1, 2013), available at <https://www.communitybusiness.org/latest-news-publications/creating-inclusive-workplaces-lgbt-employees-china-resource-guide-employers> (last visited Nov. 26, 2019).

⁷⁸ Sylvia Ann Hewlett & Kenji Yoshino, *Out in the World: Securing LGBT Rights in the Global Marketplace*, New York: Center for Talent Innovation, (Jan. 22, 2016), available at <http://www.talentinnovation.org/publication.cfm?publication=1510> (last visited Nov. 26, 2019).

⁷⁹ See Human Rights Campaign Foundation, fn. 21.

⁸⁰ Sylvia Ann Hewlett & Karen Sumberg, *For LGBT Workers, Being “Out” Brings Advantages*, *Harvard Business Review*, (Jul.–Aug. 2011), available at <https://hbr.org/2011/07/for-lgbt-workers-being-out-brings-advantages> (last visited Nov. 26, 2019).

⁸¹ *Id.*

homophobic slurs frequently.⁸² He recalled how concealing his sexual orientation was mentally tiring, “There are so many things you can’t say or that you have to lie about, and you’re constantly on guard.”⁸³ He quit the company after a year and joined Merrill Lynch where he could be openly gay without negative consequences for his career. Sears’s performance target was to bring in US\$24 million in 24 months. In four years, he brought in US\$1.4 billion.⁸⁴ When Sears started working at Merrill Lynch, it did not sponsor national LGBT organizations nor did it have top-notch LGBT-inclusion policies. However, later, “by tracking the bottom-line impact the community could have,” Sears recalled, “Merrill quickly got up to speed — spending millions of dollars sponsoring LGBT organizations and ultimately winning national awards for their work.”⁸⁵

(2) Team Performance

Inclusive policies do not only improve an individual’s performance but also improve team performance by increasing a team’s diversity. A series of studies have shown that, while homogenous groups might experience less internal disagreement, they are also less open to new ideas and opportunities, and more prone to making mistakes. Put pithily by the *Financial Times*’ Tim Smedley in summarizing this research, “Groupthink may lead to a cohesive team, but one that will happily agree on the same costly mistake.”⁸⁶

The diversity of viewpoints reduces self-deceit and overconfidence in teams because members are made to consider different viewpoints. As a result, diverse teams are more vigilant in examining facts, making decisions, and maintaining objectivity. A 2009 study had several groups of three fraternity or sorority members work to solve a murder mystery puzzle based on a set of clues. After reviewing the evidence, groups were given 20 minutes to determine the murderer out of three suspects. At the five-minute mark, a fourth member would join the group who was either from the same fraternity or sorority as the original three members or from a different one. For groups that chose the incorrect suspect at the five-minute mark, their chances of ultimate success doubled if they were joined by someone from a different sorority or fraternity (60% versus 29.4%). Groups that had the out-group fourth member reported feeling less confident in their decision and that their communication was less effective. The researchers found that better performance was not the result of the new out-group member bringing new ideas to the

⁸² Todd G. Sears, *How Todd Sears Convinced Wall Street CEOs to Put Their Weight behind LGBT Inclusion*, *The Economic Times*, (Apr. 4, 2015), available at <https://economictimes.indiatimes.com/how-todd-sears-convinced-wall-street-ceos-to-put-their-weight-behind-lgbt-inclusion/articleshow/46783600.cms> (last visited Nov. 26, 2019).

⁸³ See Hewlett & Sumberg, fn. 80.

⁸⁴ See Hewlett & Yoshino, fn. 68.

⁸⁵ See Sears, fn. 82.

⁸⁶ Tim Smedley, *The Evidence Is Growing — There Really Is a Business Case for Diversity*, *Financial Times*, (May 15, 2014), available at <https://www.ft.com/content/4f4b3c8e-d521-11e3-9187-00144feabdc0> (last visited Nov. 26, 2019).

group. Instead, the mere presence of the out-group member motivated the original members to reevaluate their thinking — even if doing so was uncomfortable. In the *Harvard Business Review*, the researchers advised, “confronting opinions you disagree with might not seem like the quickest path to getting things done, but working in groups can be like studying (or exercising): no pain, no gain.”⁸⁷

Diversity can spur greater reflection, but, to benefit fully from diverse viewpoints, more is required. According to Stephen Turban, WU Dan, and ZHANG Letian, it is necessary for each team member to feel safe in speaking out for a team to benefit from multiple viewpoints. In their research about greater representation of women in workplaces, they concluded:

*When countries and industries don't value women equally, women working in those countries likely don't feel psychologically safe speaking up in their organizations. Even though these women may have innovative ideas, they might hesitate to bring them to the table. And when that happens, everyone loses.*⁸⁸

The value of diversity cannot be fully realized without inclusion. Sometimes it can lead to a “diversity backlash” in the words of Laura Sherbin and Ripa Rashid at the Center for Talent Innovation.⁸⁹ In the research report, ZHANG Letian, a professor at Harvard Business School, notes how diversity without inclusion can lead to “conflict and stereotyping and hinder group solidarity and cooperation, thus reducing workplace efficiency.”⁹⁰ Stereotyping is particularly insidious when only a small number of people from a marginalized group are represented in the workplace. One study of the representation of women on Chinese company boards found that more gender-diverse boards improved firm performance, but such representation had to go beyond having one or two women board members who merely served as “tokens.” Otherwise, colleagues would unfairly assess their performance.⁹¹ To realize the value of diversity, businesses need to invest in creating a respectful and safe workplace environment for all employees. Illustrating this point, Sherbin and Rashid found “that employees with inclusive managers are 1.3 times more likely to feel that their innovative potential is unlocked.”⁹²

⁸⁷ David Rock, Heidi Grant & Jacqui Grey, *Diverse Teams Feel Less Comfortable — And That's Why They Perform Better*, Harvard Business Review, (Sep. 22, 2016), available at <https://hbr.org/2016/09/diverse-teams-feel-less-comfortable-and-thats-why-they-perform-better> (last visited Nov. 26, 2019).

⁸⁸ Stephen Turban, WU Dan & ZHANG Letian, *Research: When Gender Diversity Makes Firms More Productive*, Harvard Business Review, (Feb. 11, 2019), available at hbr.org/2019/02/research-when-gender-diversity-makes-firms-more-productive (last visited Nov. 26, 2019).

⁸⁹ Laura Sherbin & Ripa Rashid, *Diversity Doesn't Stick without Inclusion*, (Feb. 1, 2017), available at <https://hbr.org/2017/02/diversity-doesnt-stick-without-inclusion> (last visited Nov. 26, 2019).

⁹⁰ ZHANG Letian, *An Institutional Approach to Gender Diversity and Firm Performance*, Organization Science (forthcoming).

⁹¹ LIU Yu, WEI Zuobao & XIE Feixue, *Do Women Directors Improve Firm Performance in China?*, 28 Journal of Corporate Finance, (2014).

⁹² See Sherbin & Rashid, fn. 89.

(3) Firm Performance

Studies at the corporate level corroborate these findings, showing that diversity and inclusion policies are associated with higher firm performance. Credit Suisse tracked the stock prices of 270 companies that adopted LGBT-inclusive policies from 2010 to 2016 and found that it outperformed the MSCI All Country World Index by 3%.⁹³ Other studies have used tests to isolate variables to determine whether LGBT-inclusive policies and diversity are merely correlated or if inclusive policies actually lead to better firm performance. In a 2013 paper, LI and Nagar analyzed the performance of 300 firms that adopted same-sex domestic partnership benefits (SSDPB) between 1995 and 2008. Accounting for reverse causality, they found that SSDPB adoption led to a 10% increase in firm performance and a significant improvement relative to nonadopters. LI and Nagar hypothesized that SSDPB adoption improved performance because diversity and inclusion policies

*send latent signals to the entire organization regarding permissible biological and behavioral attributes. Such signals may then impact all employees, affecting their comfort, their unconscious projections of identity and gender in critical interpersonal meetings. These meetings are an important channel for management to elicit and consolidate valuable information about firm operations (e.g. Simons 2000), and social dynamics of these interactions can significantly affect their productivity.*⁹⁴

A 2018 study on corporate credit ratings went further. Using 7,469 samples over 16 years, the researchers looked at numerous variables to find firms that were similar except for one factor: LGBT-friendly policies. The variables included industry sector, size, capital expenditure, research and development budget, debt, board size and other aspects of corporate governance, corporate social responsibility policies, etc. The study concluded that “LGBT-friendly corporate policies are not merely associated with, but rather, *causally influence* a crucial corporate outcome, *i.e.* credit ratings.”⁹⁵ Another major study published in 2018 used 14 control variables, and came to a similar result that “the results of these causality tests provide evidence that past firm value, productivity, and profitability do not influence adoptions of LGBT-supportive corporate policies, but adoptions of these policies do result in future improvements in firm value and productivity.”⁹⁶

Research suggests that government policies also have an impact on corporate

⁹³ See Dawson, Natella & Kersley et al., fn. 23.

⁹⁴ See LI & Nagar, fn. 67.

⁹⁵ Pandej Chintrakarn, Sirimon Treepongkaruna & Pornsit Jiraporn et al., *Do LGBT-Supportive Corporate Policies Improve Credit Ratings? An Instrumental-Variable Analysis*, Journal of Business Ethics, (Aug. 30, 2018), available at <https://link.springer.com/article/10.1007/s10551-018-4009-9> (last visited Nov. 26, 2019).

⁹⁶ Shaun Pichler, Janell L. Blazovich & Kirsten A. Cook et al., *Do LGBT-Supportive Corporate Policies Enhance Firm Performance?*, 57(1) Human Resource Management, 263–278 (2018).

innovation. Professor GAO Huasheng from Nanyang Technological University and Professor ZHANG Wei from the Shanghai University of Finance and Economics analyzed patent filings of thousands of firms across different U.S. states between 1976 and 2008 and found that firms in states that had passed laws prohibiting LGBT-based discrimination (“Employment Non-Discrimination Acts” or “ENDAs”) performed better: “On average, firms headquartered in states that passed ENDAs experienced an 8% increase in the number of patents and an 11% increase in the number of patent citations, relative to firms headquartered in states that did not pass such a law.”⁹⁷ The study controlled for several variables including firm size and profitability and the social, political, and economic conditions of the states. GAO and ZHANG also compared firms that were located close to each other but across state borders from each other, since they would be in the same economic environment but in different legal jurisdictions. They “continued to find a significant increase in firms’ innovation after their states pass ENDAs, relative to their close-by neighboring firms.”⁹⁸

C. High Consumer Demand for LGBT-Supportive Brands

If the above supply-side reasons are not enough to convince businesses to support LGBT inclusion, market demand may force them to do so. The global LGBT population is 450 million, and LGBT consumers are estimated to have an annual spending power of US\$3.7 trillion.⁹⁹ China’s LGBT consumer market is approximately US\$300 billion. A 2018 survey of 12,743 LGBTQ consumers in the United States showed that 76% of respondents agreed that LGBT-supportive companies would get more of their business in the coming year.¹⁰⁰ In China, according to *Foreign Policy*, “56 percent of LGBT men [sic] and 62 percent of LGBT women [sic] in China say the most important factor influencing their purchasing decisions is company support for LGBT-friendly policies and regulations.”¹⁰¹

Non-LGBT consumers, especially young people, increasingly care about company support for the LGBT community in making purchasing decisions. In 2015, a Google consumer survey showed that “today’s young millennials — 47% of consumers under 24-years-old — are more likely to support a brand after seeing an equality-themed ad

⁹⁷ GAO Huasheng & ZHANG Wei, *Non-Discrimination Laws Make U.S. States More Innovative*, Harvard Business Review, (Aug. 17, 2016), available at <https://hbr.org/2016/08/non-discrimination-laws-make-us-states-more-innovative> (last visited Nov. 26, 2019).

⁹⁸ *Id.*

⁹⁹ See UNDP & ILO, fn. 12.

¹⁰⁰ *US LGBTQ Consumers Favor Companies That Support Equality, but Feel That Outreach Is Insufficient*, MarketingCharts, (Jul. 12, 2018), available at <https://www.marketingcharts.com/demographics-and-audiences/lgbtq-104911> (last visited Nov. 26, 2019).

¹⁰¹ See Chiu, fn. 66.

(compared with 30% of all age groups combined).”¹⁰² Meanwhile, 82% of LGBT allies say they are more likely to buy from a company that is LGBT-supportive.¹⁰³ Based on its 2017 national survey, GLAAD estimates that 49% of non-LGBTQ Americans can be considered allies.¹⁰⁴

It is no wonder then how numerous big-name Chinese companies have conducted advertising campaigns displaying support for the LGBT community. In June 2015, Alibaba publicly sponsored ten same-sex couples from China to get married in California.¹⁰⁵ A month later, the day after the Supreme Court legalized same-sex marriage throughout the United States, the DiDi ride-hailing app rainbow colored the stickers for its driver location map.¹⁰⁶ In 2016, MEIZU made a special ad series for Valentine’s Day aimed at LGBT customers.¹⁰⁷ Novak CHENG, who led the campaign, explained MEIZU’s thinking, “We have a large user base and our users are very diverse... It is obvious that they experience a wide range of love.”¹⁰⁸

IV. RECOMMENDATIONS

LGBT workplace inclusion in China and the United States needs to go further. Some businesses in China are already beginning to uncover the benefits of LGBT inclusion, but most of them are multinational companies headquartered abroad. Multinational companies have first-hand experiences with LGBT-inclusion policies outside China, which have helped their leadership to recognize the value of these policies and implement them globally. No doubt, the bottom-up demand from employees in China has also driven the implementation of inclusion policies forward, but without already-receptive corporate leadership, these efforts would not have gained so much ground so quickly.

Companies headquartered in China do not have much first-hand experience with implementing LGBT-inclusion policies. For a host of reasons, most companies are reluctant to go near the issue. For those few domestic companies that have embraced

¹⁰² Brendan Snyder, *LGBT Advertising: How Brands Are Taking a Stance on Issues*, Think with Google, (Mar. 1, 2015), available at <https://www.thinkwithgoogle.com/consumer-insights/lgbt-advertising-brands-taking-stance-on-issues/> (last visited Nov. 26, 2019).

¹⁰³ See Hewlett & Yoshino, fn. 68.

¹⁰⁴ See GLAAD, fn. 39.

¹⁰⁵ Gwynn Guilford, *Alibaba Is Sending 10 Same-Sex Couples on All-Expense-Paid Trips to US to Get Married*, Quartz, (Apr. 9, 2015), available at <https://qz.com/379195/alibaba-is-sending-10-same-sex-couples-on-all-expense-paid-trips-to-us-to-get-married/> (last visited Nov. 26, 2019).

¹⁰⁶ Duncan Hewitt, *US Supreme Court Ruling on Gay Marriage Prompts “Unprecedented” Debate in China, Gives Hope to Gay Activists*, International Business Times, (Jun. 29, 2015), available at <https://www.ibtimes.com/us-supreme-court-ruling-gay-marriage-prompts-unprecedented-debate-china-gives-hope-1987592> (last visited Nov. 26, 2019).

¹⁰⁷ 中国首位公开支持同性恋子女的母亲 (*The First Mother in China to Publicly Support Her Gay Child*), (Feb. 1, 2016), available at <https://www.bilibili.com/video/av3872513/> (last visited Nov. 26, 2019).

¹⁰⁸ See Chiu, fn. 66.

some LGBT-themed messaging, they may not yet know how to implement fully inclusion policies that benefit their employees and their bottom line. In the United States, a critical mass of research and real-world experience has led to LGBT inclusion to emerge as a corporate best practice, but there are still many employers who have non-inclusive work environments because of intentional hostility, lack of effort, or not knowing how to implement LGBT-inclusive policies properly. To encourage more enterprises to improve LGBT inclusion and uncover its benefits in the workplace, further research, as well as policymaking at the corporate and government levels, is needed.

A. Recommendations for Future Research

This article cites numerous studies showing that LGBT-inclusive policies lead to better firm performance by accounting for a wide range of factors and isolating inclusion policies as a variable. There is strong evidence of a causal connection, but it is not clear how the causal relationship works. Which kinds of LGBT-inclusion policies are the most impactful? Do increases in company value mostly come from greater innovation at the company, employees being more engaged, or investors and customers favoring companies with inclusive policies? The U.S. Chamber of Commerce Foundation also sees more research as necessary for broadening the application of LGBT-inclusive policies and assert that “a better understanding of how LGBT-inclusive strategies result in those positive impacts is a key gap to fill to facilitate the adoption of these practices among a broader range of companies.”¹⁰⁹

How to improve the implementation of LGBT-inclusive policies is another important area of inquiry. Studies of newer corporate inclusion practices, such as reimbursement for fertility and surrogacy and LGBT employee advisory councils, would help to fill out the picture. According to the U.S. Chamber of Commerce Foundation, “the impacts and changes [of LGBT-inclusion policies] on organizational culture are not as well understood.”¹¹⁰ The need to explore how changes in policy and law (*i.e.* “regulatory legitimacy”) affect culture (*i.e.* “normative legitimacy”), from both a practical and a theoretical perspective, is discussed more under this section.

LGBT inclusion in Chinese workplaces is very understudied. Currently, the vast majority of empirical research on the benefits/costs of LGBT inclusion/exclusion has been done in North America and Europe. Lee Badgett’s analysis of the cost of LGBT exclusion in India and Indonesia are two notable exceptions.¹¹¹ Scholars, as well as

¹⁰⁹ U.S. Chamber of Commerce Foundation, *Business Success and Growth through LGBT-Inclusive Culture*, (Apr. 9, 2019), available at www.uschamberfoundation.org/reports/business-success-and-growth-through-lgbt-inclusive-culture (last visited Nov. 26, 2019).

¹¹⁰ *Id.*

¹¹¹ See Badgett, *fn. 5*; M. V. Lee Badgett, Amira Hasenbush & Winston Ekaprasetya Luhur, *LGBT Exclusion in Indonesia and Its Economic Effects*, (Mar. 2017), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Exclusion-in-Indonesia-and-Its-Economic-Effects-March-2017.pdf> (last visited Nov. 26, 2019).

government and private-sector researchers, should study LGBT inclusion in China further. In China, researchers have published on how greater representation of women on Chinese companies' boards affects business performance,¹¹² but there has not been any analogous research on LGBT inclusion and overall business performance. China-focused research is needed to demonstrate the effects of LGBT inclusion on business performance in the Chinese context. Professor ZHANG Letian, in a study of gender diversity and business performance across dozens of countries, concluded that because of different social contexts, "research findings from the United States and Europe cannot be directly extrapolated to non-Western countries." If advocates only present North American and European research on LGBT inclusion and business performance to executives in China, it will be very easy for them to discount the research as inapplicable to Chinese society. Yet, we know from the research cited above by the Aibai, and UNDP on LGBT people's experiences in the workplace that stigma substantially affects many aspects of job performance, such as attendance and retention. Researchers should build on these studies to better illuminate the current conditions of LGBT employees in China and the relationship between inclusion and business outcomes.

Admittedly, there are several challenges in conducting this kind of research in China. Only a small fraction of enterprises have LGBT-inclusive policies in China and (perhaps because of that) only a small percentage of LGBT employees in China come out at their workplaces. While it is somewhat straightforward for researchers to identify cisgender women in the workplace and tabulate representation rates, the same is not true for LGBT people. This presents a chicken and egg problem. Currently, it is difficult to encourage more businesses to pursue LGBT inclusion without more China-specific research, but it is also very difficult to conduct China-specific research when there are so few companies that have LGBT-inclusion policies.

Still, researchers could start by first looking at multinational companies in China that have adopted LGBT-inclusive policies. Sample sizes will be too small and unrepresentative to draw conclusions about overall business performance, but researchers could interview and survey employees about how they perceive the relationship between their workplace environments and their job performance. Employees could be asked to compare experiences at different companies. Alternatively, since many multinational companies in China have only begun implementing LGBT-inclusive policies recently, employees could be asked to examine their experiences over time, comparing their job performance before and after a certain policy at their company was instituted (*e.g.* same-sex partner benefits, resource groups for LGBT employees and their allies, etc.). Charlene LIU's fear and worry before her employer approved her spouse's health insurance is an example. These approaches could help illustrate the relationship between LGBT-inclusive policies and environments and individual job performance. Interviews

¹¹² See LIU, WEI & XIE, fn. 91.

could include non-LGBT employees to discern whether changes in policies and environments have had any effect on them. To find LGBT-friendly businesses that might be willing to participate in research, researchers could consult company lists created by LGBT advocate networks such as Out and Equal and Shanghai Pride.

Researchers could also further document the costs of LGBT exclusion in China. It would be much more difficult to find study participants, and researchers would have to be extremely cautious to safeguard the privacy of those interviewed and surveyed. Researchers could focus on how a lack of workplace acceptance affects employee productivity and retention, for example, by asking questions such as “has concealing your identity affected your work?” and “would you leave your current organization for one that was more inclusive if you could?” Of particular interest would be employees who move from a company with LGBT-inclusive policies and an affirming workplace environment to one without. It would also be useful to compare employee experiences between firms that differ in their LGBT-inclusion policies but are in the same industry and geographic location.

Studies of this kind would not only be useful for company and government policymaking but would contribute to the theoretical understanding of the relationship between diversity and inclusion and business performance. Professor ZHANG Letian in “An Institutional Approach to Gender Diversity and Firm Performance” analyzes the effect of the broader regulatory environment on whether diversity improves performance.¹¹³ He concluded, “the more gender diversity has been normatively accepted in a country or industry, the more it benefits a firm’s market valuation and revenue.”¹¹⁴ According to ZHANG, for contexts where gender diversity is a valued social norm it will have a greater positive impact on performance, while in contexts where gender diversity is not valued (or possibly even opposed), it will have less effect. ZHANG goes on to state, “the value of gender diversity can be socially constructed; how people perceive it and approach it depends on the broader normative environment.”¹¹⁵ Regulations and policies alone do not have a substantial effect. ZHANG found that Japan, which has robust parental and homecare leave policies that benefit women but also an intensely patriarchal work culture, does not benefit from workplace gender diversity as much as places where it is more normatively valued.¹¹⁶

Although ZHANG states that issuing regulations requiring diversity alone does not enhance performance, he acknowledges that regulatory institutions do shape norms over time. In the United States, the equal employment opportunity law catalyzed the

¹¹³ See ZHANG, fn. 90.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Turban, WU & ZHANG, fn. 88.

development of diversity and inclusion-focused human resource professionals who helped to create a culture shift. ZHANG recommends that future researchers should look into how regulatory forces shape normative values regarding diversity.

Research on China presents an interesting opportunity to flesh out the theoretical framework outlined by ZHANG in several ways. It would help scholars understand the effect of diversity on performance in a context where the legitimacy of LGBT acceptance occupies a middle ground. In China, in terms of normative legitimacy, the levels of LGBT acceptance are not as high as in North America or Europe, but also not as low as in, for example, many Middle Eastern countries. With regard to regulatory legitimacy, LGBT people are almost invisible in the Chinese legal system — there are neither express LGBT-related protections (*e.g.* anti-discrimination regulations in the European Union) nor penalties (*e.g.* Iran maintaining the death penalty for same-sex sex, and Russia imposing fines for spreading “gay propaganda”). In China, there are some regulations on gender-affirming surgeries and a number of government statements and court decisions related to LGBT rights, but these are not widely known or implemented. Social acceptance in China also varies greatly across regions, communities, and even individual enterprises. Studies of LGBT diversity and inclusion in China could help researchers explore where the critical threshold of normative legitimacy is for the benefit of LGBT diversity and inclusion to be realized (whether at the workplace, in the community, or in the industry).

Professor ZHANG raised the possibility that the value of gender diversity is socially constructed — it has value because a community of people assigns it value. Exploring the difference between diversity and inclusion with regard to LGBT people and increased representation and inclusion of women in the workplace would help shed light on the role of community-constructed meanings regarding diversity’s effect on business performance. As Professor ZHANG notes, the increase of women employees is visible in companies and can lead to the possibility of stereotyping and a “diversity backlash.” However, sexual orientation and gender identity cannot be observed. A company could have many LGBT employees without anyone knowing. This “invisible diversity” makes a diversity backlash less likely because colleagues would not know that their workplace is in fact diverse. Similarly, colleagues would not be able to assign a positive value to their workplace’s diversity because they would be unaware of it.

Practically speaking, it would be challenging, but these situations would also allow researchers to test whether sexual orientation and gender identity diversity without overt and visible inclusion have any discernible effect on innovation and performance. Researchers could then look at slightly more inclusive environments to see how effects on performance change. For example, it would be valuable to study workplaces with privacy-protected systems for identifying oneself as LGBT to management so that LGBT employees can enjoy some supportive benefits without having to come out to their

colleagues. My hypothesis would be that since LGBT minority stress (e.g. stress of concealment and constant vigilance) has a serious effect on mental health, job performance, and employee's ability to contribute to their teams, a high degree of visible acceptance would be necessary at the workplace before the benefits of LGBT diversity and inclusion could become apparent. The UN Standards reflect a similar view that "Pro-LGBTI policies are critical but for them to be effective, in order to attract or retain LGBTI staff, companies should have a proactive approach with high visibility."¹¹⁷

If a critical threshold of normative legitimacy exists, an important question would be, "how do organizations, communities, and industries get there?" As more companies in China adopt LGBT-inclusive policies, it would be valuable to study how those policies affect the normative legitimacy of LGBT inclusion within companies. The Chinese government has been signaling a more LGBT-affirmative stance in some contexts. Are these signals influencing social attitudes? If the government eventually does pass LGBT-related anti-discrimination laws at a time when social attitudes toward LGBT people are still neither strongly accepting nor rejecting, it would be important to see if the passing of laws accelerates the rate of acceptance. This would help scholars better understand the effects of regulatory legitimacy on normative legitimacy with regard to LGBT inclusion.

There has been related research in the United States on the effect of the anti-discrimination law on behavior. A 2016 study on the efficacy of state and local anti-discrimination laws concluded, "research findings to date provide strong evidence that anti-discrimination laws on the basis of sexual orientation do actually reduce prejudice and acts of discrimination in the employment sphere."¹¹⁸ The United States has a patchwork of state laws and federal court decisions regarding sexual orientation and gender identity (SOGI) based discrimination. The U.S. Supreme Court will soon decide whether Title VII of the Civil Rights Act (a federal law that covers the whole nation) prohibits discrimination based on sexual orientation and gender identity. Currently, eleven states do not have state laws prohibiting SOGI-based discrimination, but they are within federal circuit court jurisdictions that interpret Title VII as covering SOGI-based discrimination. On the other hand, fifteen states have neither state laws nor a relevant federal court ruling prohibiting SOGI-based discrimination. The Supreme Court's decision could render SOGI-based discrimination in these states legal or illegal. Researchers could look at states in which the law does change to see if there is an effect on social attitudes and rates of discrimination incidents. It would also be interesting to

¹¹⁷ See the UN Standards, fn. 9.

¹¹⁸ Michelle Hebl, Laura Barron & Cody Brent Cox et al., *The Efficacy of Sexual Orientation Anti-Discrimination Legislation*, Equality, Diversity and Inclusion, (Sep. 19, 2016), available at <https://www.emeraldinsight.com/doi/abs/10.1108/EDI-07-2016-0060?journalCode=edi> (last visited Nov. 26, 2019).

look at states that have SOGI-based anti-discrimination laws to see if a change in federal law has any effect on how the legitimacy of the state law is perceived and whether that affects norms and on-the-ground behavior.

B. Recommendations for Employer Policy and Practice

Businesses in China do not have to wait for the conclusions of China-specific academic research to get started with implementing LGBT-inclusive policies. Indeed, companies that wait for a rock-solid scholarly consensus to form might find themselves lagging behind their competitors. Anecdotally, multinational companies implementing LGBT-inclusive policies in China are already reporting that inclusion has improved workplace environments and employee satisfaction. This trend is likely to get stronger. For employers starting their LGBT inclusion journey, the UN Standards provide a good guiding framework for how to proceed. Practical guides that are more specific are available on the websites of several organizations such as the Human Rights Campaign Foundation, Stonewall, Community Business, Workplace Pride, and the U.S. Chamber of Commerce Foundation.¹¹⁹ Several companies in China, as well as advocacy networks such as Out and Equal, Shanghai Pride, and the Beijing LGBT Center, are developing China-specific resources.

The vast majority of Fortune 100 companies have LGBT non-discrimination policies, but written policies only go so far in creating an inclusive environment. To achieve full inclusion, companies need to ensure they also: (1) improve benefits offered, (2) implement programs for education, training, and accountability, (3) integrate LGBT employees' input in decision-making, and (4) speak out publicly on LGBT inclusion. The Human Rights Campaign Foundation's Corporate Equality Index uses these and several other criteria to assess the LGBT-inclusion policies of 1,028 of the largest U.S. businesses. Five-hundred-and-seventy-two of these employers earned a perfect score in 2019, but many businesses have not yet adopted these best practices.¹²⁰

The process of adopting LGBT-inclusive policies among multinational companies in China and workplaces in the United States share a common feature: They have been evolutionary. Some companies started with small employee resource groups of LGBT and

¹¹⁹ See Stonewall website, available at www.stonewall.org.uk/our-work/workplace-resources (last visited Nov. 26, 2019); Human Rights Campaign, *Trans Toolkit for Employers*, available at www.hrc.org/campaigns/trans-toolkit (last visited Nov. 26, 2019); Human Rights Campaign, *Workplace Climate Resources*, available at www.hrc.org/resources/workplace-climate-resources (last visited Nov. 26, 2019); Transgender Law Center, *Model Employer Policy*, available at transgenderlawcenter.org/resources/employment/modelpolicy (last visited Nov. 26, 2019).

¹²⁰ Human Rights Campaign Foundation, *Corporate Equality Index 2019: Rating Workplaces on Lesbian, Gay, Bisexual, Transgender, and Queer Equality*, available at https://assets2.hrc.org/files/assets/resources/CEI-2019-FullReport.pdf?_ga=2.12915959.1110990168.1568641711-1349422583.1568641711 (last visited Nov. 26, 2019).

their allies, which expanded quickly to include dozens, if not hundreds, of members. The companies then built on this initial success by adding inclusive benefits for LGBT people. The U.S. Chamber of Commerce Foundation found, “though LGBT-inclusive practices do not need to be comprehensive at the beginning, they do need the capacity to grow with the needs of the organizations and their employees.” Companies should be ready for the LGBT inclusion space to develop fast.

Establishing employee resource groups and communicating support for the LGBT community is an easy but impactful way to begin improving LGBT inclusion in the workplace. Members of LGBT advocacy networks also suggest naming these “business resource groups” to emphasize that they are not just for supporting employees, but that they also provide business value by helping the company connect to a wider variety of customers, suppliers, business partners, and other sources of information and opportunity. Advocates also stress the importance of including “allies” in the title of any resource group, so cisgender straight colleagues and not-out LGBT people feel more comfortable joining. After surveying and interviewing business about their inclusion policies, researchers at the U.S. Chamber of Commerce Foundation found that companies emphasize the value of having cisgender straight allies in resource groups and attending activities in order to “create a more cohesive, supportive workplace overall.”¹²¹

To create a more inclusive work environment, multinational companies in China have also provided employees with rainbow-themed stickers, signs, ID necklaces, and other swag to use on their person or decorate their office space with. During Pride Month, companies have also posted articles on social media showing their support for the LGBT community. Other early steps could include creating written resources to inform conversations on LGBT issues in the workplace. For example, AT&T created a set of videos, trainings, and discussion guides on LGBT inclusion. These methods are low cost but can have a big impact on making LGBT employees feel more comfortable in the workplace.¹²²

Some employees might oppose the increased visibility of LGBT people and related discussions in the workplace. It is important to communicate with non-supportive employees continuously and consistently. Companies surveyed by the U.S. Chamber of Commerce Foundation said they had success by engaging with them on a one-on-one basis. One corporate research participant told the interviewers, “We continue to have [LGBT] conversations in the workplace because we believe that once we understand each other, we’ll accept each other.”¹²³

Companies should strive to formalize LGBT inclusion in a written non-discrimination

¹²¹ See U.S. Chamber of Commerce Foundation, fn. 109.

¹²² Id.

¹²³ Id.

policy requiring equal treatment in “recruitment, employment, working conditions, benefits, respect for privacy, or treatment of harassment.”¹²⁴ Non-discrimination policies should note that employees should be addressed with the names, pronouns, and terms they prefer and use the bathroom most consistent with their gender identity, without regard to official identity documents.¹²⁵ Employers should not only communicate their non-discrimination policies to employees, but also to job applicants by referencing to non-discrimination policies in job postings.

Policies should describe how to report harassment and discrimination and make clear that complainants’ privacy will be protected and they will not be retaliated against.¹²⁶ To signal the company’s seriousness and strengthen effective implementation, a senior level officer should be assigned responsibility for maintaining the system. The UN Standards cites the global law firm, Baker McKenzie, as an exemplary model since it assigns a partner in every office to be responsible for enforcing anti-discrimination policies.¹²⁷

Employers should guarantee that LGBT people receive full equal benefits, including full health care coverage parity for same-sex spouses and partners and health care coverage inclusive of gender-affirming surgery. Employers are also increasingly providing reimbursement for fertility treatment for same-sex couples and surrogacy, services that can be very expensive and burdensome for employees.

Written policies and benefit plans are necessary, but “policy does not equal practice.”¹²⁸ Regular training and reliable accountability mechanisms are required to make sure that policies are being properly implemented. An emerging best practice is to have senior leaders submit LGBT-inclusion programming as a part of their performance review. To support transgender employees, employers can create resources for employees and managers to act as a guide through the transition process. Five-hundred-and-fifteen companies surveyed by the Human Rights Campaign Foundation have created such internal guidelines, and include training for human resources professionals on gender transition to help make the process smoother for transitioning employees.¹²⁹ Relatedly, most companies currently locate their LGBT-inclusion practices within the broader diversity and inclusion portfolio of their human resource departments. The U.S. Chamber of Commerce Foundation recommends getting other departments involved like government affairs and community engagement, or, going beyond that, creating LGBT-inclusion councils and governing bodies that advise senior management. These practices will help ensure that LGBT-inclusion is a part of corporate decision-making at

¹²⁴ See the UN Standards, fn. 9.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Human Rights Campaign Foundation, fn. 120.

¹²⁹ *Id.*

all levels and on a wide variety of subjects.

A significant factor in making LGBT employees feel included is the authenticity of the employer's support. One manager told the researchers at the U.S. Chamber of Commerce Foundation, "Merely putting up a rainbow flag during Pride month is not sufficient."¹³⁰ Recognizing this, the UN Standards call on companies to speak up and act in the public sphere, and make their external and internal messaging and stances consistent.¹³¹ Employers can show public support by writing op-eds, co-sponsoring or participating in community events and public education activities, engaging policymakers about the benefits/costs of LGBT inclusion/exclusion, featuring LGBT-related content in their advertising and other public communication, and implementing diverse supply chain programs that are inclusive of LGBT-friendly/owned businesses. Alibaba's supporting same-sex couples to get married in California is a successful example of highly visible public messaging.

C. Recommendations for Law and Government Policy

Governments should improve legal protections for LGBT people in the workplace, and encourage businesses to create LGBT-inclusive work environments. Governments have the ability, and, according to the United Nations, the responsibility to conduct public education and promote the inclusion of LGBT people.¹³² For all the reasons cited above, it is the right thing to do and it is good for businesses and the economy.

The Chinese government has been signaling more support for the LGBT community than it has previously. Since 2013, the Chinese government has made several statements at the United Nations in support of greater equality for LGBT people. First, at the second Universal Periodic Review of the United Nations Human Rights Council in 2013, the Chinese government responded to recommendations to pass laws prohibiting discrimination based on sexual orientation and gender identity as "accepted and already implemented."¹³³ China's Addendum to the Report of the Working Group on the Universal Periodic Review further stated, "China's Constitution clearly stipulates that all citizens are equal before the law. China prohibits all possible discriminations via enacting specific laws."¹³⁴ In 2014, a Chinese government representative at a session of the

¹³⁰ See U.S. Chamber of Commerce Foundation, fn. 109.

¹³¹ See the UN Standards, fn. 9.

¹³² United Nations Human Rights Office of the High Commissioner, *Combating Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People — UN-Wide Work*, available at www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNSystem.aspx (last visited Nov. 26, 2019).

¹³³ *Report of the Working Group on the Universal Periodic Review, China*, Addendum A/HRC/25/5/Add.1, United Nations Human Rights Council, (Feb. 24, 2014), available at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CNindex.aspx> (last visited Nov. 26, 2019).

¹³⁴ *Id.*

Committee on the Elimination of Discrimination against Women (CEDAW) stated, “In China, all citizens’ legal rights are protected by the Constitution and law, and one will not be discriminated against on the ground of one’s sexual orientation.”¹³⁵ The following year, the Chinese government stated at a hearing of the Committee against Torture, “LGBTI people face some real challenges in terms of social acceptance, employment, education, health, and family life. This deserves our attention.”¹³⁶ At a June 2018 session of the UN Human Rights Council, the Chinese government stated, “China opposes all forms of discrimination and violence including discrimination, violence, and intolerance based on sexual orientation.”¹³⁷ In March 2019, the Chinese government declared “accepted and already implemented” six recommendations made during its third Universal Period Review at the United Nations regarding creating protections against discrimination based sexual orientation and gender identity.¹³⁸

According to these statements, domestic Chinese law already requires protections for LGBT people. Such protections would also be consistent with the domestic policy to increase labor participation by improving equal employment opportunities. When giving the Government Work Report to the second session of the 13th National People’s Congress in March 2019, Premier LI Keqiang stated that “We will resolutely protect against and stop gender and identity discrimination in employment.”¹³⁹

Although the government has said laws prohibiting LGBT-related discrimination are already implemented, the awareness of this is low throughout society and in the government itself. It is very difficult for people who have been discriminated against to

¹³⁵ Comments of MU Hong, Director-General of Office of the National Working Committee on Children and Women under the State Council, *Country Review of China under the Convention to End All Forms of Discrimination against Women*, (Oct. 2014), video available at https://mp.weixin.qq.com/s/ng7uswLyXR6v5_g_0581xA (last visited Nov. 26, 2019).

¹³⁶ Comments of YANG Jian, Ministry of Justice, *Country Review of China Under the Convention against Torture*, (Nov. 18, 2015), video available at <https://www.youtube.com/watch?v=VNsxeZZa7bQ&feature=youtu.be&t=52m58s> (last visited Nov. 26, 2019).

¹³⁷ Comments of DUAN Jiang, United Nations Human Rights Council, *Report of the Independent Expert of Sexual Orientation and Gender Identity* (Jun. 18 2018), video available at <http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/38th-session/watch/clustered-id-contd-ie-on-sexual-orientation-sr-on-peaceful-assembly-2ndmeeting-38th-regular-session-human-rights-council-/5798814612001#t=40m53s> (last visited Nov. 26, 2019).

¹³⁸ *Report of the Working Group on the Universal Periodic Review, China, A/HRC/40/6*, United Nations Human Rights Council, (Dec. 26, 2018), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/446/59/PDF/G1844659.pdf?OpenElement> (last visited Nov. 26, 2019); *Report of the Working Group on the Universal Periodic Review, China, Addendum, A/HRC/40/6/Add.1*, United Nations Human Rights Council, (Feb. 15, 2019), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/041/01/PDF/G1904101.pdf?OpenElement> (last visited Nov. 26, 2019).

¹³⁹ LI Keqiang, *Report on the Work of the Government*, (Mar. 16, 2019), available at http://english.gov.cn/premier/speeches/2019/03/16/content_281476565265580.htm (last visited Nov. 26, 2019).

vindicate their rights in court. To ameliorate this situation, the Supreme People's Court (SPC) could issue a judicial interpretation of the new cause of action on equal employment rights disputes explaining that LGBT-related discrimination is covered under the cause of action. Another and more comprehensive approach would be to pass the draft of Anti-Employment Discrimination Law (AEDL), which has express protections against discrimination based on sexual orientation and gender identity. Government-funded legal aid programs and rights protection departments should include LGBT workplace issues in their public outreach campaigns and provide legal assistance to workers and job applicants who are discriminated against.

Admittedly, none of the above is likely to happen in the short term. The AEDL has been proposed by scholars and numerous government stakeholders for several years, but its passage is not estimated to happen for many years more — perhaps out of a perception that greater regulatory requirements on employers will increase costs for businesses at a time when the economy is slowing. It should be noted that improving protections for women and minorities in the workplace will encourage greater workforce participation and productivity, and would be a boon to growth. Even if the government does pass the AEDL soon, there is a high chance it might remove the AEDL's express prohibitions on LGBT-based discrimination before adopting it.

If the government is not prepared to implement express prohibitions on LGBT-based discrimination, it should improve legal protections for women and other marginalized groups in the workplace as an intermediate step (and these measures would be incredibly valuable in-and-of themselves). Chinese law already clearly prohibits these forms of discrimination,¹⁴⁰ but it has been very difficult for victims of discrimination to get fair compensation in court, and, as a result, they have done very little to disincentivize employers from discriminating. Rights-protective procedures should be strengthened for employment discrimination suits. The SPC's cause of action on equal employment rights disputes that went into effect in January 2019 is a step in the right direction. A judicial interpretation by the SPC outlining how courts should define discrimination, better balance the burden of evidentiary production (*e.g.* through introducing an evidence burdening shifting mechanism between the plaintiff and defendant), and suggesting higher damage awards would make litigation a more effective tool in securing the equal employment rights of women and other marginalized groups. Even without expressly mentioning LGBT-related discrimination, an overall strengthening of anti-discrimination law will benefit LGBT individuals since courts still tend to accept LGBT-discrimination cases, and when express protections are in place, they can be enforced through litigation.

To improve LGBT inclusion, the government could communicate to businesses that

¹⁴⁰ See, *e.g.* *Employment Promotion Law of the People's Republic of China*, issued on Aug. 30, 2007, available at <http://en.pkulaw.cn/display.aspx?cgid=96793&lib=law> (last visited Nov. 24, 2019).

corporate LGBT-inclusive policies are welcome, or, at least, not unwelcome. This would at least help diminish the topic's level of sensitivity and advance greater openness and discussion. The government could also go a step further and educate businesses on how to comply with LGBT-protective laws as a part of the BRI. There are several countries that have signed memos of understanding with China regarding the BRI that also have legal prohibitions of LGBT-based discrimination. In 2000, the European Union issued a directive prohibiting sexual-orientation-based discrimination.¹⁴¹ In 2006, the European Union's directive prohibiting gender discrimination was expanded to cover "discrimination arising from the gender reassignment of a person."¹⁴² Employers in EU countries, including those who have signed on to the BRI, need to treat LGBT applicants and employees equally. BRI-involved countries outside of Europe such as Thailand have national laws prohibiting such discrimination.¹⁴³ The Chinese government is currently supporting lawyer trainings to help companies invest in and develop projects abroad. Content on equal employment rights for all, including LGBT people, could be integrated into the training curricula.

In the United States, only 21 states and Washington DC have laws that explicitly prohibit discrimination based on sexual orientation and gender identity, while 26 states have no such laws.¹⁴⁴ 44% of LGBT people in the United States live in states that have no legal protections for their employment rights. Efforts to pass a nation-wide federal law to expressly prohibit LGBT-related discrimination in employment have been consistently blocked by the Republican Party in both houses of Congress. Polling conducted in 2019 shows that public support for such a federal law has grown to 69%.¹⁴⁵

Advocates have successfully litigated several cases arguing that the prohibition against discrimination "because of sex" in Title VII of the 1964 Civil Rights Acts should be understood to cover discrimination based on gender identity. So far, five out of eleven federal appellate circuits concur with this interpretation, while one does not. Litigation arguing that Title VII covers sexual orientation discrimination has not fared as well. Only

¹⁴¹ European Union, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, (Nov. 27, 2000), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0078> (last visited Nov. 26, 2019).

¹⁴² European Union, *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF> (last visited Nov. 26, 2019).

¹⁴³ Thailand, *Gender Equality Act*, available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=100442&p_country=THA&p_count=441 (last visited Sep. 24, 2019).

¹⁴⁴ *Non-Discrimination Laws*, Movement Advancement Project, available at http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Nov. 26, 2019).

¹⁴⁵ Daniel Greenberg, Emma Beyer & Maxine Najle et al., *Americans Show Broad Support for LGBT Nondiscrimination Protections*, (Mar. 12, 2019), available at <https://www.prii.org/research/americans-support-protections-lgbt-people/> (last visited Nov. 26, 2019).

two appellate circuits agree with this interpretation, while the other nine do not (though most of the cases from these appellate circuits are quite old). The U.S. Supreme Court will soon determine whether Title VII covers sexual orientation discrimination and gender identity discrimination. Under the Trump administration, the Court has moved considerably to the right. With obstacles at the federal level, advocates are focusing on passing state legislation and litigating in state court. Given strong levels of public support, if a Democratic majority were to be elected in 2020, a national law expressly prohibiting SOGI-based discrimination would have another good opportunity to be passed.

CONCLUSION

The research presented in this article affirms an intuitive but powerful idea: If people are supported in who they are, they will be more engaged and creative. In accumulation, greater inclusion of LGBT people will lead to more productive and innovative businesses and economies. Former UN Secretary General Ban Ki-moon recognized this fact in calling on the United Nations to “break down the barriers that prevent LGBT people from exercising their full human rights. When we do that, we will liberate them to fully and productively contribute to our common economic progress.”¹⁴⁶ Social attitudes towards LGBT people around the world are rapidly changing, and there will continue to be greater demand by employees, customers, and other market actors for inclusive and dynamic businesses. Whether to respond to these demands is increasingly not only a question of corporate social responsibility, but also a question of whether individual enterprises — or whole economies — will remain competitive.

¹⁴⁶ United Nations Secretary-General, *Secretary-General's Remarks at the High Level LGBT Core Group Event "Leaving No-One Behind: Equality & Inclusion in the Post-2015 Development Agenda,"* (Sep. 29, 2015), available at <https://www.un.org/sg/en/content/sg/statement/2015-09-29/secretary-generals-remarks-high-level-lgbt-core-group-event-leaving> (last visited Nov. 26, 2019).